Acta Juridica Hungarica 1991

h°

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

Vol. 33 Nº 1—2

HUNGARIAN ACADEMY OF SCIENCES

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

Acta Juridica Hungarica publishes papers on all branches of legal sciences in English. Acta Juridica Hungarica is published in one volume per year, consisting of four issues by AKADÉMIAI KIADÓ Publishing House of the Hungarian Academy of Sciences, H—1117 Budapest, Prielle Kornélia u. 19—35. Manuscripts and editorial correspondence should be addressed to

ACTA JURIDICA HUNGARICA,
H—1250 Budapest P.O. Box 25

Orders should be addressed to

AKADÉMIAI KIADÓ,
H—1519 Budapest P.O. Box 245

HUNGARIAN ACADEMY OF SCIENCES

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

Vol. 33 1991 N° 1–2

CONTENTS

OBITUARY

BOOK REVIEW

Acta Juridica Hungarica
1991 33 N° 1-2

Akadémiai Kiadó,
Budapest

EDITORIAL

Dear Reader,

the new Board of Editors of this Journal is pleased to present Acta Juridica renewed both in content and form. The main innovation is that it will be from now published entirely in English. Another change is that Acta Juridica Hungarica, with a slightly modified title, carries not only papers and studies written by Hungarian authors, mostly previously published in Hungarian, but will also keep you informed on legislation and eventually judicial practice in Hungary.

It remains a chief concern of this Journal, as before, to make accesible to foreign readers what we think the best of the production of Hungarian legal scholarship otherwise doomed to be passed unnoticed due to language barriers. Moreover, we wish to open our pages to non-Hungarian scholars too, therefore the Editors wish to invite scholars from 'the rest of the world' to submit papers to Acta Juridica Hungarica.

The Board of Editors

Acta Juridica Hungarica
1991 33 N° 1–2, pp. 5–22

Akadémiai Kiadó,
Budapest

STUDIES

László SÓLYOM

The First Year of the Constitutional Court

The Constitutional Court (CC) as a new institution was not set on foot simply with a clean slate. Given the historical environment of its formation, the CC had exceptional freedom to define its status in a constitutional order; including not only its political importance and role, but its legal character in a narrow sense as well. In the midst of political changes, the legislators who enacted the Court had but a vague conception of the functions of a constitutional court and of the role to be assigned to the Hungarian CC. As a result, and because of its hurried technical preparation, the Act on the Constitutional Court [Act XXXII/1989; ACC] now appears imperfect and controversial. In order that the exercise of constitutional jurisdiction might begin without delay, the Act left the rules of procedure to be developed on the way by the CC.

The dilemmas of our political and constitutional role aware continously during the first year. Such dilemmas often confronted us quite directly when apparent political cases—such as the land act, the interest tax and the issues related to the President of the Republic—were referred to us for consideration. The final solution of many fundamental procedural issues and the answers to the open problems of the ACC depend on the definition of our role. These role-related problems should be distinguished from clear technical neutral questions such as movement of files or the rhythm of preparing decisions.

The basic question is whether the primary function of the CC is to ensure abstract constitutional order or to remedy individual injuries affecting fundamental human rights. Of course, abstract norm control and a constitutional complaint do not exclude each other. The establishment of and possible remedy for individual infringements on constitutional rights frequently lead to a legal provision being claimed to be unconstitutional, as they constitute direct control over norms. The solution of the above question, however, determines the range of persons entitled to make such petitions and the political rele-

vance of the cases said before the CC and assigns another role to the Court in the political system irrespective of the fact that the CC will remain on the same hierarchical level.

The above basic question has been on the agenda since the CC was set up, though its real importance and substance did not begin to be realized and clarified before the end of the first year. Since the ACC is entirely based on abstract norm control, the question arose first on a different level, i.e. whether the CC is a court or an "authority to protect the Constitution". For the nature (judicial or official) of the CC procedure to be determined it was inevitable to answer this question. So, for the time being, the underlying essential problem could only be seen from the fact that application of the contradictory oral and public procedure (or just some of its elements) to abstract norm control was felt by many judges to be conflicting and unjustifiable from the beginning.

a) Procedural issues

The rules of CC procedure are contained in Chapter III of the ACC providing that the detailed rules shall be established by the CC. On the proposal of the CC, the rules of procedure should be laid dawn in an Act to be passed by Parliament. In addition to specifying those entitled to make petitions as well as the powers of the plenary session and the three-member councils the ACC did not but formulate random and incongruous rules from which the character of the procedure cannot be seen clearly (except that, under para (2) of Art. 25, the procedure should fundamentally be in writing). The ACC did not tie the CC's hands in defining the character of its future procedure.

The first five constitutional judges spent a year working out the rules of procedure experimentally. The current status of the procedure can at most be ascertained from the reminders of plenary sessions or can sometimes be concluded from the decisions. On the other hand, the plenary session could always find solutions to vital practical issues outside the scope of, but not defenitely contrary to the ACC.

1. Such a problem confronting the CC, one to be solved by all means, but unforeseen in the ACC, was that of screening the great number of petitions submitted by way popular action, especially because the ACC provides that, whenever the CC cannot take jurisdiction, a case may only be referred to the body having jurisdiction and because it vested no jurisdiction in judges ordinary. The only way out was that the petitions not falling within the jurisdiction of the CC (and not worth referring somewhere else) were treated by the Secretar-Generaly "outside the CC procedure": he would explain in an informal (private) letter that the CC could not deal with that particular problem. If the petitioner was not satisfied, his second letter would be referred to one of the three-member councils, which would issue a formal decision on the lack of jurisdiction or, in some cases, judge the case on its merits.

Instead of this forced solutions, it would be better for an amendment of the ACC to empower judges to refuse cases, without "appeal" outside the jurisdiction of the CC. Such a solution would also require preparation by the Secretary-General's Office.

2. The two basic problems of a "CC case" are publicity and the situation of the petitioner. These are the aspects in which the conception based on a civil case conflicts with a written, non-public procedure that is actually followed by the CC in spite of all opinions of principle to the contrary.

The concept of court is now linked with a public hearing. As regards the CC, it is controversial from the beginning whether a public hearing is necessary only for stressing the image of the court and informing the public, or because the legal status of litigant as well as the guarantees of a public, oral, contradictory trial are to be recognized for the petitioner. According to the arguments of the first conception, the petitioner for abstract norm control will assert rights other than his own and act in the public interest (in an extreme wording he does not but yet the CC machinery going), so he needs no guarantee as a client. On the other hand, a "trial" requires another party with opposing interests; the CC found that the opposing party was the same as the body which had or prepared the particular legal provision. Those in favour of a trial supported their stand with additional arguments and the benefit of knowing mutual reflections.

In fact, the CC well a public trial in only one case, that of the interest tax; concerning capital punishment, the procedure was rather a public hearing of experts. There were a few other cases where the petitioners, or those concerned, were invited to the session. The decisions, however, were not affected by what was heard at the sessions, so no real trial took place. The CC also refused to hold public sessions on certain days, on the Italian model, when the brief opinion of the parties was to have been heard for the information of the press and the public.

As a result, the normal procedural form has become one of handing down rulings in writing, an arrangement to which the CC was also pressed by the great number of cases. The criteria of "trial" have shifted to written trial. As required by contradictory procedures, it has become customary to ask for a routine statement of the legislator and occasionally for the reaction of the petitioner. It would be better to ask expressive questions—if questions should be asked at all—on the basis of our preliminary reflections.

3. A continental-style constitutional court in general, and when limited to abstract norm control in particular, does not have any cause to hold trials. We do not need to clarify any facts through a debate of adverse parties; the legal arguments of the petitioner (though he has to give the "reasons" for the petition under para (2) of Art. 22) are in fact indifferent, since we can hear experts and the friends of the court; all this can be arranged in writing more easily; but it is our business to decide how to be assisted in formulating our position. The situation would be somewhat different if there were real constitutional complaints. Many of our decisions have shown that the proceedings resulting from a concrete complaint may lead to far-reaching consequences (administrative jurisdiction, civil procedure), which the petitioner cannot even imagine and a decision on a real constitutional complaint may become a similarly important precedent: this is the real domain of constitutional jurisdiction.

Before taking any decision, the case must be discussed among ourselves rather than with the client.

4. Petition is covered by very few provisions of the ACC. All its aspects, both regulated and unregulated, were treated by the CC in such a way as to leave wide scope for accepting cases for consideration or defining the range of matters to be considered.

Para (2) of Art. 22 of the ACC requires a "specific application". At the beginning, the CC helped to construe "questions" of the Parliament as petitions or to turn them into petitions. Since the autumn of 1990, however, it has turned against petitions for an interpretation of the Constitution that allowed shifting political or governmental responsibility. In the Rabár case it outlined the criteria to be met by petitions for an interpretation of the Constitution. However, all it was able to do was to create an authoritative and formal basis of reference for itself to continue to accept or to refuse petitions for an interpretation of the Constitution at its own discretion, for, evidently, it depends on the Court whether it finds any "concrete constitutional law problem" in a petition. (See the partial problem finally accepted for interpretation in connection with the right to environmental protection.)

In accordance with its agreement, the plenary session gave a wide interpretation of the criteria for its acceptance of matters for consideration subject to the nature of petition and considered, by invoking their "interrelationship", all legal regulations affected by the particular constitutional problem. Thus, the CC made itself independent of the petitioner's intent: it released the avalanche effect (civil proceedings) and left room for refusal of the original petition, and for declaration of unconstitutionality in respect to other provisions of law that went unchallenged (14/1990). All this is an added argument against treating the petitioner as a litigant. At the same time, the CC exposed itself to the risk of failing to cover all relevant regulations in the decision. (See capital punishment, indication of personal identity numbers in the Trade Register as cases where it is justified, and not a shame, to ask for comments by the competent ministries.)

Nevertheless, the CC retrieved its elbowroom for keeping to the petition and refusing to deal with matters it did not want to.

The CC repeals a regulation beyond the scope of a petition also in cases where repeal is practicable for a reregulation of the matter under consideration. In such cases, a constitutional provision should also be repealed. (See later, under Section II). The petition was separated from the petitioner also by an authoritative ruling of the CC, printing out that the Court is not bound by a petition that can be submitted by anyone.

5. In addition to dissenting opinion recognized by the ACC, the CC has introduced the institution of concurring opinion (called parallel). This raises the question of individual decision, personal opinion or work done collectively. The judges accepted the personality principle as a specific feature of the CC. The institution of dissenting opinion proved to be fruitful: it brought into sharp focus conceptional questions of our jurisdiction [retroactivity (5/1990), substance of a fundamental right and methodical conditions for its limitation (2/1990), competence of the CC as regards the Constitution itself (23/1990)]. There were several instances of the Court later adopting solutions first suggested in a dissenting opinion.

With the introduction of dissenting opinion the CC followed foreign examples without adopting any method in all its aspects. With the concurring opinions, we are getting

closer to the American system, though half-way. We decided to publish concurring opinions about capital punishment, when there were incompatible differences between judges ordinary in their lines of reasoning or when the statement of uniform reasons would have required too great a portion of the original opinions to be ignored. The latter would have been in conflict with the concept of personality and certainly with the ambition of the judges who had formulated their own opinions of principle. (Shortly before this, the interpretation of Art. 70/A provided an example of collective work, though there was no difference between conceptions.) On the other hand, the ruling on the death penalty pointed to the danger of fragmentation of views: uniform reasoning unbodied the unreserved opinion of only three judges, while a comparison should be made to find out who of the remaining judges was for or against the particular elements of the CC's reasoning. Since reasoning is at least as important as the operative part of a decision, it is impossible that there should be no majority-supported reasons. (Such reasons could also have been advanced in the capital punishment case if sufficient time had been devoted to the matter.)

The majority principle could be enforced without sacrificing the personal aspect if the American system was fully adopted. This would result in the indication of the judge (usually but not necessarily, the judge in charge of legal inquiry) who puts down the majority opinion and in the indication of those who form the majority; the judge who works out minority opinion(s) could also be indicated. This would certainly put an end to secret vote. Another manifestation of personality is the naming of the judge(s) who elaborate the opinion (as, e.g., in Poland).

b) Substantive issues of the judgement procedure

The activity of the CC should be examined in the interaction of two determinants. One is the CC's jurisdiction and the other is the historical environment in which the change of regime took place.

The CC is vested with all the powers that a constitutional court can be under international practice. Moreover, the range of persons and organs entitled to make petitions is extremely wide. All this gives the CC an enormous scope of action, i.e. political weight.

The CC could well symbolyse the paradoxical nature of political changes as revolution under constitutional court control. Nobody realized this aspect at the time the CC was established.

1. The most important problem faced by CC in the first year was that abstract norm control could be requested by anyone. The various aspects of the problem are related to the theoretical role of the CC (abstract order or individual legal remedy), the random revision of "old" legal material, the simply formal—hierarchical—unconstitutionality, and validity problems, while there is an interrelationship between all these items and the specific questions of the change of regime.

2. Abstract norm control as the primary activity of the CC makes the Court the guardian of a hierarchical legal system.

Using the leeway provided by Art. 43 of the ACC, the CC has lately tried to move from abstract, hierarchic protection of the Constitution to providing remedy for individual grievances, i.e. restoring genuine constitutional complaints within the frameworks of the Act; as we could not neglect the criterion that in all cases the unconstitutionality of a legal norm must differentiate between legal consequences. In a recent decision the CC has, in favour of the person who has submitted a constitutional complaint, as far as the legal consequences are concerned, and has secured, by resorting to *ex tunc* abrogation benefiting only the petitioner, a means to redress his grievance, as if rewarding him for raising the question (32/1990–cf. Austrian Ergreiferpraemie). One must see, however, that such benefit might be extended to anyone concerned, so the reward is not a real one. Therefore the petition leads us to the theoretical questions of *ex tunc* abrogation rather than to the real constitutional complaint. Yet, the above decision has directly raised, and thrown into sharp relief, the issue of CC's dual function.

3. With the introduction of popular action to apply for subsequent norm control, the ACC determined the nature of most cases that were to be submitted to the CC, for this is the reason why the issue of compatibility between the democratic Constitution and the legal provisions enacted under the former regime is put before the CC in a large number of cases though randomly and fragmentarily. Given its functions, however, the CC cannot revise complex legal materials. Therefore, in the domain of complex legal branches like social insurance law, the CC abrogates selected, partial regulations that are unconstitutional in themselves, rather than investigate the wider contexts. The situation is very similar with respect to codes (for example code of civil procedure). The CC sometimes goes beyond the petition, and investigates legal material (26/1990) even at the expense of annulling rules that are constitutional in themselves, together with those that are against the Constitution, thus urging the legislature to reregulate the entire set of problems (10/1990, 24/1990). We must admit, however, that the Court followed such course of action when it wanted to enforce a very important constitutional principle like the equality of men and women or the principle of hearing.

4. The CC cannot escape from the legacy of unconstitutionality to be declared for formal reasons: under para. (2) of Article 35 and para. (3) of Article 37 of the Constitution, a decree issued by the Government or the Prime Minister is unconstitutional if it is contrary to a higher source of law.

As a result of forty years of government by decree, a number of old regulations are unconstitutional, because they represent a source of law at a level other than that required today. Consideration of formal elements should be therefore limited to new, post–Constitution legal provisions, while some sort of substantive unconstitutionality should be an added requirement for old regulations to be repealed. A number of our cases show that a mere disagreement between hierarchical levels can be far from the concept of unconstitutionality.

The CC initially tried to find substantial reasons for mere formal unconstitutionality. These cases were associated with the concept of the former law of constitutional force. Under the Electoral Act, those who stay abroad on polling day are prevented from voting. The CC considered it to be a restriction of the right to vote and based the

abrogation on para. (3), then effective, of Article 8 of the Constitution, arguing that a fundamental right was restricted by a simple act, not by one of constitutional force. Also, the CC mentioned in its reasoning, not fully elaborated, that temporary stay in a foreign country was no sufficient ground for restricting the right to vote under conditions of modern communication and transport.

The CC abrogated the act on interest tax also for formal reasons, because it had been passed without a two-thirds majority of votes as required for an act of constitutional force. With a theoretical edge, however, the CC explained that two-thirds majority was not a formal prerequisite, but that a high degree of consensus among MPs required for regulation of fundamental rights and obligations had relevance as a guarantee. Furthermore a two-thirds consensus would also have been necessary because of the grave social problems generated by the interest tax. After the amendment of Article 8, para. (3), of the Constitution, this two-way argumentation seems to fade and the CC started to declare unconstitutionality only for hierarchical reasons.

Most recently, however, the CC has started to adopt a differential approach to abrogation on formal grounds. This practice is related to the above problems concerning the present constitutionality of legislation passed under the former system. Failure of the legislative process to have followed the logic of the former system regarding "accommodation of social interests" is not deemed by the CC to be unconstitutional. (On this basis, petitions for repeal submitted both by former "representative organs" that had been removed from power and by newly formed ones longing for influence, and even by a private person who was found to have no recognizable interest.) The CC revises the legislation act on a theoretical basis, according to the criteria of a law-governed state. As a first step, it dismissed a petition for declaring the unconstitutionality of legal provisions which had abolished nation-wide debate (28/1990–22 September). The CC has since radicalized its stand, declaring that failure to conciliate interests during the preparation of a legal provision did not make the legal provision unconstitutional and that violation of the legislation act did not lead to unconstitutionality in itself, but only in the context of a particular provision of the Constitution. Within this logic, the plenary session declared—for the time being in an authoritative ruling—that the right of trade unions and representative organs to give their consent in the legislative process was likewise incompatible with the criteria of a law-governed state (Article 2, para. 2, of the Constitution).

5. A part of the problems arising from the legal consequences of Constitutional Court decisions is related to the fact that the normal consequences of abstract norm control mingle with those of constitutional complaints. The confusedness of Articles 40 to 43 of the ACC had caused no problem to the CC until the court began to give special "rewards" for submission of constitutional complaints.

The CC has frequently departed from the general rule that an unconstitutional legal provision shall lose effect on the day the decision is published by setting a future date for repeal. By so doing the CC sought to avoid legal gaps in the language used in its statement of reasons, i.e. to leave the legislator sufficient time for reregulation in accordance with the Constitution.

Abrogations with future dates, which have become routine practice, involve more risks as they might set the CC back to the status of the former Constitutional Council, whose function was confined to signalizing unconstitutionality, for what we do in this respect is in fact set a deadline for the legislator to rectify unconstitutionality. So in this case, repeal is virtually a mere sanction for failure to have corrected a legal provision. (I wonder whether the legislators keep a record of these deadlines.) Repeal with effect from the date on which the Official Gazette is published is much more favourable to legal certainty. Finally, it would also require a theoretical explanation whether avoidance of a legal gap is enough justification for the continuing application of a legal provision for long months after the CC has established its unconstitutionality.

6. Thus in its decisions so far, the CC has either applied the general rule of *ex nunc* repeal or has departed from it with regard to the future. *Ex tunc* repeal was ordered in a single case of constitutional complaint, with its applicability confined to the petitioner only, while the unconstitutional legal provision was declared null and void in respect to everyone else from a future date (32/1990, administrative jurisdiction). The tremendous influence a decision may have on judicial practice seems to fade the theoretical problems, which are no less important for the CC.

In its decision the CC explained that the constitutional complaint itself and the resulting norm control had different consequences. While I find this differentiation justifiable, I am definitely dissatisfied with the ruling, which terminated the effect of the legal provision *erga omnes ex nunc* (or with regard to the future) and ordered *ex tunc* repeal with regard to the petitioner. I think that a ruling to the effect that a legal provision is applicable to particular persons is contrary to the normativity of the legal provision on the one hand, and disputable from the point of view of constitutional law on the other (several countries prohibit laws with applicability to particular persons). It is imaginable, however, that a legal provision is effective at various points of time—e.g. coming into effect or losing force by stages—, though always for groups subjected to law as defined with objective sets of facts.

The problem is rooted in the fact that the ACC makes no real distinction between abstract norm control and constitutional complaints, as both concern the unconstitutionality of legal provisions and, their consequences being the same, the conditions prescribed for filing a complaint are meaningless restrictions as compared to a review of norms that can be petitioned for by anyone. Art. 43, (4), of the ACC makes exceptions to *ex nunc* repeal and the rule that abrogation shall not affect legal relations established before publication of the relevant decision. This paragraph empowers the CC to depart from the general rule on repeal in setting a date for "the application of a legal provision to concrete cases", "if so warranted by a particularly important interest of the petitioner". This recourse, however, is not limited, as it should be, to constitutional complaints, but is also admissible in the case of abstract norm control. The same paragraph likewise allows the CC to repeal a legal provision *ex tunc* (or from a future date), not only in the case of corresponding abstract control, but also of complaints.

Para. (4) of Art. 43 ACC contains a double mistake. On the one hand, it integrates the legal consequences of abstract control and constitutional complaints and, on the other, sets no suitable condition for the application of any of those consequences. "Legal certainty" generally precludes *ex tunc* repeal, while the petitioner submitting a constitutional complaint is interested in receiving a remedy for his personal matter. In order that suitable conditions may be evolved and that the CC initiative, which is correct in substance, but dogmatically untenable because of its "effectivity to individual cases", may also conceptually be developed, we must put in order the concepts used in the ACC.

The ACC uses three different terms to define the consequences of declaring unconstitutionality: the ACC annuls a legal provision (Art. 40), in which case the legal provision loses effect on the day the relevant decision is published (Art. 42), and it is inapplicable from that day (Art. 43).

"Annulment" seems to be contradictory to *ex nunc* repeal mentioned in Art. 42. Annulment should be in harmony with *ex tunc* repeal as the CC merely declares unconstitutionality existing from the time a legal provision is contrary to the Constitution. Consequently, what the CC should state is that the legal provision concerned is null and void from that time. For practical reasons, however, this logical requirement is not met in full by any legal system. On the other hand, para. (4) of Art. 43 of the ACC allows *ex tunc* annulment in exceptional cases. Thus "annulment" may be construed as a general concept which, in addition to "real" annulment with retroactive effect, includes partial consequences of nullity: "revocation" of a legal provision with regard to the future only and other limitations on its applicability.

An act on a constitutional court, whether based on *ex tunc* annulment or on *ex nunc* repeal, cannot but choose to make exceptions from the rule by reason of legal certainty or equity. Even if, it admits *ex tunc* annulment of legal provisions, it does not allow its consequences to be enforced in all cases, or else it would be necessary to examine every legal transaction entered into under a non-existent legal provision and to clarify the legal situation relating to it. To avoid the burdens and legal uncertainty ensuing from this, exceptions are usually allowed to all legal relations "carried into effect", annulment having no bearing on cases finally decided, obligations fulfilled and rights acquired. So, practically, *ex tunc* repeal affects only such legal relations as have not yet been settled with all their consequences.

The final result is practically the same in the laws where *ex nunc* repeal is the general rule. Here it is equity that requires annulment to be retroactive in certain cases. Again, these cases may not be settled ones, at least in so far as they have been submitted to the Constitutional Court, albeit after their final decision, but not later than the deadline fixed for the judgement of a constitutional complaint.

Both solutions meet with the said dogmatic difficulties. The normativity of a legal provision does not allow its force to be unduly fragmentized. This difficulty is sought to be overcome by the category of "applicability to concrete cases" of the ACC, where a legal provision can or cannot be applied irrespective of a decision concerning its validity.

On this basis it would be necessary to separate, in Art. 43 of the ACC, the consequences of abstract norm control on the one hand, and those of concrete norm control and of a constitutional complaint on the other. In both cases, the theoretical barrier to the retroactivity of annulment is that the latter is limited to legal relations with some "continuing" relevance, like adverse consequences in criminal law, on the day the decision is published. Exceptionally, *ex tunc* repeal could be allowed, but the law should spell out that its legal consequences "may only be applied in concrete cases" where legal relations have not yet been carried into effect in all their aspects. On the other hand, in case of concrete norm controle—as they are pending—the general rule is the "non-applicability" of unconstitutional provisions of law, irrespective of how the CC decides the question of *erga omnes* effect.

c) Questions of interpretation of the Constitution

Interpretation of the Constitution has two implications for the Hungarian CC: special powers under Art. 1, para. (g), of the ACC "to interpret provisions of the Constitution", i.e. "theoretical" interpretation independently of concrete cases on the one hand, and, on the other, interpretation of the Constitution in decisions on concrete cases, which is, however, not less "theoretical" and not necessarily less important in its practical effect. The difference between the two kinds of interpretation is but apparent, the former being abstract and the latter concrete (as is stated in, e.g., the motivation to the ACC), since a state organ entitled to ask for an interpretation of the Constitution under para. (g) of Art. 1, will never do so in order to satisfy its scholarly interest, and the concrete case for which it actually needs information is usually known. So, "abstract" interpretation of the Constitution is actually akin to preliminary norm control, though in an earlier phase of legislation, and adds up to a preliminary assurance obtained for an even wider range of political activity.

It is a moot point whether it implies a shift of responsibility at the same time. In daily politics, application for interpretation leaves the applicant with an elbowroom and a time-span different from those involved in the abstract norm control. Theoretically, however, the Constitutional Court takes the same responsibility, and what it should not consider are precisely the circumstances of the political game and public reactions. It is very difficult to do so in practice. That is why both functions are much assailed in literature as implying a direct involvement of the Constitutional Court.

The kind of procedure followed by the CC in its most significant interpretations of the Constitution is in fact accidental. The difference is that the forward decisions on interpretation of Constitution are binding, while interpretations forming part of the Court's reasoning are not, but the CC can be expected to hand down similar interpretations in other cases as well.

1. The CC started its operation with interpretations of the Constitution under Art 1, in para. (9), of the ACC (1/1990, 4/1990). These cases, however, were turned into ones of interpretation only by the goodwill of the CC. In fact, it was because of its unfamil-

iarity with the CC's role that the Parliament referred to the CC its disputes about the interpretation of laws, and in January 1990 the Court did not want to establish bad contact with the Parliament by its prompt refusal of applications. So the CC gained two basic experiences at the very beginning. First, the CC is empowered to establish or to exclude its own jurisdiction; second, it learnt how to separate legal argumentation from political decisions in a delicate political debate (see the interpretation of the referendum on the mode of the presidential election). In the third of such decisions, the exercise of the powers of the President of the Republic by the President of Parliament was interpreted as a right vested in the current Speaker (7/1990). This was also an important political case and the first real interpretation of the Constitution.

The two questions concerning the President of the Republic could be answered by a correct positivistic interpretation of the Constitution.

In contrast, the Prime Minister's petition for an interpretation of Articles 70/A and 13 of the Constitution—the so-called "land act case"—required the CC to outline *a priori* the concept of unfavourable discrimination (21/1990). To this extent, therefore, the petitioner ran a very great political risk as the decision depended on the subjective position of the CC on an open theoretical question. At the same time, the opinion of the CC was not unknown on principle, because one of the lines of its interpretational activity was related precisely to cases of discrimination; the CC published its basic theoretical position in an insignificant case (9/1990), but the politicians were unlikely to have known about this.

2. With the land act judgement, the CC has properly defined its role at the intersection of politics and constitutionality. The response showed that, in general, the decision had not been studied in its interrelated aspects. Those who gave their comments referred only to selected passages which met their interests. What is more serious is that the role of the CC was also misunderstood by the Government, as it became evident from the petition submitted by the Minister of Finance for an interpretation of the Constitution. In fact, the petition sought a constitutionality revision of conceptions about the increase of the interest rate on housing loans by virtue of a legal provision. In its decision dismissing the petition (31/1990), the CC had to interpret its own jurisdiction narrowly and to specify the essential requisites of petition for an interpretation of the Constitution. The CC will interpret the Constitution only if a qualified petitioner applies for the interpretation of a specified provision of the Constitution in connection with a concrete constitutional problem. The decision pointed out that an expansive interpretation would lead to the CC taking over the responsibility of the legislative and executive powers and becoming some sort of a government at variance with the doctrine of the division of powers.

One of the parallel opinions stated in the decision on housing loans suggested additional general principles concerning the interpretation of social rights by the Constitutional Court. Accordingly, in respect to Article 70/A of the Constitution, the CC may not but clarify the nature of social rights, i.e. whether they imply state responsibilities or are subjective rights, and may not give an interpretation going beyond this scope. (According to the opinion, Article 70/A grants no one a subjective right to "social security".) Apart from this, the Court may establish omissions only. This makes it

possible for the CC to formulate and enforce its own minimum requirements in connection with social security, naturally in borderline cases. Therefore, constitutionality problems arising within these limits may not affect except on other constitutional provisions, such as non-discrimination.

The theoretical limits to a CC's interpretation of the Constitution are outlined in a similarly explicit way by a single parallel opinion (23/1990), which puts down methodological and substantive aspects of "the freedom of the CC in adopting its decisions". On the one hand, it recognizes the interest-neutrality of the concept of constitutional rights inasmuch as rights in a pluralist society can embody different values as long as the entire constitutional system of rights remains coherent and operative. In borderline cases and when faced with a choice between incompatible interpretations, however, the Constitutional Court enforces its own substantive conceptions by setting the standard of interpretation by its continuous interpretational activity, though starting from the Constitution as a whole.

3. The above two opinions allow an important conclusion to be drawn with regard to the interpretation of the CC's adverse decisions. When a statutory solution is not considered unconstitutional by the CC, it does not cause an opposite solution to become unconstitutional: a number of other solutions which are appropriate or fair in varying degrees may well satisfy the criteria of constitutionality. So the decisions of the CC are not of an "either or" type, but seek to preclude extremities and apparent unconstitutionality. Evidently, an interpretation of the right to life which allows, and another interpretation which precludes, capital punishment cannot be constitutional at the same time. But the fact that incompatibility between an MP's and a mayor's post is not in conflict with the Constitution does not by itself admit of the conclusion that compatibility between the two positions is against the Constitution. The full enjoyment of constitutional rights is limited not only by other rights, but also by several technical aspects, expediency, etc. These limits by statutory solutions as well, and the CC has to establish the critical point at which a limitation becomes unconstitutional, e.g. because of its extent or insufficient reasons. The CC was faced with this problem in several cases when it had to offer interpretations in connection with the establishment of unconstitutionality. For example, in the petitions against Electoral Act every technical procedure affects a fundamental right: is a more appropriate arrangement than that ordered by the law against the constitution? (The CC found that mere technical reasons were not sufficient for a limitation of the right to vote.) Judging by our practice so far, it is time we set out this methodological position on interpretation with a theoretical edge in one of our statements of reasons.

4. From the foregoing it can be seen that when the CC interprets the Constitution on the basis of a relevant petition or in deciding on a concrete case makes no real difference as regards its method, its formulation of philosophical principles, the importance of its interpretations, or its responsibility. Nevertheless, I think we should avoid theoretical explanations unsupported by concrete cases. From the CC's insistence on considering concrete constitutional problems (23/1990) follows the need to dismiss petitions for interpretations of individual rights and related state responsibilities, hence also petitions for an explanation of the right to a healthy environment. In addition,

however, it would be ideal for the CC to always define the substance of abstract constitutional rights in its "invisible constitution" by relying on its opinions expounded in concrete cases. As a court vested with judicial powers and intervening also in legislation, the CC has had opportunity to gain some experience in the legal development of real case law over the past one year, so its opinion is in line with its practice. The substance of rights is slow in crystallizing, under the pressure of repetitions and analogies, existing in variations without hardening into a single definition. Our decisions also show that certain ideas merge and then some are to stay—e.g. a necessary restriction of a right may only be proportional—, working out differently in individual decisions, but forming a stable and predictable part of our judgements.

This does not mean that there is no need for theoretical definitions frequently appearing in our decisions. Some of them are expressly interpretative of rights (see positive discrimination, nature of two-thirds majority as a guarantee, main substance of a right, specificity of the right to life, etc. as mentioned earlier). Another part *a priori* give concrete substance to constitutional rights, with concrete rights deduced from them. For example, from human dignity and the right to self-determination the CC deduced the right of workers not to be represented by the trade union without his consent (8/1990). However, this was also theoretically set out by the CC, declaring that it regarded the right to human dignity, included in the Constitution, as one of the wordings for general personal right and that it is a "parent right" which the CC and other courts can always invoke to protect the autonomy of the individual if none of the fundamental rights, concrete or nominate, can be applied to the given case.

On the other hand, even these general principles exist in the context of a given case and need to be put into a different context when applied to another case. This leaves the CC free to distance itself from earlier applications of a principle when dealing with a new case and to "shift" the interpretation. For example, in the same case (13/1990) in which the freedom of contract is interpreted as being implicitly included in the content of Article 9 of the Constitution, because this section qualifies the Hungarian economy as a market economy, the CC has stated that neither the termination of the banking monopoly nor the marked inflation can be a sufficient justification for legal provisions to change the deposit rates at the expense of depositors. Its own reasoning undoubtedly ties the CC's hands in the matter of interest rates on housing loans as well, yet it has to consider the differences between the two cases (i.e., in the CC's view, the amendment by legislation of contract terms concerning deposit rates gave on unjustifiable advantage to the National Savings Bank). At any rate, the first decision made it very difficult, though not impossible, to use inflation as an argument for raising interest rates.

5. The most frequent subjects of interpretation by the CC were enjoyment of equal rights (Article 70/A of the Constitution), the right to human dignity (Article 54), the grounds for restriction of fundamental rights (Article 8) as well as the right to protection of personal data and the principle of constitutionality.

The equality of rights is the commonest basis of reference in petitions that may be submitted by anyone. This may be influenced by the ideology of equality prevailing

under the former regime and the fact that equality (of rights) is a constitutional right that is most readily apparent to primitive approaches: someone in a disadvantageous position considers it unconstitutional if someone else is in a better position, namely he finds disparities to be contrary to the Constitution. The rigid conception of rights held by (non-professional) petitioners is characteristic of other aspects as well (such as equality and even formal requirements). By contrast, the CC set out its flexible position on the admissibility of distinction and its conditions quite early (9/1990). The CC extended the postulate of equality to treatment as equal persons (treatment as persons with equal dignity, i.e. equal consideration of aspects) and explained that unequal treatment might be justified by a social purpose not offending the Constitution or by exercise of a constitutional right unless it infringed another positively worded constitutional right. The CC's solution has its source clearly in Dworkin's explanation for cases of affirmative action. The position expounded on this basis has been simplified in subsequent decisions and has come down to the requirement of "constitutional grounds" for discrimination (10, 21, 24, 33/1990), supplemented by restrictive condition for discrimination "within the same regulatory concept" since the judgement on the land act. The importance of the constitutional test of positive discrimination, contained in the decision on the land act, has been discussed earlier; in subsequent cases of lesser importance the CC was satisfied with the simple formula.

The importance of expansive interpretation of the right to human dignity (Article 54) is comparable to that of the equality of rights. Here the CC has adopted the results of legal development achieved in the field of "general personal right" and constitutional privacy on the one hand and, on the other, has expounded original conceptions about the relationship between the rights to life and dignity in connection with capital punishment. Accordingly, the CC has *ab initio* treated the right to dignity as a source of innominate freedoms. Not confronted, for the time being, with the problem of recognizing trivial minor "rights" as separate ones, the CC has thus found it possible for the right of trade unions to legal representation and the restrictions on sportsmen's registration to another club, paraphrased as a right to self-determination and general freedom of action, respectively, to be declared unconstitutional. Capital punishment, however, gave occasion to go to opposite extreme: certain parallel opinions reached beyond the interpretation of human dignity as a "parent right" in the above sense. One opinion regarded it as a value existent prior to, and to be protected by the law; another opinion regarded it as a right in unison with the right to life, but considered it notionally unrestrictable. Such absolutization will have serious consequences in other cases relating to the rights to life and dignity, e.g. the authors of the above opinions will be forced to take an extreme stand in the abortion issue. (The *a priori* approach to values is to lead to restrictions on the possibility of abortion in order to save the mother's life. And the absolutization of these rights will logically be conducive to the negation of the embryo's subjective right to life and dignity. Similar difficulties can be expected in the euthanasia issue or in other cases closely related to the rights to life and dignity.)

As the Constitution spells out the right to protection of personal data (Article 59), the CC did not need to invoke the general personal right in interpreting the protection of data.

Article 8, which imposes limitations on the state's disposal of fundamental rights, was a frequent subject of interpretation by the CC (2, 3, 4, 11, 20, 23/1990). In most of its decisions the CC had to apply paragraphs (2) and (3), which were still in effect before the amendment of the Constitution (Act. XL of 1990), and provided that constitutional rights and obligations must be regulated exclusively by a law of constitutional force for reasons listed in the Constitution. Lack of a law of constitutional force provided the CC with an obvious reason for formal unconstitutionality; an early decision extended the formal approach, ruling out any distinction by the nature of rules governing fundamental rights (4/1990). However, this was also coupled with the CC's effort to examine the possibility of restricting a fundamental right from the point of view of its substance. It was first stated in a dissenting opinion that the mere existence of the reasons listed in para. (3) does not make limitations on a fundamental right unconstitutional. Protection of another fundamental right is therefore not a sufficient cause; the State may use the ultimate means of limitation only if the protection of another right cannot be ensured by any other means and limitation must not be greater than is absolutely necessary (2/1990). The American doctrine of compelling state interest as well as the German doctrine of proportionality have since appeared now and then in the practice of the CC. In the meantime, the causes allowing limitation were replaced by the amendment of Article 8—also on the German model—with the prohibition of limitations on the main substance of fundamental rights. This was mixed with the above criteria (an unnecessary and disproportionate limitation derogates from the main substance, 20/1990), but the absence of necessity for limitations was stated again as a separate cause of unconstitutionality, without reference to Article 8. (The purpose of a restrictive regulation can also be achieved by other means, 27/1990.) The CC's interpretation of Article 8 has taken a relatively firm dogmatic form, in a single instance among recurrent cases of interpretation. This is nevertheless understandable, as it started with a dogmatic formula originally adopted elsewhere.

Among the rights listed in Article 59 of the Constitution, the definition of the substance of the right to protection of personal data is an important achievement of the CC's interpretational activity. This right was first interpreted, again in a dissenting opinion, as a right to self-determination in respect of information, with its substantive elements stated to be constituted by the most important rights usually laid down in legislations on data protection (2/1990). Then a three-member council applied this protection to identity numbers (11 and 18/1990). Finally, as a result of the above necessity—proportionality test, the plenary session also considered the data on the financial situation of party leaders to be protectable personal data (20/1990). The definition of this right enables the CC to correct the mistake of the legislator, who, under a conservative approach, put data protection into the same category with the protection of reputation and of secrets, separating it from the freedom of information as its natural

complement (which the Parliament again wrongly linked to the freedom of the press). The CC has opened the way to expansive interpretation, thus meeting the want of a data protection law. In addition, the restrictive interpretation by Decision No. 11/1991 of the authorization to use identity numbers serves the same purpose.

6. Is the CC empowered to alter the Constitution? After we have seen that the interpretation of the Constitution is a daily task of the CC, which establishes the substances of individual fundamental rights according to its own conception sets limits to their exercise in conflicts between constitutional rights and, moreover, formulates criteria, as was claimed in a judiciary opinion, for its interpretation of the Constitution, the above question must concern something else than the substance of the freedom to interpret the Constitution, namely the existence of cases where the CC has to emerge from behind interpretation and bring into the open the conflicts of fundamental rights within the Constitution. This leads to the second part of the question, whether an obvious conflict can be resolved within the power of the CC. Another problem is whether the CC developing some kind of hierarchy within the Constitution is to invest itself with authority to resolve such conflicts and to actually use that authority.

The decision regarding the constitutionality of capital punishment raised this question, but the majority did not pay it the attention its importance merited, and finally the issue was only mentioned in a brief dissenting opinion. According to the CC's line of reasoning, Article 54 para. (1) of the Constitution did not preclude the possibility of one's arbitrary deprivation of life, while the prohibition of capital punishment can be deduced from the new text of the para. (2) of Article 8 passed in the meantime, providing that the main substance of a fundamental right shall be subject to no limitation. According to the dissenting opinion, to resolve conflicts between constitutional provisions is the prerogative of Parliament, which is vested with powers to adopt and to amend the Constitution, and the CC can not vindicate that prerogative. Only one of the parallel opinions reverted to the question, though not on the merits, because, according to the position expounded therein, there was no conflict in the Constitution, not even in its original wording and capital punishment had been against the Constitution before the amendment of Article 8. So the CC tacitly decided that the conflict, which was not denied by the majority, should not be made explicit, but could be resolved within the framework of interpretation.

Is, then, the CC a judge to decide the constitutionality of the Constitution? Yes, it is, within the broadest limits of interpretation as indicated above. However, can the legislative assembly act in case of an open violation of the Constitution, one that cannot be remedied by interpretation? Decision No. 3/1990 of the CC annulled the provision of the Electoral Act which stated that citizens staying abroad on polling day must be deemed to be prevented from voting. This rule restricted a fundamental right. In view of the fortcoming elections, the CC invited the Parliament to fill the resultant gap in law possibly with effect on the current elections. The Parliament could not find an immediate technical solution for the voting of citizens staying abroad and, panicked at the pressure of time, ended the non-regulation of the question by depriving those citizens of their suffrage (Article 70 para. (1), of the Constitution). The Constitution itself cannot be at-

tacked in this case. It was the law amending the Constitution that was in obvious conflict with former Article 8 of the Constitution, because the curtailment of the right to vote could not be justified by any of the grounds listed there for the limitation of fundamental rights. So the question is this: to what extent may the legislative assembly ignore the Constitution? The Hungarian Constitution contains no "eternal" norms, like those in e.g., the German Fundamental Statue, the unchangeability of wich is guarded over by the Constitutional Court. The CC did not think, even in its decision on capital punishment, of attaching such consequences to the rights to life and dignity created as they are, with distinction. On the above analogy, the most the CC can do is to try to emphasize the significance of the procedural rules of Article 8 as providing guarantees and to separate the provision intended to express the substance of the Constitution from the amending act itself; it is in the aspect of amendment that this conflict can be detected, i.e. the legislative assembly fails to observe the limits it has set, though it may naturally overstep them, but not tacitly. (As against this, one may ask whether the previous conditions listed in Article 8 and the present impossibility to restrict the main substance hold for the Constitution.) By trying to annul the amending act, the CC would at least point up the problem, though the consequences of such a decision, e.g. refusal by Parliament, would bring additional problems to the surface. (Opposition to Parliament and challenging its powers are not the same as now-enforcement of the CC's judgement in default.) With the CC holding great sway over sovereign anyway, this borderline question might arise as one of the CC openly placing itself above the Constitution and challenging Parliament's power beyond the CC's control in this respect, implying that Parliament is sovereign nevertheless.

7. The ACC rule on unconstitutionality as manifest in default is not unambiguously clear. Does the text lay a conjunctive condition or refer to a casual relationship? (If "the law-making organ has omitted making a law under an enabling provision of law and has thereby given ground for unconstitutionality", the CC will establish the default; Art. 49 of the ACC.) Default is also readily apparent to primitive and non-professional "interpretation of the Constitution" and is indeed evident from petitions pleading default. With the requirement of possessing legislative powers, the ACC has introduced but an apparently formal condition, since the Constitution makes it a duty, as a rule, of the Government to enforce the Constitution, whereas the legislation act requires it to carry out regulatory activities according to need. So far the CC has normally required concrete authorization as a condition for establishing default, stating on a theoretical plane that mere omission to regulate a problem in need of regulation is no ground for unconstitutionality (22/1990), and that non-compliance with a duty to pass laws must be a ground of unconstitutionality. Departure of an implementing provision of law from being intendment of the enabling act was likewise deemed by the CC to constitute omission, which was a ground of unconstitutionality (16/1990). In another case, however, the CC dispensed with a rigorous examination of the existence of authorization and established the theoretical premise that if a previous legal provision deprived citizens of the possibility of exercising their constitutional rights, omission to adopt a legal provision allowing assertion of such rights gave by itself, i.e. even in the absence of formal authorization,

ground for unconstitutional default (22/1990). Thus the CC has devised a sufficiently solid dogmatic formula for a partly restrictive, partly expansive interpretation of Art. 49 of the ACC. The "reparative" criterion is narrow enough to give ground for unconstitutionality, for, in the absence of concrete authorization to pass laws, non-regulation may ensue from the legislator's will, and in such a case it would be controversial if the CC obliged the legislator to make laws without reliance on established criteria for unconstitutionality.

In the majority of cases, the CC found that lack of legal regulations required for the exercise of rights was the source of unconstitutionality. The most important of its decisions in this respect established unconstitutional default because of the failure to have enacted a law on administrative jurisdiction (32/1990), but similar reasons were also stated in Decisions Nos. 22 and 30/1990.

8. The decisions of the CC are binding on all. If the CC annuls a legal provision, the decision needs no separate execution and the guarantees for the observance of such "negative legislation" are the same as for that of positive legislation. Theoretically, the deadlines set by the CC for the repeal of legal regulations make no difference. *Ex nunc* repeal practically tends to weaken the character of repeal as a sanction, as has been mentioned earlier. Behind repeals with future effect there is always an invitation too, to correct unconstitutional provisions. This serves to bring such cases closer to rulings obligating concerned organs to make laws by way of mending default. In one case the CC established default and unconstitutionality at the same time and the "deadlines for replacement and correction" coincided (16/1990); in another case, the CC sent to Parliament its decision on repeal with a recommendation to fill the gap in law without delay (5/1990); but the deadlines for *ex nunc* repeals always imply the intention of the CC to allow sufficient time for annulled provisions of law.

However, the CC has no means at all to enforce its decisions on law-making. The necessary legal provisions, including legislation on social insurance, were generally adopted, though the Social Insurance Directorate indicated its difficulties by letter and tried to get new deadlines. No new provision of law was passed to replace Article 17 of Law-Decree No. 2 of 1989 on savings deposits, which had ceased to have effect on 31 December 1990 (13/1990). It is more serious that the legislator failed to repair its default concerning the payment of POW allowances (22/1990), the deadline for which had expired also on 31 December 1990. The Government did not put forward the bill on the judicial revision of administrative decisions until 31 January 1991 (32/1990). In its decision, however, the CC pointed to the consequences of the delay: the judicial procedure was to commence on the basis of the Constitution, meaning that the restrictions otherwise allowed by Article 70/K of the Constitution would not apply either.

Of course, the CC is not under obligation to motivate its decisions, but the legislator is interested in considering the theoretical position contained therein, if it is to avoid subsequent annulment. At once occurred that the dissenting rather than the majority opinion was taken into account: the second canvassing card did not show the identification numbers which had been held unconstitutional by a single judge of the CC.

Acta Juridica Hungarica
1991 33 N° 1–2, pp. 23–38

Akadémiai Kiadó,
Budapest

Imre VEREBÉLYI

Fundamental Features of Local Self-Government

The Hungarian system of self-government consists of local self-government (of settlements and counties) with a broad scope of responsibility and with operational democracy and autonomy.

1. Broad scope of comprehensive responsibility

(a) Unlike self-government organized for a single purpose, local self-government with comprehensive responsibility is characterized by local management concurrently of various public affairs. Comprehensive responsibility allows local self-government authorities to use the benefits of independent and democratic exercise of local power in a variety of local affairs within the frameworks of law and in response to local needs. In the case of comprehensive local administration, comprehensive responsibilities and functions leave scope for local coordination of matters with many interlinkages, for the realization of territorial complexity.

The advantages of independent and democratic exercise of local power are fully felt when comprehensive local administration embraces the *widest possible spectrum of public affairs* that emerge *in loco* (as well). Obviously, the comprehensive responsibility of self-government cannot extend to all local affairs of public concern, but local self-government is the more effective the more the local public affairs *of importance* it attends to. Our self-government Act has adopted the concept of local self-government with a broad scope of responsibility by providing (in Chapter I) that the responsibilities and functions of local self-government shall *embrace a wide range of local public affairs and that legislation may only exceptionally refer management of local public affairs to another organization.* The delegation of a broad scope of responsibility is supported by, *inter alia,* the way in which local tasks emerge.

As distinct from, e.g., the British or certain American self-government, the Hungarian self-government may take care not only of affaires which the central legislator has explicitly empowered or required it to administer. The broad scope of responsibilities and functions of our self-governments are in part evolved by these same authorities through voluntary administration of public affairs in part determined by the legislator, who defines in mandatory terms the public affairs to be managed by them. The board scope of responsibility is established by a combined application of techniques regulatory of negative and positive powers. Our self-governments may voluntarily take care of any local public affair not referred by law to the competence of another organ. They may, in the light of local needs and possibilities, freely determine which function to perform to what extent and how.

Local freedom to accept performance of functions means freedom in relation to the legislator rather than to the will of local electors. Local self-government bodies and their senior executives may be "forced" by the local population to attend to optional tasks of the greatest importance in the locality and even to keep exploring the necessary sources of finance. An elected self-government focusing, on fulfilling functions mandatorily defined by law and making no attempt to attend to self-imposed tasks, is bound to face serious consequences at the next local elections.

In carrying out voluntarily accepted responsibilities, a local self-government may do anything not offending the law. In addition, the law determines *mandatory* responsibilities and functions to be performed by self-government authorities. This does not mean, however, that there is no *autonomy in the local performance* of mandatory tasks. The element of autonomy inherent in the substance of a public affair is considerably reinforced by the need for Parliament to secure the necessary material conditions for attending to such local tasks. Local budgets must make allocations primarily for discharge of local responsibilities and functions mandatorily determined by law, and performance of optional tasks may not jeopardize autonomy in the local fulfillment of obligations prescribed by law.

The Hungarian self-government Act has guaranteed for local self-governments a broad scope of responsibilities and functions and has entitled them to *make submissions* to higher organs in matters falling within the competence of state organs. The representative body of self-government may, in any matter affecting it but falling within the competence of state organs, request information and data and, in professional matters and questions relating to interpretation of law, a statement of position or may make suggestions, etc. The organ approached is under obligation to give a substantive reply to a request within 30 days.

The *term "local affairs"* cannot be given a precise *definition.* A local public affair is always one deemed to be such by the legislator or accepted by the decision of a local self-government for management by the community. Nevertheless there are certain specifics which may qualify a type of matters as local public affairs. The substance of each local public affair reveals elements of local motivation which enable self-governmentents to be purposively involved in managing public affairs by exercise of discretionary powers. In most cases, affairs with elements of local motivation are also concurrently of

concern to central state organs. Where such is the case, the state does well not to exclude an affair from the competence of self-government, but to enforce its national relevance (interest of the state) by means of central regulation, provision of finance and special state supervision. A matter may be a public affair, where a self-government can be supposed to have the *capability* to address it and to assume responsibility for taking care of it. Central assistance and local association may enable self-governments to do a great deal, but not everything. (Public affairs requiring sophisticated expertise, larger funds and national overview should, by their very nature, be referred to organs other that self-governments, whose action may be ruled out by conflicts of interest, inherent in administrative measures, between the clientele and self-governments, etc.) Amenable to self-government action are public affairs whose *territorial scope* in such as to allow their management in a given settlement or county without prejudice to the interests of another self-government.

Given their categories, public affairs managed by self-governments are related to organization of municipal services and to *exercise of local public power* (local administrative regulations, administrative measures of self-governments) and associated with creation of *conditions in terms of organization, personnel and resources* for the performance of these two "extraneous" functions.

(b) Matters amenable to self-government action are attended to by *self-government of settlements* (villages, towns, towns of country rank, capital city and districts) or *counties*. In regulating the division of labour between them, the Hungarian legislator endeavoured to assign management of local public affairs to the *self-governments of settlements, with subsidiary involvement of counties* in the delivery of municipal services "extraneous" to self-governments and their exercise of public power.

The functions of local self-governments in settlements *relating to municipal services* are enumerated examplificatively in the Self-government Act (settlement planning and development, protection of the environment man-made and natural, water management and rainwater drainage, sewers, maintenance of public cemeteries, local public roads and public areas, local mass transportation, public sanitation, fire-protection, public safety, cooperation in local energy supply and in the solution of employment problems, running of kindergartens and primary schools, provision of health-care and social services, places of public assembly, support for cultural, scientific and artistic activities and sports, ensuring the enjoyment of rights by national and ethnic minorities).

The enumeration shows that the Hungarian self-governments of settlements are not organs performing marginal functions, but attend to a really wide range of matters exceeding by far the responsibilities of taking care of the local technical infrastructure and even including human services (primary health-care and social services, primary education), which the legislations of several other countries have entrusted to organs other than local self-governments, other than grass-root self-governments of settlements.

The Self-government Act made it a duty of self-government in each settlement to make provision for safe water supply, primary education, primary health and social care, public lighting, maintenance of local public roads and public cemeteries, either on its own or through associations, as well as for the local exercise of rights by national and

ethnic minorities, among the responsibilities enumerated above. Of course, mandatory delivery of services by all local self-governments may also be prescribed by other legislations (as was the case with the legislative enactment which made it a duty of self-government authorities in settlements to maintain kindergartens or public libraries, to name but a few).

The law may assign *more* mandatory responsibilities and functions to self-governments *with more capabilities* in larger settlements than to self-governments of smaller settlements, in addition to the duties imposed on *all* local self-governments. Such subsidiary duties, exceeding those of self-government in all settlements, to provide basic services include, e.g., fire-fighting and salvage operations. Provision of such a mandatory municipal service is a task only for self-governments of larger settlements like towns, and even among towns only for larger ones, where established professional fire services of self-governments have their bases. Such fire-departments have the duty to provide service for *districts,* outside their seats, embracing another village or smaller town. (The state allocates budgetary support for the performance of subsidiary tasks, while smaller settlements with no professional service may also organize voluntary fire-brigades.) The benefits of this arrangement are coupled with the disbenefit that no room is left for the settlements receiving this service to influence the administration of district service subordinated to the town self-government only.

(c) As is known, village and town councils in Hungary were subordinated to the counties before the change of regime. Settlements were administered by counties. Often, the county council senior executives did not but transmit central expectations to the settlements, with the county exercising allocative and personnel administration functions in matters of villages and towns. With the introduction of the system of self-government, the county as an elected self-government, in exercising its functions, translates into reality, through transmissions, the self-government of the electors' county community. (Such transmissions do not alter the fact that the county self-government is a special self-governing community of electors, as it is elected by delegated members of the local electors' representative bodies of settlements, mostly from among their own ranks.)

There is no hierarchical relationship (subordination and superordination) between equal local self-governments in counties and settlements, their responsibilities and functions are delimited, and in cases where their municipal services and interests are interlinked, the self-governments collaborate as ones invested with equal rights. The responsibilities and functions of county self-governments are also comprehensive, but do not embrace as wide a variety of matters as those of self-governments in settlements.

A basic task of the county self-government is to organize those municipal services (e.g. maintenance museums, special social and health-care institutes) which are rendered for several settlements and which it would be difficult for a town or an association of settlements to deliver effectively and democratically.

Legislation may assign to the county self-government a dual *duty* to deliver municipal services: first, to provide municipal services for a district comprising the whole or a large part of the county; secondly, to organize municipal services also for an area within the county where the majority of beneficiaries do not live in the territory of the

local self-government of the settlement in which the institution delivering the service has its seat. It would not be practicable for legislation to make it a duty of the self-government of that locality to run and develop for its own use municipal services destined to serve district interests in the first place, while the elected county self-government has the capability to extend important district services destined to serve district interests in the first place, while the elected county self-government has the capability to extend important district services to towns and villages. These two arrangements are democratic in that a middle-level or special institution with a larger clientele is placed under management by the elected self-government embracing a larger area (county), which includes representatives of the users of services rendered by the given institution. This arrangement *via* the county self-government may be said to be effective because it leaves room for municipal services with a larger clientele to be organized and harmonized competently and economically county-wide. The legislator has assigned to the county mandatory responsibilities whose performance serves the interests of the settlements represented by the county. However, such powers and duties established by law produce situations in which measures taken by the county in attending to these responsibilities may fail to suit the interests of all the settlements represented by the country.

Along with mandatory functions, the county may perform *voluntarily* assumed tasks of public concern and of greater dimensions which legislation has not referred to the exclusive competence of another organ or the performance of which does not prejudice the interests of villages and towns represented by the county. This provision implies a serious limitation, for the county cannot undertake to carry out such optional tasks, affecting, e.g., the area of a village or town represented by it, as the self-government involved wishes to address itself for whose performance it deems to be contrary to its own interests for some other reason. Functions of the county clearly not prejudicing, but serving the interests of a settlement include, for instance, regional coordination with other than hierarchical tools, acceptance by collegiate decision of commissions from settlements, or methodological assistance for settlements.

In exercising its functions to carry out mandatory and optional tasks in the field of municipal services the county evidently performs related representative functions as well. Despite attempts, the county *was not prohibited from representing certain interests of settlements*. Function-related representation, however, does not prevent settlements from having other interests expressed or defended by themselves or through their regional or national representative unions.

(d) Given the size of their populations and capacities, larger towns do not depend on mandatory or optional delivery of services by the county. They are capable of organizing in their own areas the specific municipal services which other settlements provide with the help of the county self-government of their representatives indirectly elected from their respective areas. Large towns have the ways and means of affirming the interests of their electors, whereas villages and smaller towns in a country are in a position to satisfy, without subordination to a large town, their specific needs beyond the scope of their basic responsibilities. The representatives of towns with over 50000 inhabitants have no seats in the county body (assembly) of smaller self-governments, which serves

as a guarantee that regional or district interests of large towns and smaller settlements may be articulated independently, without suppressing each other, in the corresponding self-government. Where such interests are closely interlinked, the self-governments of a county and a large town collaborate on the bases of the principle of equality and, in justified cases, may even run and develop joint public utility works with larger clienteles. Such undertakings can be facilitated by close working relationships and continuous exchange of information (invitation of representatives to attend meetings of each other's bodies with voice but no vote, holding joint committee meetings, regular meetings between elected leaders, daily working relationship between specialists, etc.)

(e) A town with over 50000 inhabitants may be given by Parliament the status of county *(town of county rank).* (It is to be noted that the Bill originally proposed a larger number of inhabitants.) A town of county rank does not form part of the county self-government, but may, in its own area, even exercise *county functions*, with corresponding differences, along with its *local responsibilities.* Towns of county rank and smaller settlements as self-governments have an equal standing in terms of basic rights, but legislation may assign additional responsibilities and functions to the former. Where services are predominantly used in urban areas the municipal services mandatorily delivered by a town of county rank may extend beyond the confines of the town in respect to the boundaries of the district served. Therefore, with the necessary conditions created, a town of county rank may not deny delivery of services to a district. In view of the different sets of conditions, the legislator may choose not to impose on a town of county rank all of the tasks that are mandatory for a county. In such a case the town concerned is free to decide to carry out a similar task as an optional one in its own area, with the necessary conditions prevailing. The right to assume a duty of a county (delivery of municipal services) derives not from the county status, but from the fact that a town of county rank is in most cases the seat of a county institution providing municipal services for the surrounding county. The mandatory responsibility of a county to deliver municipal services is not reserved exclusively for the county! In the case of *already existing* county institutions providing municipal services on a district-wide basis the *settlement in which such an institution has its seat may take over* from the county that institution for voluntary operation if its services were used, on the average of the previous 4 years, mainly by the inhabitants of the settlement. On the other hand, a *new* institution intended to provide services on a district-wide basis may be voluntarily created by any settlement or its association if it has the necessary resources to operate it. An important financial constraint regarding both existing and newly established district institutions consists in that the settlement in which an institution has its seat *cannot apply for any extra support* from the state or the county in addition to that granted from the state or the county budget in the form of authorization for the settlement to retain a part of local revenues. A settlement, which has taken over such a county-operated service facility or has voluntarily established one, may not refuse to satisfy needs arising in another locality for the municipal service it operates. These rules allow scope only for undertaking tasks with restraint and responsibility. At the same time, the first phase of the switch to a self-government system called for the adoption

of special statutory enactments (e.g. a town or village is not required to declare its wish to take over the delivery of a county-operated municipal service, but certain responsibilities concerning education in a district may be retained by the settlement until it decides to surrender them).

(f) The *Capital* as the largest city of the country needed a special legislative coverage different from that applicable to the self-governments of settlements. The differences are treated by a separate chapter of the Self-Government Act and by a separate enactment on the metropolitan and district self-governments. Passing over the details, we shall single out the following main aspects of regulation for the present discussion.

In the case of the Capital there are elected conceptually two kinds of independent, but collaborating self-government and a self-government in each district. (During the political debate the legislators rejected the professional proposal that a town should have one self-government with local offices and administrative agencies in districts. Also, under a liberal approach, they rejected the proposal that, once the districts have self-governments of their own, the metropolitan self-government should be empowered to place stronger limitations on district autonomy.) Of the two self-governments, the larger part (66 members) of the capital city's representative body is directly elected by electors and a smaller part (22 members) indirectly by the district self-governments. (These ratios and this size were the result of a political bargain among MPs, who agreed to increase the size of the metropolitan assembly by one member in only one case, since originally the Lord Mayor, elected subsequently, was not to be a member of the assembly.)

The metropolitan *district* self-governments have the duty to provide the basic services specified by law and the right to voluntarily assumed management of public affairs along with the former. A district self-government is entitled to have certain direct revenues of its own. It has its own budget separate from that of the Capital. The *metropolitan* self-government takes care of matters affecting the whole or a large part of the Capital (the Capital renders limited-scope services, too, which are provided by, e.g., villages elsewhere). The Capital has a separate budget and direct revenues. In addition to collaboration between the two self-governments on an equal footing, the *unity* of city management is guaranteed by the power of the metropolitan assembly to adopt the Capital's city-planning programme and general development plan. The assembly may by decree transfer to the districts the organization of certain projects, and its consent is required to the assumption of such responsibilities by a district. The metropolitan self-government decides by decree on the distraction of sizable revenues, which, by virtue of law, are shared by the Capital and its districts. The political compromise, as embodied in the Bill that such decrees of the metropolitan self-government must be subject to the consent of the *majority* of district representative bodies, is intended to counteract abuse of metropolitan power. (It will be noted that there was an exaggerated political proposal, ultimately rejected, to require the consent of the majority of districts to the most important decrees of the metropolitan self-government.)

(g) As would be the case in all similar situations, questions of *terminology* arose, perhaps unnecessarily, a great debate before and, unfortunately, after the preparation of

law. A salient question concerned a general name for self-governments of different types. There was agreement that it was not enough to talk of self-governments, but that it was necessary to designate them in concrete terms (thus marking them off from professional self-governments). The version of "territorial self-government" was also proposed. In a phase of the legislative process that was strongly biassed against the county, the Bill was given the title "settlement self-governments" and then "settlement and county self-governments", but the legislator finally accepted the professional proposal to use a *comprehensive* terminology similar to the European Charter of Local Self-Government, thereby expressing the concept that the self-governments of settlements and counties are all regarded as *local* self-governments *versus* the self-government of *central* power (Parliament).

(h) Along with the function to deliver municipal services, self-governments are vested with the right to exercise *local public (administrative) power.* The representative body of self-governments in settlements may issue *local decrees* to regulate local social relations not governed by law or, in exercise of the authority delegated by law, to enforce that law. Under the enabling law, it is mandatory as a rule to issue local decrees enforcing a law, but legislation may leave adoption of detailed decrees to local discretion. (In special cases the legislator may also choose to give the provisions of a law governing local problems a subsidiary character, i.e. they are not applicable unless a particular matter is regulated otherwise by the self-government.) The self-government of a county may, in a narrower scope than the self-government of a settlement, issue decrees in its own field of activity and by virtue of law.

A law or a self-government decree may make it a duty of the local representative body to take care of individual matters of concern to the clientele *(local administrative matters).* Related decisions of the representative body are within the discretionary powers of self-government (e.g. issuance of permits conceding some benefit on grounds of equity in individual cases). Such administrative matters had previously formed part of a single group of matters amenable to action by state administration, but were referred by law to the competence of the representative body. An appeal against its decision may be filed with the self-government only, or if the decision offends the law, it may be brought before the court. In individual cases the representative body may delegate its administrative power to its committee or the mayor except when delegation is prohibited by law or by a decree of self-government. An appeal lies with the representative body in such cases, including matters within its discretionary powers, and when a decision offends the law it may be brought before the court. The representative body is free to decide what *functions* to delegate, and how, to the mayor or the committees.

2. *Democracy, autonomy, effectiveness*

(a) Local self-government cannot be equated with the local oligarchy of "petty monarchs" or with a passive "yesman" collegiate body. Local power is exercised by local self-government authorities in a democratic way. Our legislative enactments on self-

governments and, by and by, also the social practice of self-governments indicate that the fora of public power which have been established democratically employ *democratic methods and procedures* by their use of autonomy inherent in a broad scope of local responsibilities. Of course, the first measures resulting from a democratic operation have also entailed unexpected difficulties. The legal frameworks existed, but *traditions* did not, for a local democracy to function. Initially the representative bodies were preoccupied with themselves and with taking stock of their apparatuses and came face to face with the needs and problems of local societies at a later stage. These bodies and the mayors often worked unaided, also by reason of the fact that hardly any or no basic cells—self-organizing small communities—of civil society had yet emerged in local societies.

Democracy in every country finds its roots in local self-governments. Strong self-governments act to promote local exercise of self-organizing power, by means of which the population manages local public affairs directly or *through* its representatives elected on competitive and pluralist bases. Democratic exercise of local power is governed by the constitutional principle of *people's sovereignty,* according to which only the people can be the source and possessor of public power, including local public power. Local self-government is a collective right to be exercised solely by the *local community* of electors, a self-government or by the representative body of the local self-government.

Local referendum (people's initiative) is a democratic form less frequently used. There is no doubt that submission of more important local matters to a local referendum involves much more electors in local decision-making than adoption of decisions by the local representative body, even though after a social preparation. The democracy of representative bodies has qualitative advantages (effectiveness) over the quantitative ones of democracy practised through referendum. A decision by referendum depends to a great extent on how a matter is presented by a smaller group of people for decision. A local referendum has but two options, either affirmative or negative, in a question formulated in advance. By contrast, the democratic decision-making procedure of the *local representative body* enables representatives to participate in preparing (formulating and reformulating) matters for decision, to present a variety of options, to come to compromise by confronting opposing views during debates in the representative body and its committees.

Within the frameworks of the Self-Government Act the local representative body is free to evolve the everyday democratism of its procedure, both in its statute and in its practical functioning. A question of collegiate democracy is, for instance, that of enabling local representatives to join as soon as possible in *preparing* for decision matters of greater importance. Scope for doing so is allowed by a system of committees under which a committee is likewise involved in the preparation or commissioning of submissions in addition to commenting on submissions by the apparatus. In collegiate debates during the preparation of decisions it is highly important for a representative to act in furtherance of his electors' partial interests in awareness of the responsibility he bears for the entire self-government (the whole of the given settlement). It is quite true

that under democracy everyone is free to represent any partial interests and that it is ultimately for a majority-based collegiate decision to integrate such interests. However, such a majority decision is hard to arrive at under conditions of a "quarrelsome" democracy, in which a representative does not respect and consider opinions but his own. To be enforced, the public will need *majority* decisions. The rights of the *minority* are safeguarded by the law making important local decisions subject to a two-thirds majority of votes, for which—in questions of settlement policy—there is more room at the local level than in the Parliament, strongly segmented as it is by political parties. Also, the rights of the minority are guaranteed by the provision of law that it may initiate a procedure preparatory to decision-making (the representative body must be convened on a motion by one-fourth of local representatives, the proposal of a representative must, at his request, be discussed at the next committee meeting, etc.). A local representative may ask that his opinion be put on record separately, he may argue, ask questions, interpellate, etc. The right to elect a spokesman is a separate guarantee for national and ethnic minorities living in the territory of the local self-government. If the spokesman was not elected representative during the elections, he may attend the meetings of the self-government with voice but no vote. The representative body must be informed of any opinions expressed, but defeated, at the various fora open to the population.

It is an attribute of democracy that a multiple *control mechanism* is built in the system of self-government. The committee or the alderman (local representative elected by the assembly to take charge of important business of the local self-government), for instance, may control the work of the body's office in preparing and enforcing self-government decisions and, where it observes departure from the objectives and interests of the self-government, the committee may initiate measures by the mayor. By its use of delegated authority, the committee may take a decision, which, however, the mayor may suspend and refer to the representative body. The chief executive has the duty to signal to the body, the committee or the mayor any contravention of law he may have observed in their decisions.

Democracy is inconceivable without guaranteeing *publicity* as a general rule (public collegiate meetings, inspection by electors of submissions and record except those of closed meetings, etc.).

Local democracy is one of *equals*. Equality is to be construed as including the equality of *elected representatives*, with "no one more equal among equals". Functions (mayor, deputy mayor, committee chairman) may imply extra duties and rights, which, however, may not be performed and exercised except for the discharge of functions. Thus, for instance, local regulations may stipulate that the mayor presiding over meetings may not set out his views except at the end of the debate or, if he wishes to participate in the debate, he may rise from the chair, with someone else taking over the presidency for that time, etc. Under the Hungarian system of self-government, democracy prevails in relations between the various local governments, whose

fundamental rights are equal regardless of their type and size, while their responsibilities and functions may differ.

Representative democracy has the more substance the more it is coupled with forms of *participatory democracy.* Opportunities for direct participation by the population are provided for by population convened by organs of the representative body, with arrangements leaving time for asking questions and hearing the public between agenda items, allowing interest representatives to be elected to committees up to 40% of their memberships, involving the population's self-organizing small communities in the management of public affairs reserved for self-governments, etc. Our "participatory" local democracy is rather imperfect, parochialists with an inquiring mind are few in number, the various self-organizing communities of the population are still in the making, local masses of people are hard to kindle into action along with elected people participating in "representative" democracy.

In a self-government democracy, interests are allowed free scope for being articulated in the internal functioning of local self-government on the one hand and, "outwardly", in an *association-like* organization of *self-government interests* on the other.

As is provided for in the European Charter of Local Self-Government, "the entitlement of local authorities to belong to an association for the protection and promotion of their common interests and to belong to an international association of local authorities shall be recognized in each State". The provisions of the Charter are incorporated in the Hungarian Constitution and additional partial rules are laid down in the Self-Government Act.

Under the Self-Government Act, the *representational organization* of self-government may exercise the right to make submissions to state organs (requesting interpretation, data and information, raising objections, presenting proposals). The *national* representational organizations of self-government may—in addition to the rights of territorial or regional associations—give opinion on draft laws and other state regulations affecting self-governments, and their position must be communicated to the central decision-making organ.

Just as our system of self-government now in the making is coping with its infantile disorders, its movements to form associations have been unable to avoid initial pitfalls. While immediately before the change of regime there was but one national association, it has grown in number since the municipal elections (currently there are 16 national and regional associations). One half of associations are regional, which cannot be objected to, but it is all the less propitious that the number of so-called national associations—with which the centre is supposed to coordinate its work individually—is larger than justified. Self-governments of the same type (e.g. in settlements) have formed parallel associations competing with each other. Party considerations have played a role in this separation, and some national associations have few affiliates, whereas a few of them have overemphasized their role to represent and protect interests and have neglected or even failed to develop their function to deliver services. On the other side, government offices or parliamentary committees have often bypassed associations or have taken a

selective approach to them, so there are less to act upon. Professionally, we have a clear view of the target, too: less associations, possibly one, for each type (sub-type) of self-government, a national coordinating organization established by various associations, associations to be stable, with leading posts varying by electoral results (of political parties), continuous working relationship with government organs, larger memberships and more thoughtful patterns of attitude, widening scope of services. A significant and serious national association whose decisions are accepted by the members is suitable to sign agreements with the government on specific issues.

By contrast, one can only write nice things about our affiliation to associations in international organizations. Some of our associations have already joined an international association. Our associations have by consensus sent 7 Hungarian delegates to the organization of the Council of Europe concerned with matters of self-government, where they take an active part in work.

(b) In the initial period of evolving the Hungarian system of self-government the new legislature sought to maximize democracy and to minimize the role of administrative organs. That endeavour was inspired by the objective situation that during the decades previous to the change of regime there had been reserved too large a role for local apparatuses and too small a role for democracy. (Essential matters were decided in advance by local apparatuses at narrow fora of closed meetings held by heads of apparatuses. In most cases, local bodies did not but sanction submissions by apparatuses, the latter "setting in motion" the former, rather than conversely.) That legacy had to be done away with by all means. Another rationale for restricting the scope of action of apparatuses was that the "peaceful revolution" did not want to sack, and rightly so, some 30000 staffs constituting the local apparatus of the previous regime, but was distrustful of them. Given these national conditions and specifics, the legislator establishing a Hungarian system of self-government went, where he could, as far as the *maximum of democracy* and the *sustainable minimum of administrative efficiency*. The Self-Government Act invested the local administrative organ and its head, the chief executive, with *no power to decide on matters of self-government*. The chief executive and the office may not adopt any self-government decision within their own sphere of competence or in exercise of delegated authority. The main responsibility of the administrative apparatus is to prepare and to implement self-government decisions. This is an added reason why the local office was deprived of its formerly independent legal status as a juristic person. By contrast, the legislator formulated different rules on administrative matters.

Following the example of other countries, there were at hand *several* workable models for the direction and the immediate administration of the office of self-government. As is known, some well-functioning countries have devised structures with a "weak" mayor, who is attached only to the representative body, acting as its president and performing other representative functions, and the apparatus is directed, on the basis of collegiate decisions, solely by a "strong" career head official, who is employed by the representative body generally for a definite period, for the tenure of representatives' office. The head official appoints public servants for indefinite periods and exercises employer's rights over them. On another, equally well-functioning, model a *"strong"*

mayor will be the supreme head official, too, who is "only" assisted by a secretary, with the right of appointment exercised by the mayor or, with his approval, by the representative body. Between the two models there are intermediate arrangements, cases being not infrequent where several models are concurrently followed in different parts of a country. The Hungarian structure, appropriate to the distinctive features of democratization in the wake of the change in regime, follows the model with a "moderately" strong mayor.

In accordance with the Self-Government Act, the office is *directed by the mayor* through the chief executive, while it is *headed* as single office, and its work organized, by the chief executive, an administrative specialist appointed by the representative body for an indefinite period. With the exception of appointment, all employer's rights are exercised by the mayor in respect to the chief executive. The mayor appoints the office staff and exercises employer's rights concerning them. His rights to provide guidance for the work of chief executive and the office are based on the fact that the larger part of the responsibilities of local administrative authorities consists of preparing and implementing self-government decisions and that the office collaborates in performing the mayor's own administrative functions as well. At the same time, the mayor may not direct, in matters of substance, the work of the chief executive and the office administrator in discharging their own administrative responsibilities and functions. Direction by the mayor as an elected local politician is based on self-government interests and decisions. In carrying out his directing activity the mayor may rely—to a greater or smaller extent depending on the special situation of the self-government, on whether he attends to his duties on a full-time or a voluntary basis—on the chief executive, a specialist heading the office. The chief executive at the head of the office takes care to see that the work of his office meets the criteria of administrative competence and legality. He is an *administrative generalist,* while the executives heading internal units of a larger mayorality are concerned primarily with specific *administrative matters of a professional character.*

Control over the magistracy is assisted by committees and by *aldermen,* who may be elected to discharge such function as well.

Under the arrangement responding to the political needs of Hungarian legislation, the mayor's "strong" position is *weakened* by the regulation that there is a separate head of office appointed by the representative body for an indefinite period, the representative body may remodel the organization, the mayor performs a directive function through the chief executive (one-channel direction) and may not direct the administrative activities of the chief executive and the office administrator within their respective spheres of competence. The mayor's position is strengthened by the mode of his election, i.e. he cannot be recalled regardless of whether he is elected directly (in settlements with less than 10000 inhabitants) or by the representative body. Precisely in view of, *inter alia,* his directive function, legislation has widened the range of persons eligible for the post of mayor (the representative body may elect to be mayor a person without a representative's mandate "from without" in the absence of another suitable person in the

settlement). Appointment of the office staff is part of a "moderately" strong position. According to the Government's original bill, employer's rights over the office staff with the exception of appointment and disciplinary power were to be exercised by the chief executive, but the political decision vested all rights in the mayor, with the chief executive *collaborating* their exercise.

In the functions of the chief executive and the mayor, *administrative matters* are, by their nature, separated from self-government matters, as they should be dealt with according to uniform criteria nationwide and require consideration of strongly professional aspects; decisions on individual matters leave by themselves little room for discretionary consideration of settlement policy and usually do not affect a large number of inhabitants; appeals against such decisions should be considered by a higher organ, really independent of the authority of first instance, by reason of protecting the interests of the persons or organs concerned. As a general rule, *decision at first instance* on a large part of administrative matters is referred by the legislator to the competence of the chief executive in self-government closest to the population and, in exceptional cases, to that of the mayor or the office administrator. As can be seen, decision-making power is not vested in the representative body, to which persons dealing with administrative matters are not subordinated in respect of performing this function. Appeals against local decisions of first instance are, as a rule, considered by the commissioner of the Republic, the underlying reason being to allow scope for discretion and meeting criteria of legality.

The chief executive performs a number of administrative functions in first instance. (Legislation may also empower the chief executive to settle administrative matters beyond the boundaries of a local self-government.)

In Hungary, matters that *occur en masse* (involving permits, orders establishing obligations), including those which in other countries are attended to by deconcentrated organs other than self-governments (building permits, proceedings involving petty offences, guardianship administration, etc.) are settled at first instance by self-government organs in settlements.

However, discharge of functions to decide on administrative matters in first instance may not impose on the person acting on such matters so great a burden as to divert him from his *basic responsibilities* to prepare and implement self-government decisions. This is an added reason why the mayor is *only exceptionally* vested with administrative powers by law or an enforcing government decree. The mayor may involve the chief executive and the office in the preparation and implementation of related decisions and may empower to act on his behalf to sign documents for him. The chief executive, a person with professional qualifications and with much wider administrative functions, may also proceed likewise.

Naturally, decisions of first instance on administrative matters not only impose burdens on the self-governments of settlements, as the elected self-government of the population is ultimately interested also in the way of dealing with individual matters of electors *en masse*. Although the self-government of a settlement (or the mayor on its behalf) may not give instructions concerning such individual matters, it may create a favourable set of local conditions for dealing with administrative matters. By its de-

cisions concerning organization, personnel and material resources it may enhance administrative expediency, improve the standards of services for the clientele, and reduce symptoms of red-tape administration.

Mention should also be made of the possibility to involve the mayor, in exceptional cases, in local efforts to resolve central (national) *administrative tasks* (relating to national or civil defence or prevention of disasters).

The mayor is assigned administrative tasks mainly *in times of emergency,* when only an elected *politician* is in a position to decide which of his specialists' proposals is most tolerable for the population. The cases of emergency in which the mayor chief executive may receive instructions from higher state organs are specified by central legislation.

The elected organs of self-government except of the chief executive and his office staff as public servants *loyalty* (not fealty to party politics, but commitment to the projects and decisions of the representative body), *expertise,* and a high standard of professional services, whereas the apparatus needs *stability* in the performance of its functions, considering that the representative body and the mayor are cyclically replaced under democratic systems. The stability of the apparatus and its head is primarily guaranteed by appointments for indefinite periods, strict restrictions on dismissal, legally guaranteed remuneration and career progression. The arrangement is also conceivable for local employees' security of tenure to be ensured by requiring the approval or decision of superior state organs in individual cases. The Self-Government Act has opted for the former arrangement. Unfortunately, however, the Parliament has not yet created the fundamental conditions for executing this option, i.e. it has not yet passed the Bill on the Status of Public Servants, which is a source of considerable uncertainty.

(c) Genuine local self-governments are autonomous and act to promote decentralization of power. In possession of autonomy a local self-government may respond to local needs, make allowance for local conditions, and kindle its electors' spirit of initiative. Through their national network of organizations, local self-governments operate to force the central government to ensure that centralism, which is always needed to maintain the country's unity and operating capacity, is democratically enforced, but reduced to the lowest possible degree, while free scope for democratic decentralization is allowed as a general rule. With these conditions prevailing, self-governments can be expected to carry on bustling activities, and they are able to use their counterweights to soundly balance central interventions. It is not accidental that the *fundamental rights equally enjoyed* by all self-governments and *protected by courts and the Constitutional Court* are linked in their majority to some area of self-government autonomy.

Self-government autonomy prevails *in three areas:* autonomy in the substance of local management of public affairs, financial autonomy constituting the basis of independent management, and local freedom to devise the organization of self-government and to recruit its personnel attending to local matters. Decisions on matters within the competence of self-governments are *final* and are subject to revision only by the *court* and only in case of *violation of law.*

In matters of personnal, the third area of local autonomy, a degree of autonomy impressive even by European standards is guaranteed by the Constitution, the Self-Gov-

ernment Act, and the Act on the Capital and its districts. In the legal sense, arrangements appropriate to autonomy have been adopted for both the provision and the utilization of funds. Coupled with the burdens of inexperience and increased local responsibility, the painful problems of autonomy which self-governments face daily arise mainly from scarcity of finance compared with local needs and from the fact that management of local affairs is still regulated by an unduly great number of central laws or that, in other areas, lack of the necessary laws make full use of autonomy impossible.

In the experience of other countries, it takes several years to remedy the lack of autonomy in the management of local affairs as regards their *professional substance and the essential aspects of self-government policy.* The new system of self-government has inherited the prevailing laws and regulations, including a plethora of ministerial and government decrees, adopted over the past decades. The problem could be solved rapidly if the only task was one of deregulation or repeal of the legislation in force. In a number of questions, however, laws repealed should be replaced by new, pro-self-government ones, but Parliament, coping as it does with a heavy agenda in the initial period, is unable to act swiftly. As for the future, there are two courses of action open: either to speed up the legislative process, accepting temporary gaps in legislative coverage, conflicts between old and new laws, and a greater need for interpretations of law, or for legislation to give the Government wide powers to issue decrees subject to subsequent revision by Parliament, which will either make them law or amend them by legislative enactments.

Autonomy implies an obligation to carry out responsibilities *with efficiency.* In order to correct the injustices caused by the previous forceful amalgamations and fusions of settlements, the Hungarian legislator has recognized the right to local self-government for all settlements (communities of electors) able and willing to accept that challenge. In doing so, however, the legislator offered for local self-governments various forms of *voluntary fusion along with* autonomy. Among the three main types of fusion, ground has been gained by fusion in administrative management and by joint administration. Fears were not borne out that numerous small communities could not be granted autonomy or be let retain it because their representative bodies would probably refuse to have a *joint administrative apparatus.* Even if one considers only the figures on *joint administration,* the most comprehensive form of administrative fusion, it is obvious that autonomy in the domain of competent administration has resulted not in separation, but in collaboration based on mutual interest (representative bodies in 1526 villages, mainly small ones, established 529 joint administrations on a voluntary basis). The picture is not so favourable in respect of setting up joint organizations to manage common services. Nor can one rest content with the fact that the process of setting up *joint representative bodies* on a voluntary basis has failed to get under way. Proposals for economic and legal regulations to encourage *more advanced forms of integration* for delivery of services and exercise of public power are in preparation. Should attempts at voluntary integration fail, one cannot rule out *ex nunc* legislative intervention, based on social consensus, in furtherance of the country's interests.

Acta Juridica Hungarica
1991 33 N° 1–2, pp. 39–56

Akadémiai Kiadó,
Budapest

János ZLINSZKY

Two Questions about the Adaptation of Juridical Models: The XII Tables and Hungarian Reception

The history of Rome's law spans approximately 1000 years. These 1000 years start and end with great and comprehensive legislative works: the XII Tables in the beginning and Justinian's codification at the end. About the latter we know that it has served as a legal model for more than 1500 years. The originality of the former is dubious.

Our short essay is divided into two parts. In the first part we are going to examine the rules of the XII Tables: to what extent *ius Quiritium* was a unique production of a special historical situation and to what extent it represents, or is the recipient of, earlier legal models. In the second part we are going to examine the repercussions of the "keystone" of Roman legal development, the legislation of Justinian. The reception of Roman law is a discussed problem. We would like to examine how it served as a model in Hungary where it was not accepted as code.

I. Traditional stories about the origin of the XII Tables say that before the codification the Romans sent a deputation to Athens to study Greek law. Liv. 3. 31. 8.: "...cum de legibus conveniret, de latore tantum discreparet, missi legati Athenas Sp. Postumius Albus, A. Manlius, P. Sulpicius Camerinus iussique inclitas leges Solonis describere et aliarum Graeciae civitatum instituta, mores iuraque noscere." Ibid. 32. 6.: "Iam redierant legati cum Atticis legibus. Eo intentius instabant tribuni, ut tandem scribendarum legum initium fieret." Dion. X. 52.: "...legati legum a Greacis petendarum causa creati sunt."

The XII Tables themselves contain—it seems—details of the provisions of Solon. As the fourth book of Gaius Comments, the XII Tables according to D. 10. 1. 13. (XII. 7. 2.): "sciendum est in actione finium regundorum illud observandum esse, quod ad exemplum quodammodo eius legis scriptum est, quam Athenis Solonem dicitur tulisse.

Nam illic ita est: 'ean tis haimasian'..." Solon 23. of Plutarch (Bioi paralelloi) says the same.

Other rules are said to be contained by fragment XII. 10. 2. Cic. De leg. 2. 23. 59.: "Iam cetera in XII minuendi sumptus sunt lamentationique funeribus, translata de Solonis fere legibus ... quod eo magis iudico verum esse, quia lex Solonis id ipsum vetat." Plut. 21. is quite similar: "Most of these prohibitions can also be found among our legal rules." As we can see on the basis of certain coincidences, the fact of reception was not dubious for the ancients.

Today's scientific community does not accept the significance of the Greek influence on the XII Tables. According to Bonfante: "Spigolare nelle XII Tavole se questa o quella massima sia derivata del diritto greco, è uno sport intellettuale, che portà anche non essere totalmente inutile, ma la messe è assai dubbia, nè vale mai le spese e i sudori ... perchè tutto è rudo e primitivo, rappresentino un diritto prettamente romano."[1] Less sceptical are, for example, Jolowicz and Nicholson, who, mentioning the traditions and quoting Pliny and Pomponius on the co-authorship of Hermodorus of Ephesus, say the following: "Modern opinion has generally been sceptical. But in so far as this scepticism has been founded on the supposition that the horizons of the Roman world did not yet extend so far, it has been shown by recent archeological discoveries to be unjustified."[2] According to their last conclusion: "No doubt some disputed points were settled and some innovations were introduced, of which a few may well have been copied from Greek originals, but as a whole the XII Tables are based on the customary law of Rome herself.[3] Selb, in the fourth edition of "Jörs-Kunkel-Wenger", came to the same conclusion.[4] Wieacker has examined this problem in detail several times.[5] In one of his essays[6] he gives a profound analysis of the traditions, and, not denying the Greek influence on certain elements, he emphasizes the Roman character of the whole work. This is the common opinion of the scientific community today.

All the more interesting is, that recently the originality of this legal piece of work has been queried again. Raymond Westbrook in his essay titled "Nature and Origins of

---

1 BONFANTE, P.: Storia del diritto romano. I. Milano 1958. p. 129.

2 JOLOWITZ, H. F.-NICHOLSON, B.: Historical Introduction to the Study of Roman Law, 3. Cambridge 1972. p. 112.

3 JOLOWITZ-NICHOLSON op. cit. p. 113.

4 JÖRS, P.-KUNKEL, W.-WENGER, L.-SELB, W.: Römisches Recht, 4. Berlin-Heidelberg 1987. p. 6.

5 WIEACKER, F.: Zwölftafelprobleme. RIDA III (1956) pp. 459-491; Der römische Staat als Rechtsordnung, in: Vom römischen Recht, 2. Stuttgart 1961; Die XII Tafeln in ihrem Jahrhundert, in: Entretiens sur l'Antiquité classique, Tome XIII. Les origines de la République romaine, Genève 1967. pp. 293-362; Rechtsauftrag und Rechtsvorstellung im archaischen Rom, in: Entstehung und Wandel rechtlicher Traditionen, red. W. FIKENTSCHER, Freiburg-München 1980. pp. 581-608.; Die Entstehung einer archaischen Rechtsordnung, in: Rechtswissenschaft und Rechtsentwicklung, Göttingen 1980. pp. 32-52; Römische Rechtsgeschichte, Handbuch der Altertumswissenschaft 3.1.1. München 1988.

6 WIEACKER, F.: Zwölftafelprobleme 1956.

the XII Tables",[7] while analysing the question accurately, traces back many rules of the XII Tables to Babylonian law and not to the Greek one. He points out that in reflecting on the newest cuneiform findings, the provisions of Hammurapi do not seem to be a unique and mysterious work of law anymore. Their content can be found in the contemporary and, partly, in the later legislation. It had an influence on Phoenician and Egyptian codices; it was transferred to many Greek and Hebrew pieces of law. As the migration of legal models is so general, we cannot preclude the possibility of the Romans sharing this tradition too. Both archeological and written sources show not only Roman–Greek but Roman–Carthaginian connections as well. Besides the connection with Etrury, the Etruscan relations to Rome are a common fact today.

This newest opinion, which has surfaced in spite of opposing common consent, makes me wonder. Which part of the Roman legal rules belong to the common antique model? Which part of them is original and why? These are the questions I am trying to answer in a short and not too detailed way.

Many experts have given thorough analysis of the Greek influence on the XII Tables. This influence is reflected in two areas of legal regulation: the norms of neighbourhoods and the rules against luxurious funerals. Wieacker mentions even the structure of legal norms. Ferenczy[8] declares the Locri Code of Zeleucus as a model. Westbrook correctly mentions, that this theory "is based on the merest generalities". These generalities are: the popularity of this code all over Magna Graecia; its private and penal character, the role of procedural rules, the mentioning of "talio" and the prohibition of luxurious funerals.

There is no question that the Greek influence on the provisions of the XII Tables cannot be excluded, especially on the basis of textal coincidences. On the other hand, we can find an explanation of both of these coincidences. Rome was built among the far-*settled small Latin towns. Here, dispersed agricultural units were common, and rarely built around cultic centers.*[9] *Such groups of huts existed on the hills of Rome already by the 10th century B.C. but can hardly be called a colony.*[10] *Rome was founded, as tradition says, for purposes of defence, and many facts show the necessity of this.*[11] *The founders were outlaws in the middle of the 8th century B.C., who wanted to defend themselves.*[12] *In other words, there was a relatively great mass of people to be gathered at a defensible place in the colony. The first Romans could not bring normative examples of such a cohabitation from their places of birth and they got acquainted with Etruscan "polis"*-building only much later. Many experts declare this

7 SZ 105 (1988) pp. 74–121.

8 FERENCZY, E.: La legge delle XII Tavole e la codificazione greche, in: Studi Guarino IV. Napoli 1984. pp. 2001–2012.

9 To the settlements see DE FRANCISCI, Pietro: Primordia civitatis, Roma 1959. p. 133.

10 See MÜLLER–KARPE, H.: Vom Anfang Roms, Heidelberg 1979. p. 30.

11 MOMMSEN, T.: Römische Geschichte, Berlin 1941. p. 15.

12 Livy 1. 8. 4.; Dion. Ha. Ant. Rom. 2. 15.; Plut. Rom. 9.

Etruscan influence to be the "town-builder" during the process of the Stadtwerdung.[13] While making order in *Roma quadrata* crowded with little "herediums", one had to use a polis as model. The merchant colonies of Magna Graecia were such densely populated areas. The reception of the rules of Solon about neighbouring grounds originated here. The provisions of newer Roman law about boundaries, overfalling fruits, overbending trees, aquaeducts, and the real servitudes of passage and ladling water all have the same roots. In this connection we can suppose that Rome adopted some Greek "town-planning" rules and used them as a model.

A possible explanation of funeral prohibitions might be that after expelling the Etruscan kings, Rome tried to prevent the Etruscan luxurious way of life. In this case the rules are younger than the previous group of norms. They appeared only when the "grande Roma dei Tarquini"[14] already had international connections and they could consciously choose between Etruscan luxury and Greek modesty.

These changes can also be connected to religious influences. During the 5th century B.C. Rome, having its own Latin gods, and having already accepted the cult of Etruscan gods too, meets Greek cultic influences. At the beginning these Greek provisions might have been simple cultic norms without the domination of prohibitive characteristics. We also have a theory of this Greek cultic influence, and we cannot preclude the possibility mentioned. Nevertheless, it is questionable that in both cases there may be the use of rules as a model and the receipt of their content as well.[15] The other arguments mentioned by Ferenczy and Wieacker are too general to be a sound foundation for an influence theory.

And what about the issue raised again by Westbrook, that was first and, for a long time only, mentioned by Müller in 1903,[16] saying the law of the Middle East had influenced the XII Tables as a model?

First and foremost, Westbrook refuses the idea of developing the XII Tables on political grounds. The XII Tables, as they have come to us, do not contain the "liberties" of the plebs, he says.

Secondly, as increasing numbers of legal sources of the Middle East show, the Code of Hammurapi and the Old Testament are not unique in their own age. Originating between 2100 and 600 B.C., and thus earlier than the XII Tables, Westbrook can today enumerate nine original codices in the Middle East and Near East, whose interaction is

---

13 First of all GJERSTÄD, E.: Early Rome, 1966–73; The Origins of the Roman Republic, in: Entretiens (N. 5) pp. 1–44; Innenpolitische und militärische Organisation in frührömischer Zeit, in: ANRW I. 1. pp. 136–188.

14 PASQUALI, G.: La nuova antologia, 1936. p. 405; also MOMIGLIANO, A. JRS 1967. p. 212; against ALFÖLDI, A.: Das frühe Rom und die Latiner, 1977. p. 282.; Römische Frühgeschichte, Heidelberg 1976. p. 111.

15 In accordance with historiographical sources.

16 MÜLLER, D. H.: Die Gesetze Hammurabis, Wien 1903.

obvious and clearly show the circulation of a certain legal model.[17] So in antiquity we can talk about a common legal approach eastwards of the Mediterranean. This way of thinking, however, had an influence on the surrounding smaller forms of society through commerce, diplomacy, science, cultic connections and conquest.

The existence of trade in this area is accepted on the grounds of archeological findings.[18] It could have been realized through personal contacts and perhaps chain-trading. It postulates the settling of travellers, owing mostly to the season-dependency of travelling by sea. In support of this tradesmanship we can also detect diplomatic relations that partly contain cultic elements; it is enough just to mention the visiting of oracles. But, beyond others, during the first millenary B.C., different federalisms, agreements guaranteeing temporary peace, and wars alternated with each other. Great, all-against-all wars quite rare, although certain nations, especially the Phoenicians, encountered other populations through war–like ways as this. During their dispersion in the first centuries of the millenary, the ancient Greeks mixed with people of Asia Minor, Italy, Iberia, etc. and they kept their inner connections as well. Ulysses is not the only globe-trotter of this age.

By the assimilation of religious elements, Westbrook firstly means the appearance of the cult of Heracles that is known in Rome from the beginnings. This cult contains many Oriental elements, at the same time it differs from the ways of religious services as in the ancient Latin community, and later in the Etruscan State.

In Rome Heracles was adored as the god of private people; we may say that he was the god of enterprisers and not of heroes.

Among the types of Oriental influence we should note the Roman belief in its Troyan origin.[19] Poucet, the great sceptic of traditions, says that this is supported by the greatest number of facts.[20]

As for the conquests, it is a proven fact that in the 6th century B.C. Rome was ruled by Etruscans. One of the theories connected with the origin of this nation says they were Eastern sailors; this is just as possible as other explanations.[21] Nevertheless, it is proven that parts of Magna Graecia came under their rule and that they had connections, as well as confrontations, with the Puns. Archeological findings make it probable that they had commercial and other kinds of relationships with Crete, Mycenae and Asia Minor. They could have even transferred these models to Rome which, in a cultural

---

17 These are: Codex Ur-Nammu (c.2100 B.C.), Codex Lipit-Ishtar (c.1930 B.C.), Codex Eshnunna (c.1720 B.C.), Codex Hammurapi (c.1680 B.C.), Assyrian Laws (end of 12th century B.C.), Hittite Laws (13th century B.C.), Neo-Babylonian Laws (6th century B.C.), Covenant Code of the Bible (beginning of the first millenium B.C.), Deuteronomic Code (7th century B.C.).

18 MEYER, J. C.: Pre-republican Rome, Odense 1983. p. 160.

19 LATTE, K.: Römische Religionsgeschichte, München 1960. p. 213.

20 POUCET, J.: Les origines de Rome, Bruxelles 1985. p. 187.

21 HEURGON, J.: Rome et la Mediterranée occidentale jusqu'aux guerres puniques, Nouvelle Clio 7, Paris 1980.

sense, became a real town under their rule.[22] All the more, because the Etruscan government in Rome ordered great building operations and communal works which probably meant a considerable wave of immigration as well. In my opinion this was the time when the masses of the later plebs settled down in Rome; they were enterpreneurs and engineers, well-to-do, who were neither peasants nor warriors, but simple workers.[23] These people brought their own beliefs and cultic habits. After the expulsion of the kings and the Etruscans, the plebs remained and became an integral part of the Roman society, however they were foreigners in ancient rural Rome. This adaptation to the constitutional world of Quirites was the first great testing of the young republic.[24] According to Roman tradition, the enactment of the XII Tables was part of this progression.

Of course this adaptation could not happen without recognizing the traditions of the *plebs;* It is proven by having their own priests, sanctuaries and magistrates. In this part we can even corroborate the possible existence of mediators in Westbrook's theory. The only problem is that he does not take the Etruscans into consideration at all and emphasizes the significance of the Punic connection. In my opinion this connection could exist only through Etruscan mediation in that age, though we cannot preclude the idea of forming a league with the anti-Etruscan Puns while expelling the Etruscans.[25] As we can see, there was a way for Oriental ideas to reach Italy, the only question is if the models themselves can be found in the Roman Code.

Westbrook talks about the characteristics of the model and the copy and he supports his opinion by the following arguments. The "codices" contain casuistic rules solving everyday problems and not having sacral features. The typical casuistic form says "If a man does X, the punishment shall be Y." We cannot find the method of abstraction and there are not definitions at all. Eastern "codices" are much more collections of decisions than codices, according to what we mean by "codex" today. In the connection of deciding, in these legal pieces, there is an adaptational method that appears in one instance after another and solves the same case in different ways by changing certain factors, so CH 229-231.[26] Such gradual adaptation can be found on nearly every page of all the Eastern codes but we can see the same in the cultic texts as well. According to Westbrook, it belongs to the methods used by Babylonian science. He says it is impossible that Mesopotamian science had an influence on the form of the XII Tables without also influencing its content as well. On the other hand, the homology of content,

---

22 See GJERSTAD op. cit. N. 13.

23 ZLINSZKY, J.: Arbeit im archaischen Rom, SIHDA 1988, in: RIDA 1989. p. 421-446.

24 MOMMSEN, T. op. cit. p. 37; Das Volkstribunat und die Dezemvirn; BINDER, J.: Die Plebs, Leipzig 1909. p. 375; FERENCZY, E.: From the Patrician State to the Patricioplebeian State, Budapest 1976.

25 See ANRW. I. 1. FERRON, J.: Un traité d'alliance entre Caere et Carthage contemporain des derniers temps de la royauté étrusque à Rome où l'évenement commémoré par la quasi-bilingue de Pyrgi, pp. 189-216; PETZOLD, K.-E.: Die beiden ersten römisch-karthagischen Verträge und das Foedus Cassianum, pp. 364-411.

26 CH = Codex Hammurabi, also §§ 209-211.

together with formal similarities, is a strong argument in support of the adaptation of the whole model. Westbrook seeks to defeat two coincidences. One is the list of injury types: fracturing members, breaking bones, hurting in other ways, cutting out trees. According to Pólay this list could be continued.[27] Wieacker says other provisions would fit the list as well.[28] This is an example of the element-changing, horizontal and practical "judge-made" law in Westbrook. The other point of coincidence is in the regulation of theft; there is the night thief, the thief defending himself with a weapon, the thief caught in the act, the receiver of stolen goods, the thief who sells the stolen goods. Westbrook emphasizes that we can make similar distinctions in many Mesopotamian codes.

It is very interesting that both Wieacker and Westbrook declare that technically the XII Tables are remarkably developed for their own era in which we must place them, according to the prevailing opinion of today. Wieacker uses exactly this technique as an argument in proving the presence of common Greek influences.[29] Many experts have already had the idea that this technique of legislation can be traced to patterns of sacral texts.[30] However, these sacral texts and their owners, the sacerdotal groups were practically the only ones which could have been in connection with one another in that time. As we have mentioned, the presence of sacral interrelations is obvious in Rome too.

It is my opinion that the Roman development of the economy and society and the scientific—literal traditions do not give exact ground for either making or inheriting such legal works. The XII Tables seem premature in the primitive society of poor peasants. The rough, disintegrated rules reflect this society quite well; it is just their own appearance that seems too early. In social units on a level like this, such a literary product is quite unusual. We have to find secondary reasons beyond the level of society and economy.[31]

We might easily select the provisions brought by the culturally much more developed Etruscan aristocracy, especially in that we know nearly nothing about Etruscan law, and in making theories our fantasy can be quite free. But, as tradition says, parts of the Tables are even earlier that the Etruscan government, other parts were codificated only after the expulsion of the Etruscan kings. Certain provisions of the XII Tables intend to repress exactly the Etruscan habits.

At the same time, it is necessary to notice the absolutely unique trial procedure. One may find parallels to the ideas of *ius*, *mos* and *lex*. But the ways of jurisdiction and legislation and the separated judication on the one hand, cognition on the other hand,

---

27 PÓLAY, E.: Iniuria Types in Roman Law, Budapest 1986.

28 WIEACKER, F.: Zwölftafelprobleme, see N. 5.

29 WIEACKER, F. op. cit. N. 5.

30 WIEACKER, F.: Altrömische Priesterjurisprudenz, in: Iuris professio, Festgabe für Max Kaser 80, Wien 1986; NOAILLES, P.: Du droit sacré au droit civil, Paris 1949.

31 See ZLINSZKY, J.: Staat und Recht im archaischen Rom, Helicon-XXVIII (1988) pp. 169–182.

shows a very special ambiguity. They represent the fact that in ancient and primitive Rome the conflicts were arranged in double ways. Of the "twin procedures" only one is similar to the Mesopotamian model, the domination of the legislator. The other directly comes from the world of tribes and clans where chieftains were arbitrators as well, where the enforcing of rights was spontaneous and peace was sought among kinsmen.[32]

The Mesopotamian codes are far back from this legislatory position. Only the Jews of the Old Testament saved it for themselves; a nation that put down its own law of declared divine origin in foreign surroundings, at a noticeably lower level of economical development. This was the moving spirit of legislation by the Jews. But what was that of the Romans?

We divide this problem into two. The first question is: what was the reason of the ambiguity of archaic Roman law, the introduction of both *legislatio* and *jurisdictio*? The second question is: what was the reason for codificating the rules of the XII Tables? Though it is generally accepted that, in spite of new motives, the XII Tables did not mean new legal rules. The comparison of these two questions is very rare.

I. In my opinion this approach carries important possibilities. We may believe in either way of Rome's origin, either the theory of "Stadtwerdung" or "Stadtgründung", but there are 3–5 centuries between the first pioneers of *Roma quadrata* and the creators of the XII Tables. And, if we accept that the economic surroundings of the XII Tables were much more primitive than other communities creating similar books of law, we must also accept it in connection with the previous, pre-Etruscan, times. It is true that we hardly know any specific historical facts about this era,[33] but recent archeological surveys draw a detailed picture about economic and social life.[34] Pasturing and primitive agricultural colonies of small huts and social equality are the characteristics of the era. But why isn't the habits of clans enough, what requires military power, legislation and jurisdiction in this early state? Why does this primitive society have to use sacral norms in its everyday life?

There must be some special deficiency or contradiction in the norms of ancient Roman society that requires such solutions. This deficiency is explained by the historical tradition that Rome was founded by outlaws of different nations and became bearer of different customs as well. The habits of various populations, and the customs of clans were not sufficient any more as there weren't original tribes and clans.[35] New rules had to be created and the valid ones had to be chosen from the existing multiplicity of

32 WESEL, U.: Frühformen des Rechts in vorstaatlichen Gesellschaften, Frankfurt 1985.

33 See POUCET, op. cit. N. 20.

34 DE MARTINO, F.: Clienti e condizioni materiali in Roma antica, in: Misc. di Studi Classici in on. di E. Manni, II. p. 691: "mostrarci una società agricolo–pastorale in fase di gran arretrezza".

35 ZLINSZKY, J.: Staat und Recht, N. 31.

norms. This is the significance of *jurisdictio*.[36] At the same time the newly gathered and unusual community produced new situations that required new rules. These rules had to be found, chosen and declared. This is the supposed way of legislation. Parallel to that, the rules of *ius* and *mos* that are part of the common spirit of relative nations continue to have their own spontaneous effects. One only has to establish the missing dignity of the chieftain, and the missing council of the heads of clans and the elders when it is necessary to make decisions in realizing the new rules. Spontaneous realization does not need such an institution at all.

Did models of other cultures have a role in searching for solutions to problems given by the new situation? Possibly they had. It is not a mere coincidence that the priestal bodies are the guards, inspirers and representatives of these solutions. The necessity of solving the new problems is given by the unique genesis of Rome (unique in success of surviving, not in the experience[37]). And, as this society met the legislation in a very early phase, when ethnically it was heterogeneous, the "ius" became common property, part of the identity of the "civis Romanus". The vision of "supplex turba timebat iudicis ora sui"[38] is a flashback to views of a posterior society. This era wasn't a kind of "golden age" at all. It was a "struggle for life" in the best form and it meant external wars. Infighting most likely arose from the wildness, roughness and rootlessness of the massed-up crowd. Roots had to be created by legal instruments and internal contradictions had to be controlled by divine decisions.

That is the way in which the free selection of judges, the jurisdiction of magistrates, the spontaneous enforcing of law "inter Quirites", and the legislation meet in the norms of Roman society. The power, created by the society for selfdefencing purposes, was used for plundering expeditions as they happened in the wild neighbourhoods,[39] introduced jurisdiction, or, better to say, declaring of legal rules just to make an end of internal tension. This power was new in this environment and it was used under pressure and not voluntarily. The position of a Roman rex was absolutely different from the dignity of a Mesopotamian despot.[40] He served as a substitute for a simple chieftain by right of sacral elections. He was not an omnipotent lord but only the head of armed bandits. Following the example of other nations, he tried to make peace because peace was needed. The rules about murder seem to be a good example of this point of view. "There were not special norms about murdering a blood relative, but, in a special way,

---

36 ZLINSZKY, J.: Gedanken zum "legis actio sacramento in rem", in: SZ 106 (1988) pp. 106–151, esp. p. 139.

37 ZLINSZKY, J.: Staat und Recht, N. 31.

38 Ovidius, Metamorph. De quattuor aetatibus.

39 See ALFÖLDI, A.: Die Struktur des Römerstaates im 5. Jh. vor Christ, in: Entretiens sur l'Antiquité classique XIII; Les origines de la République Romaine, 1867. pp. 225–290, esp. p. 238. "Der Krieg, der Normalzustand in Latium".

40 COLI, U.: Regnum, in: Studia et Documenta Historiae et Iuris XVII (1957).

all murders were declared a killing of a blood relative."[41] It shows that in the surrounding communities the prohibition against murdering relatives was a well-known fact. Killing a foreigner leads to a blood feud but it doesn't affect the society. But what happened if the population of a town consisted of outlaws coming from different tribes? Was it possible to let murders be avenged only by a blood feud? It would be a danger of the new community to destroy itself. In such a situation there was a possible alternative to let everybody be a relative in the eyes of the law and let every murder in Rome be "paricidas" (killing of a blood relative) subject to public retaliation, as without this the community itself would be indifferent to the acts endangering its own existence.[42] So, after the "Staatsgründung" (not even "Stadtgründung") possibly happening in the 8th century B.C., the legal rules of Rome were created by necessity. It is real "case law" like Mesopotamian dispositions, giving answers to questions raised by everyday practice. In this respect those certain faraway rules may even serve as a model for them. A necessity for this supposition to explain the legislation of Rome does not exist.

In my opinion, in this era it was not the Eastern law that had certain effects on archaic Rome, but that necessity forced the community to select its own rules that were valid among more primitive circumstances. May be sacral sciences and traditions had their own role in creating and preserving these norms. In this sense the sacral "common property" of the Mediterranean had an influence on the inner forming of Roman law. But, the subject of these legal rules was determined by problems and decisions arising from a special historic period.

The Etruscan kings and their much more developed order burst into this world of special norms. They reshaped it both economically and socially; they built a new town, they created traffic and transport. Social differences were born together with these changes too. "Aristocracy" appeared in the old, homogeneous world of peasants,[43] new trades and needs appeared in the homogeneous process of production, but, most of all, a new town grew out from the earth. The "Stadtwerdung" took place at that time, during the 6th century B.C.[44]

The new professions, new activities, and especially the new building operations attracted not only masses of workers but masses of educated and rich people as well. They settled down besides the "Quirites", "supra infraque Romam".[45] At the beginning

---

41 Plut. Rom. 22. L. R. 1. 10., Festus P. 221. L. R. 2. 16.

42 MEYLAN, Ph.: L'étimologie du mot "parricide" à travers la formule "paricidas esto" de la loi romaine, Lausanne 1928; COLI, U.: Paricidas esto, in: St. Paoli, Firenze 1956. pp. 171-194; CLOUD, J. D.: Parricidium from the Lex Numae to the Lex Pompeia de parricidiis, ZSS 88 (1971) pp. 1-66; MAGDELAIN, A.: Paricidas, in: Du châtiment dans la cité, Rome 1984. pp. 549-571.

43 ALFÖLDI, A.: Der frührömische Reiteradel und seine Ehrenabzeichen, Baden-Baden 1952.

44 See N. 13. AMPOLO, C.: Die endgültige Stadtwerdung Roms im 7. und 6. Jh. vor Chr.; Wann entstand die Civitas? in: Palast und Hütte, 1979.

45 Festus: "Dicti sunt, qui supra infraque Romam habitaverunt."

the society could not offer a position for them, so they became the familiars, clients, or guards of the kings.[46] This was the only way for the "Reiteradel" as well as the rich newcomers, the "assidui",[47] and the workers, the "proletarii",[48] to gain a position outside the rows of the Quirites, but inside of the walls of the newly built Rome. After settling they remained where they were and had their own share of military obligations too; "centuriae" took place of the former "curiae", and we meet a few companies of the "celeri", "opifices" and "proletarii". It meant a new step towards new political rights; they gained the position of the "filii familias" or "clientes", but they did not become Quirites with full rights. They did not have a "gens".[49]

The Etruscan rule was an aggressive one which was hardly tolerated by the militarian Rome at all, and they broke from its bonds as soon as the circumstances of foreign affairs made it possible. While fighting against foreign powers, they had to separate it from its native backing. András Alföldi revealed this fact in connection with the royal horse guard during the early Republic;[50] the economic part of the Quirital rights, the commercium was offered to the other two groups of royal clients, too. Probably at the same time the "clientes gentiles" were given the same right as well. In this way the opposers of the Etruscan rule managed to make the newcomers interested in the revolution.[51] But, after establishing the new order, it became obvious that the bait was not as fat and as sweet as it had seemed previously. "Commercium" was a useless right without "heredium", without land. At the same time the great enterprises and great building operations came to an end and trade stagnated. The world "trans Tiberim" became hostile.[52]

Historiographers truly described the nostalgia of the plebs of the Tarquinian world and their riot not long after the expulsion of the Etruscan kings.[53] It could not have happened in another way. The appearance of new solutions support this theory; instead the *patronus* plebeians received a new magistrate, the *tribunus plebis;* the *plebs* were given sacral protection and cultic unity, at the same time the government guaranteed work and corn supply. These measures did not change the main character of the position of the *plebs*. The *plebes* could not enter the world of the ancient Quirites, they could not take part in the interpretation of legal rules, or become knowledgeable about them. They were not allowed to be members of the priestal bodies. Obviously, it resulted in uncertainty. Law can be manipulated and it was manipulated in ancient times as well. Unwritten law has this characteristic too, especially in a world where it was not naturally

46 ZLINSZKY, J.: Arbeit im archaischen Rom, see N. 23; BINDER, Julius: Die plebs, N. 24.

47 XII 1. 4.: "Assiduo vindex assiduus esto..."

48 XII 1. 4.: "Proletario iam civi qui volet rindex esto."

49 "Quad gentem non habent", see GUARINO, A.: La rivoluzione della plebe, Napoli 1975. p. 159.

50 ALFÖLDI, A. op. cit. N. 43.

51 ZLINSZKY, J.: Arbeit im archaischen Rom, see N. 23.

52 XII 3. 5. "Trans Tiberim peregre venum ibant."

53 Livy 2. 24.

born but was an artificially established phenomenon. History has knowledge of another riot. The *tribuni* prevented recruiting and with it they attacked the base of Roman order, the *res publica Romana.* That was *perduellio* in its classical form, riot and collaborating with the enemy,[54] but the participating crowd was so great that the government could not allow the luxury of settling a deterring example. The new compromise offered putting the legal rules into writing which meant the dawn of a monopolistic situation as well. Westbrook says if historiographers did not mention the enforcement of codificating the XII Tables we would not be able to realize it by its contents. This is true. Only security was created for the plebs and not new legal rules improving the situation of the poor. However, there are parts of the XII Tables which support the tradition. First of all amnesty was declared to everybody who took part in the riot; at least we can interprete "Forcti sanatique idem ius esto" this way.[55] Some kind of Latin confederates[56] were not supposed to exist at the time and historians do not mention them at all. At the same time, in respect of the borders of "Roma quadrata", the plebeians were settled down "infra supraque Romam"; the Aventinus, with the sanctuary of the plebs was declared extra-mural for a very long time.[57] This is *idem ius* what otherwise traitors, "perduellis", lost; it concerns commercium, *nexi mancipique ius.* On the contrary, it does not concern *connubium,* as the Tables lay it down separately.[58] Like the system of "centuriae", the law makes a distinction between rich and poor plebeians: "Assiduo vindex assiduus esto, proletario iam civi quis volet vindex esto".[59] The rules concerning debtors seem to be anti-plebeian, too, but we should not forget that in this time "financiers" were mostly plebeian newcomers and not members of the old Quiritarian group. The fact that the XII Tables are not debtor-centric can be explained by the fractions in which the plebs were divided; it was the group of rich plebeians who had a certain influence on legislation and they used the poorer plebeians for political pressure. The rules concentrate much more on creditors, though we must take into consideration that the XII Tables contain some advantages for the debtors[60] as well, and the only sale possibility of personal retaliation—selling and killing the debtor—forces both the creditor and debtor to *pacisci.*

If we accept the explanation given by historic tradition, we have enough reasons for the genesis of the XII Tables. In its drafting, not social and economical, but political requirements had the main roles. Regarding its content, both neighbouring Latin tribes,

---

54 Perduellio: "Qui hostem concitaverit" XII 9. 5.

55 XII 1. 5.: "NEXI mancipique FORCTI SANATIsque idem ius esto"; see HOFFMANN, E.: Das Gesetz der XII Tafeln von den Forcten und Sanaten, Wien 1966; ZLINSZKY, J.: Arbeit im archaischen Rom N. 23.

56 Festus; ALFÖLDI op. cit. N. 14.

57 Plebeians on the Aventine; NIPPEL, H.: Aufruhr und Polizei in der römischen Republik, Stuttgart 1988. p. 27; LATTE, op. cit. N. 19; GUARINO, op. cit. pp. 75. ss.

58 XII 1. 4.; see GUARINO, A.: Le origini Quiritarii, Napoli 1973. p. 217.

59 XII 1. 4.

60 "Dies iusti sunto, quis eo vindex esto, tertiis nundinis, libras farris endo dies dato", XII 3. 1., 3., 4., 5.

Etruscans and Greeks, or what is more impossible, in my opinion, even the Phoenician model could have had an influence on the rules. In this meaning both Wieacker and Westbrook may be right. But the situation that made the legislation necessary is a unique moment in history. It is consistent with the period in which, according to traditions, it was created; it is consistent with the economic surroundings of that age and place. It is not scholastics at all, but politically required registration of the results of jurisdiction born case by case. In this respect it is a typical but unique Roman production.[61]

II. It was the emperor Justinian who laid down Roman law in the way we know it today.[62] Most of these legal rules had been out of use instantly after his era; only fragments were used in practice. All his code was not used even in Byzantium; it existed only in the shape of translations and extracts. At the same time, the part accepted by everyday practice meant progression for the new states of Europe; it was switchover from barbaric customs to civilisation. The Church accepted it—"vivit lege Romana"[63]—and it became master of the new European nations. By authority, the Roman law became the model of the social norms of the new German kingdoms in Europe. The christianization of Hungary was the result of a political decision. Our first king undoubtedly supported Christianism wholeheartedly, but the basis of his mission was power and not evangelization.

He accepted and secured the Christian legality, too, and he appreciated the legal customs and traditions brought by the newcomers: "Sicut enim ex diversis partibus veniunt hospites, ita diversas linguas et consuetudines diversaque documenta secum ducunt, quae omnia Regnum ornant et magnificant aulam, et perterritant exterorum arrogantiam."[64] Nevertheless, even in Hungary, national custom grew pretty soon from the accepted norms;[65] it means the parts that were accepted and used by the home judicial practice. "Sciendum quod quamquam omnia fere iura Regni huius originaliter ex Pontificii Caesarique iuris fontibus progressum habeant, municipalis tamen haec nostra consuetudo, qua in iudiciis modo generaliter utimus, ex tribus fundamnetis constat. Primo ex constitutionibus ... secundo ex privilegiis Principum, tertio vero ex Judicum Ordinariorum Regni sententiis."[66]

---

61 As common sense it means, e. g., WIEACKER, BONFANTE, KASER.

62 Corpus Iuris Civilis, ed. MOMMSEN–KRÜGER I–III. Berlin 1905.

63 FÜRST, C. G.: Ecclesia vivit lege Romana? ZSS Kan. XCII (1975).

64 St. Stephen I. Decr. §. 6. 2.

65 BONIS, Gy.: Einflüsse des römischen Rechts in Ungarn, in: IRMAE 1964. V. 10; about consuetudo see ZLINSZKY, J.: Die Rolle der Gerichtsbarkeit in der Gestaltung des ungarischen Privatrechts vom 16. zum 20. Jh., in: Ius Commune X (1983).

66 Trip. II. 6., similarly: "In regno Hungaria non secundum iure civili aut canonico in causis procedatur, sed secundum consuetudines regni et statuta." Mon. Vat. L. 2. 213. falloring BONIS, Gy.: Középkori jogunk elemei, Budapest 1972. p. 113. N. 21.

During the 15th century this previous practice watched suspiciously the possible reforms. It is the same era when the Roman law, in the shape of "ius commune", gained new and theoretically based validity in Europe.

This process in the 16th century was partly influenced by he mistrusting imperial legislation. The more the remaining parts of Hungary became necessarily dependent on the empire, trying to avoid Turkish conquest,[67] the more it guarded jealously the remnants of its legal independence. We can find many signs of this in the legislation of the 16th century. For a long time history of law declared that this effort to gain independence prevented the reception of Roman law as well as the fact that Hungarian legal experts were not willing to accept it.[68]

The keystone of Hungarian legal development in the Middle Ages is the work of István Werbőczy's "Opus Tripartitum", published in 1517.[69] It contains Hungarian customary law as it was mentioned before. Its parallel is Henry Bracton's "De legibus et consuetudinibus Angliae".

The fate of these two is nearly the same. Both are summaries of feudal "consuetudo" in the sense mentioned before. Both became a symbol of the *rex* being *imperator* in his *regnum*, and it means that the king has legislational *potestatis plenitudo* and within the borders of his *regnum* the *ius imperiale*, the imperial law is not valid any more; at the same time, it has some legal effects if *iure rationis* it was accepted by the courts.[70] The declaration of "Nolumus leges Angliae mutare" is reflected by the declarations of the feudal "dietae" of Hungary, 150 years later.[71]

It is possible that, contemporaneously with the imperial reception, the Roman law was not the model for the Hungarian legislation any more? Is it true what our historians critically say, that in Hungary there was not any suitable base for intellectuals, to accept the new trend? Undoubtedly it was "Gelehrtenrecht" and it required "Juristenstand" to be accepted. Was it legal science that was opposed by the low-educated Hungarian lawyers?

One reason for the English and Hungarian isolation (and we may add France and the Scandinavian countries as well) unquestionably was a suprematic one. Neither of the countries in question wanted to appear as if it were under the legal supremacy of either the emperor or the Papal State. Beyond this, the other reasons are quite different. There is no doubt that during the 16th century Roman law was accepted as the model of early capitalist legal development, either scientifically, or in the shape of legal provisions. It was not needed at all in the areas which already had their own "Code of Commerce". No wonder that the Hansa towns were less willing to take part in the reception of Roman

---

67 SHAW, S.: History of the Ottoman Empire and Modern Turkey I–II. Cambridge 1976–77.

68 ZLINSZKY, J.: Ein Versuch zur Rezeption des römischen Rechts in Ungarn, in: Festschrift Herdlitzka, München 1972. p. 315.

69 Mittelalterliche Gesetzbücher Bd. II. Tripartitum, op. red. A. WOLF.

70 Trip. II. 6. 3. COING, H.: Ius Commune I. München 1985.

71 Op. Quadr. Praef., Decr. 1563:49; 1567:27; 1569:41.

law.[72] England and the Netherlands were ahead of their time;[73] through their case law most of the legal principles of the Roman law of obligations were "domesticated" by the time of their scientific or central introduction. In the areas of French and Spanish "droit écrite" the base of Roman law was never missing, though it existed in a very vulgarized form. So in these areas the "mos Gallicus" does not take the Glossa and the Commentaries as an example; instead they tried to improve their own Romanistic traditions from a clear humanistic point of view.[74]

The Hungarian situation of the 16th *century* is absolutely different. Our country reached the level of European culture exactly by the *15th century*. Hungarian Renaissance precedes that of Germany, England and France and derives directly from the Italian Renaissance.[75] In the end of the *15th century* the Decretum Maius of our king Matthias expressly declared a programme that legislational unity should be required on Roman grounds.[76] The Italian echo of his efforts was to show that our great ruler planned the whole reception of the Justinianean law,[77] but the reform came to a stop at the first step; after the early death of the king it did not get beyond the reforming of procedural law.[78] Under the rule of his successor, who was educated in the Renaissance spirit, the selfish opposition of magnates prevented the creation of legal frameworks for the just beginning achievements of the Hungarian "bourgeois". They only allowed the declaration of the rights of the gentry;[79] the efforts of the upper classes were destroyed in a sanguinary peasant insurrection, as it happened similarly in Germany. The economic development, possibly demanding a new legal framework, was prevented by perpetual war that, after stagnation, resulted in regression.

In Transylvania, where this stagnation and regression emerged much later, the rate of progress brought the only example of Hungarian reception appearing in the statutes of the Transylvanian Saxons.[80] The leading Saxon intellectuals were systematically, and in great numbers, educated in German universities of Protestant spirit, and for them the first printed base of Justinianean law was the book of Honterus.[81] First it was used by

---

72 On reception in the Hansa towns see WIEACKER, F.: Privatrechtsgeschichte der Neuzeit, p. 227.

73 On reception in Great Britain and in the Netherlands, see WIEACKER op. cit. N. 72.

74 On "mos Gallicus" and humanistic science see COING, H.: Ius Commune I. N. 70. pp. 25-67.

75 On Hungarian renaissance see: Mathias Corvinus und die Renaissance in Ungarn, Schallaburg 1982. Wien 1982. Textteil.

76 Decr. Maius Prol. 1-6.; BONIS, Gy.: King Matthias the Legislator, in: Hungarian Quarterly 6 (1940).

77 Justinianean law in Hungary, see: BONIS, Gy. op. cit. N. 65.

78 Decr, 1492 of Wladislav II.

79 Trip. I. 9.

80 SZABÓ, B.: Az erdélyi szászok "római" joga, Miskolc 1985. Diss. (Römisches Recht der Siebenbürger Saxen, in ZSS under publishing).

81 HONTERUS, J.: Compendium iuris civilis in usum civitate ac sedium Saxonicarum in Transilvania collectum, Brassoviae 1544; Sententiae ex pandectis Iustiniani decerptis, Brassoviae 1539.

Bommel,[82] later by Fronius[83] while preparing their own drafts. These drafts became the source of the Roman law for the Transylvanian Saxons as well. Transylvania was not the only spot of receptional success of German-speaking people. It is the land where the first complete Hungarian-Roman "Institutio", the "Syntagma iuris Institutionum imperialis ac Tripartiti" of János Baranyai Decsi was born.[84] As this book explicitly wanted to continue the development of the Hungarian law book "ut illius naevos huius aequitate temperarem, defectus ubertate supplerem, confusionem methodo corrigerem, squallorem et barbariam elegantia mitigarem et expolirem", it is important from our point of view. The work of Decius was not the first literal experience of this kind at all. Much earlier it was the Canon Pápóczy of Pozsony who tried to partially introduce Roman law in Hungary.[85] Decius is the author of the first comprehensive system in which one tried to reshape the Hungarian legal traditions, the "Tripartitum" and "Quadripartitum", using the Roman system of Institutions as an example. Where he found legal gaps, he tried to fill them with Roman legal rules. In the end the result was that his book contained mostly Roman law and only a minor part was about Hungarian legal customs.

Johannes Czimor was born in the little village of Decs near the Danube which was situated in the Upper-Baronian Superintendancy. That is why he called himself Johannes Decius (Czimor) Barovius or Baronius. After attending the protestant colleges of Tolna, Debrecen and Kolozsvár, he was sent to the universities of Strasbourg and Wittemberg by Transylvanian magnates, giving company to their sons on their "Kavalierstour". Between 1587 and 1590 he was in Wittemberg, between 1590 and 1592 he spent two years in Strasbourg. In Strasbourg he presented his paper for philosophical doctorship, titled "Synopsis Philosophiae" in 1591 (second edition 1592). As he says, because he was beside the young magnates, he had to study political, historical and legal sciences as well, both in the universities of Wittemberg and Strasbourg. During these years he realized that "...leges nostras non solum ordine confuso collectas ac stylo squallido conscriptas esse, sed etiam plurimis naevis atque defectibus scatere." According to Decius, "quidquid bonarum rectarum salutariumque legum decreta Hungarica habeant, id omne ex iure Romano transsumptum sit. Immo quidquid naevorum ac defectuum leges nostrae continent, quibus iusto plus abundant, id certe nonnisi ex his ipsis Romani iuris fontibus corrigi supplerique potest." As soon as the young humanist became aware of this, he tried to win his teachers over to the cause: "Coepi quosdam excellentes Germaniae et Galliae iureconsultos obnoxius obrogare, ut non gravarentur ius nostrum Hungaricum institutis Imperialibus coniungere." His efforts were unsuccessful, as "...hoc

82 BOMMEL, Th.: Statuta iurium municipalium civitatis Cibiniensium reliquarum civitatum et universorum Saxonum in Transylvania 1560.

83 FRONIUS, M.: Statuta iurium municipalium civitatis Cibiniensium reliquarum civitatum et universorum Saxonum in Transylvania 1583.

84 ZLINSZKY, J.: Ein Versuch, p. 319. N. 68.

85 BONIS, Gy.: Középkori jogunk elemei, IRMAE N. 65-66.

ego ab iis impetrare non potui, vel quod vernacula quadam characteris obscuritate ad hoc instituto deterrerentur, vel quod maioribus occupati studiis nollent minoribus iisque alienis sine maxima mercede operam suam navare." In the end the young man decided to begin his work alone, and—trying to compile the two kinds of law—taking the system of Roman law as an example, in four books, under the titles of "Persons", "Property", "Obligations" and "Claims", in the form of questions and answers "...genera revocavi, generibus species subieci, easque cum definitionibus expressi, tum exemplis illustravi." The base of his work was Hungarian law, but he filled its gaps with Roman legal principles and rules. This is the confession of the author about his work. It appeared in an unfortunate moment in history, just before the 15-year war. The prince did not take notice of it[86] but his contemporaries did—in a negative way. Kitonich, the codificator of Hungarian procedural law,[87] mentions Decius in his books published two decades after him, but he is doubtful about its practical usefulness as Kitonich was a man of theory and not of practice.[88] The fact that Decius knew it all, confessed it, and foretold it, did not make his critics' hearts softer. The "Bibliotheca Hungarica" of Schmeizel directly talks about the work of Decius as "ad praxim vero et usum forensem valituras ut magnum nihil."[89] They were wrong. Decius is not unique, as early researchers or, better said, their purposeful silence on the subject tried to suggest. He was one of those high-educated humanists who attended foreign universities during the 16th and 17th centuries and returned home to make their knowledge useful in Hungary, under poor and difficult circumstances. Humanist sciences, and jurisprudence as well, were an example for them while trying to develop Hungarian sciences up to their level. These efforts were succesful in the fields of exact sciences, philosophy or theology; even the poorer colleges of Debrecen, Enyed, Sárospatak or Marosvásárhely had experts of European fame and educational level on their staffs.[90] But law is not an abstract kind of science. First and foremost it is not a logical system but a political expression of economic facts. If there is no economic base, no social demand behind it, if the legal cases are missing, even the greatest sciencificity, the strongest power is unable to substitute them.

Decius was not a great lawyer at all; such kind can be brought up by practice only. The contemporary power of the state did not support him. The politicians educated in a humanist spirit like himself were interested in his activity but the Prince of Transylvania was not. So this experience, which was begun by the initiation, or at least support, of upper circles,[91] remained singular in this extent. On the contrary, during the

---

86 ZLINSZKY, J.: Ein Versuch, p. 321. N. 68.

87 ZLINSZKY, J.: Ungarn-Zivilprozessrecht, in: COING: Handbuch 3/2. 11. 1. p. 2819.

88 See ZLINSZKY, J.: Die Rolle der Gerichtsbarkeit... p. 56. N. 65.

89 SCWEIZEL, M.: Bibliotheca Hungarica 24.

90 Science, see e.g. BARTONIEK, E.: Fejezetek a XVI-XVII. századi magyar történetírás történetéből [Chapters from the History of Hungarian Historiography in the XVIth-XVIIth Century], Budapest 1975; Magyarország története III/2 [History of Hungary] 1526-1686. Budapest 1985. pp. 1781 skk, 1861. skk.

91 Proven by ZLINSZKY, J.: Ein Versuch... p. 322.

following century, many books were written by peregrinating lawyers, either on purpose of making the *ius commune* known and systematized, or detecting its connections with Hungarian law and making it known abroad. Some of these legal works became popular only in Hungary, others were published many times abroad.[92]

At the end of the 17th century the royal Hungary tried to modernizate the law of the country; what is more, the initiator was the central government. Every "Einrichtungswerk" contained the necessity of reforming our judicial system and modernizing our law. There were efforts in it. One of the duties of the newly founded Nagyszombat faculty of law was: "Professores iuristae id maxime incumbent, ut iura municipalia combinent cum Caesareo et Canonico, in quantum fieri poterit. Et quae in nostris desunt, ex iis supplere studeant."[93] The manuals of Hungarian law in the next century show some willingness to do it.[94] But it remained an obstacle for a very long time that the Hungarian magnates did not wish to change their "home liberties" to the order of the Empire. As the economic circumstances did not urge a change up to the first third of the 18th century, all the efforts were prevented.

The first official attempt to incorporate new legal models was the Decree No. 117. of 1723: "Consilium Locumtenentiale specifica instituendorum commerciorum elaborabit et suae Maiestati sacratissimae submittet: ut eadem, vicinis etiam provinciis et regnis communicari, et cum eodem concursu commercia ipsa meliori successu institui et continuari valeant."[95]

It is obvious that as soon as everyday society required new rules, legislation required it as well, though it is true that the reforming of the legal order was stopped quite often by the differences in ideas about constitutional power. So the new legal rules were present in education and it was introduced to the practice by decrees and other provisions, where it was necessary;[96] the other way of reception remained the old one, as court practice accepted new rules as *naturalis ratio* from the *ius commune* if it was necessary to solve practical problems. In this connection Roman law served as an example of the development of the Hungarian legal system, as it happened in most of the European countries, directly or indirectly, but it had an influence on the reception of modern forms of civil, commercial and procedural law as well.[97]

---

92 HÓMAN, B.–SZEKFŰ, Gy.: Magyar történet [History of Hungary] VI. pp. 14 ff.

93 Diplom of the Faculty of Law, see ZLINSZKY, J.: Die Rolle der Gerichtsbarkeit... p. 59. N. 65.

94 ZLINSZKY, J.: Die Rolle der Gerichtsbarkeit... p. 61. N. 65.

95 See ZLINSZKY, J.: A nemzetközi magánjog kezdetei Magyarországon [The Formation of Private International Law in Hungary], in: Jogtudományi Közlöny XXXVI/11. (1981) pp. 941–949, esp. p. 945.

96 See ZLINSZKY, J.: A nemzetközi magánjog kezdetei, p. 946.

97 See ZLINSZKY, J. in: Coings Handbuch der Quellen und Literatur der europäischen Privatrechtsgeschichte III. 2. 14. Ungarn.

Acta Juridica Hungarica
1991 33 N° 1–2, pp. 57–73

Akadémiai Kiadó,
Budapest

Zoltán PÉTERI

The Declaration of the Rights of Man and Citizen and the Hungarian Constitution

Revised version of the Report submitted to the
XIIIth International Congress of Comparative Law

I.

The scope of writings on the influence of the ideas of the French Revolution of 1789 already amounts to libraries, the Declaration of the Rights of Man and Citizen having stimmulated political and legal thinking far beyond the borders of France.[1] However, a comprehensive survey of its effects has been mostly in the sphere of political and legal ideas while the influence of the Great Declaration on positive constitutional law has been, so far, restricted to the institutions of some countries.[2] As a result, a comparative analysis of the influence of the French Declaration on the constitutional development,

---

1 In the Hungarian literature see ECKHARDT, S.: The ideas of the French Revolution in Hungary (in Hungarian). Budapest, 1924.

2 See the reports submitted to the Ninth International Congress of Comparative Law (Teheran, 31 August-7 September, 1974) on the topic "Human Rights Declarations and their Place in the History of Constitutional Law" (Section I. A. 2.): BARILE, P.: The particular value of the rights of freedom set out in the present Italian Constitution in the lights of subsequent trends, in: Italian National Reports to the IXth International Congress of Comparative Law, Milano, 1974. pp. 43-53. and GALIZIA, M.: The declarations of rights and their place in the history of Italian constitutional law, ibid. pp. 31-41.; CSIZMADIA, A.: Les déclarations des droits de l'homme et leur place dans l'histoire de la Constitution hongroise, in: The comparison of law-La comparaison de droit, ed. PÉTERI, Z. Budapest, 1974. pp. 11-32.; DEMETER, I.: "Les déclarations de droits" et leur place dans l'histoire du droit constitutionnel, in: Revue Roumaine des Sciences Sociales, Ser. Sci. Iur. no. 18. pp. 21-33.; GILISSEN, J.–MAGITS, M.: Les déclarations de droits dans l'histoire du droit des provinces belges, in: Rapports belges au IXe Congrès de l'Académie international de droit comparé, Bruxelles, 1974, pp. 1-32.; SCHOTT, C.: Die Grundrechte in der deutschen Verfassungsgeschichte, Zschr. f. Vergl. Rechtswiss, 75 (1975) pp. 45-66.

both universal and regional, is still lacking, so the attempt to put the subject on the agenda of the XIIIth World Congress of Comparative Law may, in this sense, be a pioneer undertaking.[3]

This characterization seems to be particularly justified in the light of the past and present development of comparative law, taking into account its further perspectives as well. On the one hand, the Declaration of the Rights of Man and Citizen has marked the beginnings of a new era not only in France but also in world history altogether. Thus the national achievements in several countries as the results of the influence of the French Declaration could be classified as parts of a universal pattern determined by some generally valid laws of development, the discovery of which having been held as the central task of the so-called droit comparé in the last century.[4] On the other hand, a comparative survey of the constitutional development in countries with various historical traditions, and dissimilar political, social and ideological backgrounds may prove the existence of significant differences in the interpretation of the rights and liberties listed in the French Declaration as well as providing for a particularly fertile ground for a socially oriented legal comparison.[5] At the same time, considering the split in our world, the search for some generally acceptable patterns of development seems to be more important than ever, not only as the logical precondition of every comparison but also as its "fond commun".[6] The rights of man and citizen fixed in the Declaration could serve as a starting point in seeking out the "common core"[7] of our institutions which—as an organic part of the common cultural heritage of mankind—could also promote better understanding among nations. Therefore, as an expression given to the general feeling, it may truly be asserted that "Liberty, Equality and Fraternity were the watchwords with which the Revolution placarded the walls of France, and whatever may have been the disappointments and disillusionments of the succeeding time, they still possess the souls of the Western world, and we know that so far as there has been, or it is to be any reality of social and political progress, it is under these terms that we must look for it."[8]

---

3 The discussions at the Congress of Teheran were concentrated on both the American and the French Declarations; moreover no written general report was submitted or published later on the topic.

4 LAMBERT, É.: Conception générale et définition de la science du droit comparé, sa méthode, son histoire; le droit comparé et l'enseignement du droit. In: Congrès International de Droit Comparé. Tenu à Paris du 31 juillet au 4 août 1900. Procès-verbaux des Séances et Documents. Tome premier. Paris, 1905. pp. 38. et seq.

5 PÉTERI, Z.: Some Aspects of the Sociological Approach in Comparative Law. In: Droit Hongrois-Droit Comparé, ed. PÉTERI, Z. Budapest, 1970. pp. 75-94.

6 SCHLESINGER, R.: Comparative Law. Cases-Text-Materials. 3. ed. New York, 1970. pp. 30. et seq.

7 This term is used here in the sense indicated by Prof. HAZARD, J. N. in his "Communists and their Law-A Search for the Common Core of the Legal Systems of the Marxian Socialist States." Chicago-London, 1969.

8 CARLYLE, A. J.: Political Liberty. A history of the conception in the middle ages and modern times. Liverpool and London, 1963. p. 170.

On the other hand, however, some incertitude concerning the topic seems to be justified. As a matter of general knowledge, the word "constitution" having come of current use only recently, was understood differently among nations in the course of world history and also this modern use is ambiguous.[9] Even if the long-lasting distinction between written and unwritten constitutions could be set aside for the moment, only very few direct conclusions may be drawn concerning the institutional framework from the rights and basic principles laid down in the Declaration. And even if a direct line of causal relations could be detected between the French model and the constitutional development of any country, the effects produced may often be perceptible only much after the influence of other factors. Limiting the topic in every respect seems to be, therefore, a proper undertaking. In any case, it seems to be a well-established view that the chief importance of the French Declaration could be ascertained both to its solemn announcements of man's basic, "natural" or "inborn" rights and to its composing some institutional patterns or guarantees for their protection. In the following these basic aspects of the problem will be dealt with.

II.

1) The singular character of the Hungarian contribution to such a comparative synthesis may be emphasized without any exaggeration. This is due partly to the historical fact that in the course of the nearly thousand years of Hungarian legal development up to the middle of this century, no written constitution had been produced, the creation and eventual amendments of which could be analyzed in the light of the French Declaration. Consequently, such an inquiry could, save for the draft constitution of the short-lived Hungarian Republic of the Councils (1919), start with the Constitution of the Hungarian People's Republic enacted after the Second World War (Act XX of 1949) as a landmark of Hungary's transition both to the socialist road of development based on the Soviet model, and to the idea of the written constitution. However, such an approach would be deceptive and as such, could lead to erroneous conclusions. Because the nearly 1000 years' existence of the Hungarian Kingdom (established in A.D. 1000) was, as in England, connected to the idea of a "historical constitution", the integrative parts of which, e.g. the law instituting the hereditary monarchy instead of the old electoral one (1687), the famous Pragmatica Sanctio initiating in Hungary the female succession of the House of Hapsburg (1723), the "Laws of April" enacted during the revolution (1848) abolishing most feudal remnants of the past, having been put together successively in the course of a long historical development, were held and preserved as the constitution of the country all through Hungarian history.[10]

---

9 KOVÁCS, I.: New elements in the evolution of the socialist constitution. Budapest, 1968. pp. 72. et seq.

10 BALOGH, A.: A magyar államjog alaptanai (The bases of Hungarian Public Law). Budapest, 1901. p. 131.

The fundamental or cardinal laws (leges fundamentales or cardinales) having been always understood as integrative parts of the historical constitution,[11] the long-lasting struggles for national survival and the safeguarding of national independence were contended repeatedly with reference to the rights and liberties guaranteed by them against autocratic rulers. These fights may be traced back to the Middle Ages as inseparable parts of Hungary's political and legal development, their achievements and failures being—like in most small countries in Eastern Europe—dependent on the international power relations and on the comprehensive processes taking place there and also indicating the limits of national endeavours.

Also the distinction made between the "broad" and "narrow" meaning of the constitution used to be represented in Hungarian writings on constitutional law; the former having meant a state structure in general, while the latter as a body of legal rules as guarantees against any misuse of state power.[12] This broader concept of the constitution prevailing in Hungarian political and legal thinking up to the end of the Second World War[13], had its roots in Romanist traditions: just as "constitutio" was the generic name used for the legislative enactments, i.e. the decrees (decreta), edicts (edicta) and orders (mandata) made by Roman Emperors[14] so, similarly, in medieval Hungary, since the second half of the 12th century, this word was used for the products of the legislative activity of the kings.[15]

However, this legislative activity used to be, following Western patterns, restrained by the rise of feudalism. The laws connected to the names of the first kings of Hungary were—on the evidence of their wording—recalling the idea of the "King in Parliament", by the king's decree with the assent of the people (decreto regali et consensu populi) or by the king's decree with the testimony of the whole clergy and the people (decreto regali cum testimonio totius cleri et populi). This meaning became established with the rise of the feudal aristocracy and its counterpart, the class of other noblemen, and their growing role in legislation. As it was laid down in the Tripartitum, a collection of the medieval Hungarian customary law published by a highranking judge, Stephen Werbőczy (1517) and applied—though in lack of formal enactment—as valid law up to the post-war changes in the second half of the 20th century, the right to legislate had been reserved to the king and the people assembled in Parliament.[16] Of course, the people (populus)

---

11 KARVASY, A.: A politikai tudományok (Political sciences). Győr, 1845. p. 24.

12 KOVÁCS, I.: Magyar alkotmányjog. (Hungarian Constitutional Law.) Szeged, 1990. p. 243. et seq.

13 MOLNÁR, K.: Magyar Közjog. (Hungarian Public Law.) Pécs, 1929. p. 244.

14 WALKER, D.: The Oxford Companion to Law. Oxford, 1980. p. 279.

15 MARCZALI, H.: Alkotmánytervezetek 1790-ben. (Draft constitutions in 1790.) In: Budapesti Szemle, 1906. Vol. 125. p. 395.

16 "...princeps proprio motu... constitutiones facere non potest, sed accersito interrogatoque populo". (Tripartitum opus juris consuetudinarii regni Hungariae. Viennae, 1517. Pars II. Tit. 3. The word "parlamentum" emerged for the first time in Hungary at the end of the 13th century. LADÁNYI, G.: A magyar királyság alkotmánytörténete a szatmári békekötésig. (Constitutional history of the Hungarian kingdom

used to mean in medieval Hungary, similarly to the legislative practice introduced in the form of the capitularies by Charlemagne, the closest and most devoted adherents of the monarch, the ecclesiastical and secular chiefs of the country.[17] The laws enacted jointly by the king and Parliament retained their central place among the sources of written law during the Middle Ages and also in newer times, the most important ones as "leges fundamentales" having the rank of an unwritten, "historical" constitution.

The new-meaning Latin word "constitutio" first appeared in Hapsburg-ruled Hungary, under the influence of French Enlightment, at the end of the 18th century.[18] The laws enacted in the years 1790–91, having emphasized the principle that legislative power shall be vested jointly in the lawfully crowned king and Parliament, and having restricted subordinate legislation in the form of royal decrees or patents to "affairs in conformity with Acts" (Act no. XII of 1790–91), specified Hungary as "a country independent from every other people, having an existence and constitution of her own" (Act no. X of 1790–91). Therefore, it may be said without exaggeration that the role of the French Declaration in influencing Hungarian constitutional development could be dealt with not only in the field of ideas but also concerning positive constitutional law itself.

2) Also the idea of some basic rights and freedoms has had ancient roots in Hungary. The Golden Bull of King Andrew II (1222), a document coupled with the golden seal used by the kings of Hungary since the 13th century for ratifying their most important decrees, had some similarities with the Magna Charta of England (1215) as an agreement between the monarch and the feudal barons of the country.[19] The Bull imposed considerable limitations on royal power, moreover it contained important guarantees inclusive of the right of armed resistance against the illegal acts of the king (Art. XXXI).[20] The noblemen compelling the king to promulgate the Bull made their complaints appear as a protest against the infringements of the "ancient liberties" laid down by the founder and first law-maker of the Hungarian kingdom, king St. Stephen (A.D. 1000–1038). In reality however, they succeeded, by its enactment, in reaffirming their feudal privileges, the most important ones being the freedom of the person, the privilege to be put on trial before the king's courts, the immunity from taxes and the "ius resistendi" men-

---

up to the Treaty of Szatmár) Debrecen, 1871. p. 117.

17 KOLLÁR, Á. F.: De originibus et usu perpetuo potestatis legislativae apostolicorum Regum Hungariae circa Sacra. Wien, 1764. pp. 28–30. As it was also put down in the Tripartitum, "nation" (populus) included only the noblemen: Nomine autem et appelatione populi... intellige solummodo dominos praelatos, barones et alios magnates, atque quoslibet nobiles, sed non ignobiles." (Pars II. Tit. 4.)

18 KOVÁCS, I.: On the problem of Act of Parliament and Law-Decree. Acta Universitatis Szegediensis de Attila József Nominatae. Tom. XXIII. Fasc. 4. Szeged, 1976. pp. 17–18.

19 PÉTERI, Z.: The Golden Bull of Hungary and the Problem of Human Rights. In: Essays in Legal History in Honor of Felix Frankfurter, ed. by FORKOSCH, M. D. Indianapolis, Kansas City, New York, 1966. pp. 211–225.

20 This claim was given up only by Act no. IV. of 1687.

tioned above.[21] These privileges, inclusive of the equality of all noblemen (una eademque nobilitas), were guaranteed also by the Tripartitum as belonging to the old customary law of the land.[22]

On the other hand, however, the overwhelming majority of the population, and first of all the peasantry, had not enjoyed any privileges at all but a long series of feudal burdens in the form of various pecuniary and natural services to be performed for their landlords (similar to those which existed in the West, e.g. socage, relief, aid, etc.). As some of other countries, in Hungary the lower classes of the population sometimes tried to get rid of their burdens by employing revolutionary methods. The huge peasants' uprising 1514, (among the aims of which were the abolition of the monarchy, the destruction of both spiritual and lay aristocracy and the assurance of equal rights for every group of the population) proved to exert a lasting influence on later development. The privileged classes, after having suppressed the uprising, not only restored the formerly existing feudal burdens but also aggravated them, inasmuch as they imposed on the peasants the penalty of a "total and eternal servitude" (mera and perpetua rusticitas) inclusive of the ban on their freedom of movement (Act no XXV of 1514). The tragedy of the business lies in the fact that these rules had been included also into the freshly-compiled work of Werbőczy as parts of the customary law of Hungary,[23] and, although subsequent legislation about half a century later restored the freedom of movement of the peasants (Acts XXVII-XXXII of 1556), this newer regulation had to yield to the opposite course of the landlords based on the great authority of the Tripartitum. The penalty as inflicted on "sinners and innocents alike" seemed to be an "incomprehensible contradiction" also in the eyes of posterity; moreover, as a treatment "more repulsive than slavery in ancient times" resulted in the exclusion of a group of people from the nation as a whole and may be held responsible for the fact that "our land had to suffer a century-long stagnation and poverty until the latest times".[24] Actually, real improvement in peasant life occurred only step by step, first at the beginning of the 19th century by facilitating the payment of indemnity to the owners of real property ("fee simple"), then by the abolishing of all feudal burdens.

---

21 "...ipsi, nisi primum citati vel evocati, ordineque judiciario condemnati fuerint, in eorum personis...per neminem detineri possint"; "...quoque princeps noster...neminem eorum praeter viam juris et altera parte non audita, in persona, vel rebus suis, ordinaria autoritate impedire potest"; "..ab omnique conditionaria servitute, ac datiarum et collectarum, tributorum, vectigalium, tricesimarumque solutione, per omnia immunes et exempti habentur.."; "...si quisqiam regum et principum nostrorum, libertatibus nobilium...declaratis et expressis contravenire attentaret: extunc sine nota alicujus infidelitatis, liberam illi resistendi et contradicendi habent in perpetuum facultatem." (Tripartitum Pars I. Tit. 9.)

22 "...omnes domini praelati et ecclesiarum rectores, ac barones et caeteri magnates, atque nobiles et proceres regni hujus Hungariae, ratione nobilitatis, et bonorum temporalium, una eademque libertatis, exemptionis, et immunitatis praerogativa gaudent..." (Pars I. Tit. 2.)

23 Tripartitum Pars III. Tit. 25.

24 HORVÁTH, M.: Az 1514-diki pórlázadás, annak okai és következményei. (The peasants' uprising of 1514, its causes and consequences.) Pest, 1868.

This state of affairs suited well the interests of the privileged classes; any attempt aiming at its modification met with their opposition. Prohibitions in the laws enacted by the Hungarian diet in the Middle Ages were drafted repeatedly against "harmful innovations".[25] This conservative attitude, supported by the famous Art. XXXI of the Golden Bull, had also a peculiar meaning in Hungarian history. The repeated allusions to the "ius resistendi" were meant to serve as a shelter not only from the unlawful acts of the kings but also as the justification of armed or unarmed struggles in defence of national independence. This fact could partly be explained by the historical experience gained in the periods of reiterated assaults against the independence of the country and, respectively, by the fear that any changes in the traditional institutions and the old system of constitutional guarantees would endanger Hungary's national existence.[26]

As a consequence of this, the idea of national independence and the right of Hungary to be governed according to her own laws and ancient customs, inclusive of the privileges of the noblemen, could play a mobilizing role in a long series of wars, uprisings and revolutions against foreign rulers and was repeatedly emphasized and guaranteed in the several peace treaties concluded during the 17th and 18th centuries between the Princes of Transsylvania as successors of medieval Hungarian monarchs, and the Hapsburg Emperors.[27]

The efforts of the Hapsburg dynasty aimed at the establishment of a uniform and German-speaking Austrian Empire were permanently frustrated by Hungarian national resistance in defence of the historical constitution of the country, inclusive of the privileges of the noblemen.[28]

3) The concept of natural law has its early origin in Hungary in the serf-liberating documents called arenga dating back to the 13th century.[29] Later on, the Tripartitum contained a rather detailed analysis of the distinction between natural law (ius naturale)

---

25 E.g. "Novitates et nocivae constitutiones introductae aboleantur et destruantur" (Act IV. of 1439) or "...quod nullas prorsus quemadmodum praefatus quondam dominus rex Matthias fecerat, introducamus..." (Act II. of 1490).

26 MARCZALI: Op. cit. p. 394.

27 The treaties concluded in Vienna (1606), Nikolsburg (1622) and Linz (1645) guaranteed, among others, the free exercise of Protestant religion which had previously been menaced with detention and death by burning under Act IV of 1525: "Lutherani etiam omnes de Regno exstirpentur et ubicunque reperti fuerint, non solum per ecclesiasticos, verum etiam per seculares personas libere capiantur et conburantur".

28 After the revolutionary wars led by Princes I. Thököly (1678-1685), then F. Rákóczi (1703-1711), the Habsburg Emperors had, in their capacity as Kings of Hungary, to guarantee in their "diploma inaugurale" confirmed by oath before the coronation and enacted by an Act of Parliament, the freedom, laws and customs of the country (e.g. Act II. of 1715., Act II. of 1741. etc.).

29 BÓNIS, Gy.: Középkori jogunk elemei. (The elements of our law in the Middle Ages.) Budapest, 1972. pp. 62-63.

and civil law (ius civile),[30] the intended purpose of the former being to protect the natural order of society. A new, revolutionary meaning was attached to the original idea in the years before the peasant uprising of 1514 when arguments based on natural justice and the equality of all men were advanced against feudal privileges.[31] In the second half of the 16th century the most radical principles formulated by the school of the French monarchomachs (Du Plessis etc.) concerning the relations between the monarch and his subjects were drawn into the disputes between Protestants and Catholics inasmuch as Protestant authors, in justifying the subjects' duty of obedience towards their rulers, disclaimed such a duty towards a Hapsburg (i.e. Catholic) monarch who, allegedly, had violated the covenant concluded by him with his subjects.[32]

Protestant ideas also found their way to Transsylvania which, as formerly a part of the Hungarian Kingdom, could retain some kind of independence after the split of Hungary as a result of the Turkish invasion. Several young men had been sent then from the principality of Transsylvania to German, Dutch and other Western universities who, after having finished their studies, returned home as propagandists of the ideas of Enlightenment and Protestant schools of natural law.[33] These ideas and first of all, those of Althusius, inclusive of his justification of rebellion against the tyrant, were summarized in the "Hungarian Encyclopedia" written by a former student of Dutch universities, János Apáczai Csere who, after having returned home, became an eminent scholar and high school professor in Transsylvania. Apáczai distinguished between two kinds of covenants, that is, one between God and the directors of the civil society on the strength of which the laws of God shall be made to be obeyed by everybody, and that between the directors themselves on the strength of which the laws of the civil society shall be obeyed.[34] According to Apáczai, the tyrant, i.e. the person having distorted and suppressed the just cause of the people, may be resisted and even killed,[35] a really revolutionary and risky demand in contemporary Transsylvania ruled by absolute monarchs called princes. These revolutionary ideas proclaimed by the adherents of natural law in Western countries were echoed in Transsylvania mostly in the documents

30 "Ius igitur naturale: est commune omnium nationum, eo quod ubique instinctu naturae, et non constitutione aliqua habetur; sive, quod natura omnia animalia docet et docuit." (Introductio, Tit. II.); "Ius autem civile est, quod quisque populus, vel quaeque civitas, sibi propter divinam, humanamque causam constituit." (Introductio, Tit. II.)

31 SZŰCS, J.: Nép és nemzet a középkor végén. (People and nation at the end of the Middle Ages.) Valóság, 6–1972. p. 22.

32 MAKKAI, L.: Etat des ordres et théocratie calviniste au XVI–e siècle dans l'Europe Centro–Orientale. Studia Historica, Budapest, 1975. p. 10.

33 BENKŐ, S.: Beke Sámuel élete és halála. (Life and death of Sámuel Beke.) In: Haladás és megmaradás. (Progress and survival.) Budapest, 1979. p. 423.

34 APÁCZAI CSERE, J.: Magyar Encyclopaedia. (Hungarian Encyclopedia.) Tizedik rész. (Pars. 10.) XXV. Bukarest, 1977. pp. 409. et seq.

35 Ibid. XXVIII. pp. 417. et seq.

of the several uprisings and even wars made against Austrian Emperors.[36] The authors of these documents used to justify their claims with arguments based on the teachings of Grotius concerning "social contract" violations by the monarch.[37] There are, however, written proofs of the availability also of the most important contemporary works of Western Enlightenment in Transsylvanian libraries.[38]

However, in the Western part of Hungary ruled by the Hapsburgs, the characteristic features of contemporary natural law theories, presuming the existence of some innate and inalienable human rights and the "social contract" as the basis of civil society and prescribing the sphere of authority of the monarch towards his subjects, took a rather conservative meaning based mostly on German and Austrian patterns. In the years of the enlightened absolutism practiced by Emperors Maria Theresia and Joseph II (1740–1790), the German theories of natural law and, first of all, that of Ch. Wolff, were taken over and spread troughout the Hapsburg Empire by the mediation of C.A. Martini, professor of the university of Vienna, one of the legal advisers of the monarch.[39] In Martini's interpretation of the "social contract", emphasis was put on the subjection as its most important constituent, thus subordinating entirely the members of the "civil society" to the authority of the monarch.[40]

This conservative theory of natural law introduced officially as an obligatory part of the university curriculum,[41] gained pre-eminence also in Hungary as one of the means of centralization adopted by imperial authorities. On the other hand, arguments based on natural law were also used on the side of the opposition, with emphasis on the contract stipulating the rights and duties of both parties and violated several times by the unlawful acts of centralized state organs.[42] However, the "natural" or "inborn" rights, mentioned repeatedly in the petitions addressed to the Emperor by the Hungarian noblemen, constituted in accordance with their residences in the counties, and resembling both in form and content the "cahiers de doléances" in pre-revolutionary France,[43] were usual-

36 E.g. the Proclamation of the Hungarian Orders (1605); in BENDA, K.: A Bocskay-szabadságharc. (The war of independence of Bocskay.) Budapest, 1955. p. 101.

37 RÁDAY, P.: Animadversiones apologicae. In: A Rákóczi-szabadságharc és Európa. (The war of independence of Rákóczi and Europe.) Budapest, 1970. p. 13.

38 TOLNAI, G. (ed.): Egy erdélyi gróf a felvilágosult Európában. Teleki József utazásai. (A Transsylvanian Count in enlightened Europe. The travels of József Teleki.) Budapest, 1987. p. 10.

39 SZABÓ, I.: A burzsoá állam- és jogbölcselet Magyarországon. (Bourgeois philosophy of state and law in Hungary.) Budapest, 1980. pp. 43–48.

40 MARTINI, K. A.: Lehrbegriff des allgemeinen Staatsrechts. Wien, 1783. p. 41.

41 Obligatory courses on natural law started in Hungary in 1760; Martini's works found their way to university curriculum in 1777. See ECKHART, F.: A jog- és államtudományi kar története. 1667-1935. (History of the Faculty of Law and State 1667-1935.) Budapest, 1936. p. 186.

42 In an anonymous pamphlet published in 1790 mention was made of the "thread of succession interrupted" (filum successions interruptum), i.e. the loss of the right of the House of Hapsburg to the Hungarian throne as a consequence of these infringements. See MARCZALI: Op. cit. p. 323.

43 La déclaration des droits de l'homme et du citoyen. Présentée par. RIALS, S. Paris, 1988. p. 115. et seq.

ly identified with the traditional privileges of the noblemen.[44] Also the concept of the social contract obtained a "harmless", i.e. conservative meaning as a synonym for any agreement of general character. By reason of such an interpretation, the Golden Bull itself and each of the subsequent compromises or treaties between the monarch and the Estates of the Realm (e.g. the Pragmatica Sanctio (1723) extending the order of succession of the House of Hapsburg to Hungary) could be held as a kind of "social contract". Such an explanation and practice allowing a series of compromises both in the past and in the future between the monarch and the feudal landlords, could contribute to creating and maintaining the general belief that the conservative reforms proposed by the noblemen and casually agreed to by the Emperor, had their justification in the idea of the social contract based on natural law.[45]

The reform plans based on conservative patterns of natural law thinking usually confined themselves to striving after only smaller changes in the traditional order of state and society. E.g. the draft constitution submitted anonymously in 1790 involved the establishment of a moderate form of government in Hungary while reference was made to the "extremely dangerous" nature of a quite new constitution "now when the whole Europe is excited by the philosophical (French) ideas". (sic!)[46]

However, since the last decade of the 18th century onwards, a revolutionary trend in the Hungarian reform movement gained ground, mostly as a result of general discontent and nourished by the news coming from Paris.[47] Its adherents also aimed, according to the testimony of a rather extensive scope of literary works,[48] both at the "modernization" of the existing constitutional structure in Hungary and the fulfilment of the main requirements of the bourgeois transformation based on the French model. Revolutionary ideas soon led to revolutionary action, amounting in an underground organization. One of its animators, the revolutionary-minded abbot, I. Martinovics, planned to establish in Hungary two secret societies.[49] One of them, called "Reformers'

---

44 E.g. an anonymous pamphlet (1765), having enumerated the examples of abusing royal power, stood up for the inviolability of noblemen's privileges. CONCHA, GY.: A "Vexatio dat intellectum" c. röpirat 1765-ből. (The pamphlet "Vexatio dat intellectum" from 1765). In: Hatvan év tudományos mozgalmai között. (Amidst sixty years' scientific movements.) Vol. I. Budapest, 1928. p. 202. et seq.

45 SZABÓ, I.: Op. cit. p. 71.

46 The author of the draft was Count F. Széchényi, father of the "greatest Hungarian", I. Széchenyi, who did his best to find a way for reconciliation between the Emperor and the nation.

47 "We who were always among the first ones in the battlefields, have to be the first ones in following the immortal French" (sic!) as was echoed in one of the revolutionary pamphlets of the time under the title "Oratio ad Proceres et Nobiles Regni Hungariae, 1790. See FRAKNÓI, V: The conspiracy of Martinovics and Co. In: Egyház, műveltség, történetírás. (Church, culture, historiography.) Budapest, 1981. p. 219.

48 BALLAGI, G.: A politikai irodalom Magyarországon 1825-ig. (Political writings in Hungary up to 1825.) Budapest, 1888. Among others, also the renowned poet, Batsányi, J. greeted the "changes in France" in a passionate verse, which later nearly cost him his life.

49 BENDA, K. (ed.): "A magyar jakobinusok iratai." (Documents of the Hungarian Jacobins.) Budapest, 1952.

Society" with rather modest purposes, was intended for the use of the broad masses of the population, while the other association called "Society for Freedom and Equality" was meant to bring together the most devoted adherents of the French revolution. The two revolutionary "catechisms" drafted and circulated by the radical reformers, i.e. Martinovics and his friends, may be closely associated with the documents of previous revolutions in Western Europe both in general and in some details.[50]

The catechism of the "Reformers" drafted in the form of questions and answers, represents a peculiar mixture and compromise between two kinds of traditions. On the one hand, it has some similarities to the English constitutional documents of the 17th century in enumerating past grievances of the noblemen caused by the unlawful acts of the Emperors and their officers, (e.g. assessment and collection of taxes without the consent of Parliament, non-convocation of Parliamentary sessions, abolition of the freedom of the press, etc.); and with the documents of contemporary French development, inasmuch as several ideas and demands contained in the Declaration of the Rights of Man and Citizen and in other revolutionary documents (separation of the executive power from the legislative one, freedom of worship, expression of opinion in speech or in writing, using one's mother tongue in public assemblies, free administration of justice, etc.) have been echoed in the catechism. Its drafters suggested to pass over to the republican form of government on the understanding that the Emperor, by his unlawful acts, had lost his legal rights as hereditary monarch and "had interrupted the thread of succession" as far as the House of Hapsburg is concerned. This argumentation, based on the conservative traditions of the land, played a great part also in subsequent controversies in the field of Hungarian public law.[51] On the other hand, however, in order to obtain broader support from the adherents of the reform movement, the drafters laid emphasis on the traditional rights and privileges of the noblemen (e.g. inviolability of their property rights and the exemption from any taxation, etc.).

The other catechism drafted originally in French language (!) and associated closer to the French model, went substantially further with its demands. Based upon the terminology of contemporary natural law theories (civil society, social contract, natural rights, separation of powers, etc.) it condemned any form of despotism and proclaimed the right to rebellion against its privilegized supporters, i.e. monarchs, nobles and clergymen. As characteristic of its origin, the reasoning was based upon man's natural rights to life, freedom, property and equality, which must not be cut off or limited by anybody or by any public authority.[52]

---

50 CONCHA, Gy.: A kilencvenes évek reformeszméi és előzményeik. (Reform ideas in the nineties and their antecedents.) Budapest, 1885.

51 DEÁK, F.: Adalék a magyar közjoghoz. (Contribution to the Hungarian public law.) Pest, 1865.

52 "Question: Has the serf lost his rights? Answer: Not at all. The rights of man may not be cut off anyway. While man lives, he has the right to defend his life, freedom, property and equality." Catechism of the Society for Freedom and Equality. In BENDA–ELEK: Op. cit. p. 165.

Revolutionary demands were also echoed in other writings of these bold reformers called Jacobins and especially in those of the eminent jurist, J. Hajnóczy who, probably the first one in Hungary, succeeded in achieving harmony between the wants of progress and those of patriotism.[53] Hajnóczy's scientific career led him from traditional noblemen's conservativism towards, at first, the ideas of the constitutional monarchy[54] and then towards those of a republic with the characteristic features of the State of Law (Rechtsstaat).[55] The consequences drawn from the idea of the social contract by Hajnóczy resembled the teachings of Rousseau about man's inborn rights which can not be cut off by obsolescence or given up by the contracting parties themselves. The free migration inside the country, the right to emigrate, freedom of conscience, religion, speech and press, the right to private property and the pursuit of happiness, as the most important components of the general idea of freedom, were dealt with by Hajnóczy as integral parts of the reforms proposed.[56] The famous "ius resistendi" stipulated for in the Golden Bull, though itself inconsistent with the idea of the social contract, was interpreted by him as one of the most important guarantees of the aforesaid rights because without its acknowledgement the contract made between the monarch and the estates of land would amount to a "contractus leoninus" to the advantage of the former.[57] But the chief guarantee for the stability of the social contract lies, according to Hajnóczy, in the joint efforts of persons disposing of moral or physical power, i.e. the spiritual and secular leaders of the country, and the masses of ordinary citizens. In taking the side of the idea of equality, Hajnóczy suggested to abolish the feudal burdens of the peasantry and to open public offices to all members of the nation, i.e. to persons of non-noble origin.[58]

However, the movement of the Hungarian Jacobins based on French enlightened and revolutionary ideas ended in failure very soon. The poorly organized secret societies were disclosed, several of their leaders, inclusive of Martinovics and Hajnóczy, executed, hundreds of other members imprisoned,[59] so the fulfilment of their demands had to be postponed into a better future.

4) The decisive step tending towards the radical transformation of the Hungarian society and state structure based mostly on the ideas of the French Declaration was taken

---

53 BÓNIS, Gy.: Hajnóczy József. Budapest, 1954.

54 Dissertatio politico-publica de regiae potestatis in Hungaria limitibus. 1791.

55 De comitiis Regni Hungariae deque organisatione eorundem dissertatio iuris publici Hungariae. 1791.

56 Ratio proponendarum in comitiis Hungariae legum. 1790. (Manuscript.) Archive of Széchényi National Library. Fol. Lat. 3635. IV. tom. 75–112. f.

57 Propositiones deputationi fine elaborandae ablegatis incliti comitatus ad comitia mittendis instructionis exhibendae. 1790. (Manuscript.) Archive of Széchényi National Library. Fol. Lat. 3635. IV. tom. 113–114. f.

58 Ratio proponendarum in comitiis Hungariae legum. Ibid.

59 BENDA, K.–ELEK, J.: Vizsgálat Martinovics Ignác szászvári apát és társai ügyében. (Investigation in the case of the abbot of Szászvár, I. Martinovics and his companions.) Budapest, 1983. p. 146. et seq.

in 1848, the year of revolutions in the heart of Europe. Undoubtedly, on the way of modernization several measures were also taken earlier in the first decades of the 19th century, called the "Reform Age", as a consequence of the developing legislative activity of the Hungarian diet.[60] One of its most important results may be mentioned as the toll imposed on all passengers using the newly built bridge on the Danube between Pest and Buda (1836), as the first break-through of the traditional immunities of the noble class.[61] The declaration of Hungarian as the official language of the realm, replacing the traditional Latin, may also be understood as a necessary means of strengthening national feelings and independence. Between the years 1790 and 1844 not less than seven laws were enacted by the diet on the obligatory use of the Hungarian language in legislation, public administration, administration of justice, public education and worship.[62]

Later on, the seed sown by the reform movement had a good harvest. The demands, forwarded by the revolutionary leaders and, at first, L. Kossuth, amounted to comprehensive reforms both in the political and economic structure of the country. These reforms, the defence of which the war of independence of 1848/49, one of the most remarkable events in Hungarian history, had been waged, were retained in living memory after the defeat of the revolution as symbols of national independence and the profound transformation of the country according to progressive Western models.

The structure of the Hungarian state before 1848 could be conceived as a peculiar mixture of various elements, i.e. those of bureaucratic absolutism and feudal self-government, centralization and decentralization organized according to diverse basic principles. Legislative, executive and judicial powers were not consistently separated, their officials having been held responsible for their acts to two different, conflicting authorities permanently at odds with each other, i.e. royal or feudal county. Having their origin in an obsolete feudal system, social and legal inequalities indicated a sharp dividing line between two big parts of the population, i.e. those with and those without privileges,.[63] Therefore, it stands to reason that in the center of revolutionary demands, parallel with the declaration of basic rights, the establishment of a new system of government took place.

The laws enacted in April 1848 by both houses of the diet, and sanctioned by the Austrian Emperor in his capacity as King of Hungary, may be summarized as a new constitution of the land though, in accordance with her historical traditions, disregarded the form of a charter.

---

60 EÖTVÖS, J.: Reform, Pest, 1846.

61 No. XXVI. of 1836.

62 It deserves mention that these measures taken by the Hungarian diet as means of self-defence against the centralizing and Germanizing efforts of Emperor Joseph II, remained then unopposed by the national minorities living in Hungary.

63 FRANK, I.: A közigazság törvénye Magyarországon. (Institutions of Hungarian Law) Buda, 1845. p. 107. et seq.

As far as the declaration of basic rights is concerned, the principle of equal and proportionate sharing of public burdens having been announced,[64] all the feudal obligations, inclusive of the jurisdiction of the manorial courts administered by the landlords, were abolished forever and the compensation due to the members of the earlier privilegized classes was put "under the protection of the nation's common fairness".[65] Freedom of the press was re-established and, as a provisional guarantee for its realization, everybody was entitled to publish and disseminate his or her ideas freely; censorship ceased to exist.[66] Freedom of teaching and learning was, *expressis verbis*, guaranteed for the Hungarian university, free choice given to its students in selecting their courses and professors and authorizing, in addition to the ordinary professors, some "outstanding persons" to deliver lessons under conditions stipulated by law.[67] Equal rights, without any distinction, were guaranteed to each of the lawfully adopted religions.[68]

On the other hand, the establishment of the first responsible Hungarian government as the symbol and embodiment of national endeavors, may be held as the most important result of the new legislation. According to the laws enacted in 1848, the formerly unlimited executive power of the monarch was substantially restricted, inasmuch as any of his decrees, orders or appointments had to be considered as valid only when countersigned by a member of the new government.[69] The legislation introduced a new form of ministerial responsibility; the members of the government could be held responsible for their acts before Parliament.[70] Legislative power was held, under the new legislation, by the King and Parliament; parliamentary sessions had to be convoked every year, after general elections, in the (then separate) town of Pest.[71] However, suffrage was given only to male persons of age and of a property or intellectual status, as defined by law.[72] Provisional dispositions concerning the administration of justice and the prospect of substantial reform of the courts were also enacted.[73] In order to progress with the radical transformation of the Hungarian legal system in general, provisions were taken for preparing a Civil Code, the draft of which had to be submitted at the next Parliamentary session.[74] Important steps were taken towards modernizing the traditional county organizations[75] and establishing a new system of local govern-

64 Act No. VIII of 1848.
65 Act No. IX of 1848.
66 Act No. XVIII of 1848.
67 Act No. XIX of 1848.
68 Act No. XX of 1848.
69 Act No. III of 1848.
70 Ibid.
71 Act No. IV of 1848.
72 Act No. V of 1848.
73 Act No. XI of 1848.
74 Act No. XV of 1848.
75 Act No. XVI of 1848.

ments,[76] and, last but not least, new guarantees were provided in order to protect the independence of public officers against any unlawful influence.[77]

As a counterpart of these rights only a very few civil duties were stipulated in the laws of 1848. Chief among them was every citizen's duty to pay taxes[78] and to serve in the newly-established national guard[79].

Later on, in 1849 the revolutionary Parliament passed a resolution on the dethronisation of the House of Hapsburg. According to the declaration concerned, as the new Hungarian government was responsible only to Parliament, no royal influence on its activities must be tolerated. Royal authority and people's power being incompatible with each other, their coexistence would lead necessarily to permanent clashes between the monarch and the deputies. Some plans for drafting a new written constitution based on the traditions of Enlightment and proclaiming liberty, equality and fraternity, connected by the principles of justice, were also forwarded.[80]

However, the Acts passed by revolutionary Hungary and her other reform endeavors could not be realized. The revolution having been destroyed by the common efforts of two Empires, Austria and Russia, Hungary became degraded to the rank of one of the territorial units of the Hapsburg monarchy. The achievements of the revolution, with the only exceptions of the laws abolishing the feudal obligations and those providing for the general and proportionate sharing of public burdens, were annulled. It took some time till, as a consequence of the increasing national resistance and the developments in international affairs, the House of Hapsburg was forced to yield to Hungarian demands in restoring, though not entirely, the laws enacted in 1848 and in guaranteeing equal rights for Hungary in the newly established Austrian-Hungarian monarchy.[81]

III.

In summing up, some conclusions may be drawn from the aforesaid. As first of all, it is beyond any doubt that the ideas of the French Enlightment embodied in the Declaration of the Rights of Man and Citizen had, though indirectly, a substantial impact on the theory and practice of Hungarian constitutionalism. These ideas, taken over rather early by the adherents of the Hungarian reform movement, spread with remarkable rapidity in the country and, despite their having been temporarily defeated and suppressed, survived up to the revolution and the war of independence in 1848/49, respectively. Part

---

76 Act No. XXIII of 1848.

77 Act No. XXIX of 1848.

78 Act No. VIII of 184.

79 Act No. XXII of 1848.

80 Az 1848/49. évi népképviseleti országgyűlés. (Parliament based on people's representation in 1848/49.) Ed. BEÉR, J. Budapest, 1954.

81 The Austrian-Hungarian compromise was enacted by the Grundgesetz No. 142 of 1867. in Austria, and by the Act No. XII of 1867. in Hungary.

of the French demands were also reflected in the laws enacted in 1848, laying the foundations of civil society and constitutional establishment in Hungary, exerting a lasting influence on subsequent development.

On the other hand, however, it cannot be denied that in drafting their demands, the "founding fathers" in 1848 did not closely follow the French model. They did not choose the form of the declaration or charter which could have been included later, partly or entirely, into a new written constitution, though the laws enacted by them aimed, by abolishing several remnants of feudalism, at a substantial transformation of the country. The wording of the new laws did not echo the vocabulary of the revolutionary natural law, either. No mention was made in them of the "natural" or "inborn" rights of man and citizens; on the contrary, the Hungarian legislators often laid emphasis on the ancient Hungarian traditions of constitutionalism. Some of the political achievements guaranteed in the laws of 1848 were declared as re-establishments of ancient rights and liberties, and the new institutions re-framing Hungarian constitutionalism had to live together with traditional ones.[82] The institutional patterns drafted in the French Declaration were taken over considerably by its Hungarian followers; however, some hesitation on the reformers' side could be felt in the relatively great number of new stipulations declared as only temporary, with the final solutions having been postponed until later legislation. The reason for all this may be found in the desire of many revolutionary leaders to avoid an open breach with Austria and to make progress only step by step. Consequently, at the beginning, only the plans for some moderate reforms were approved and the events took a more radical turn only later, under the pressure of subsequent circumstances.

These tendencies could be ascribed, to some extent, to the English conservative traditions, having found a fertile ground in contemporary Hungarian political and legal thinking.[83] The chief and decisive constituent, however, may be found in the characteristic features of Hungarian history, limiting the reformers' freedom of movement and giving preference to the demands for slower and more moderate reforms.[84] Taking into account the subsequent development that led to a revolutionary war and its defeat, an open question to be discussed has remained till now; which course could have best been taken in modernizing the out-of-date constitutional framework in Hungary. One of the answers, though a rather skeptical one, would echo the words of Count M. Zrínyi, the great Hungarian poet, commander and political thinker in the 17th century: "sors bona, nihil aliud", i.e. "being short of good luck no efforts could be crowned with success". However, as another political thinker, our contemporary, pointed out,[85] on the evidence

82 E.g. the most characteristic feature of the old Hungarian state organization, the office of the nádor (palatinus) as "homo regius" and permanent deputy of the king, was retained also under the new legislation.

83 CONCHA, Gy.: Az angolos irány politikai irodalmunkban a múlt század végén. (The "English line" in our political literature at the end of the last century.) In CONCHA, Gy.: Op. cit. p. 213. et seq.

84 GERGELY, A.: Egy nemzetet az emberiségnek. (A nation to mankind.) Budapest, 1987. p. 380. et seq.

85 BIBÓ, I.: Válogatott tanulmányok. (Selected essays.) Vol. 2. pp. 108–109. Budapest, 1986.

of world history that even small nations are sometimes given the chance to make a choice between various paths to go on and, consequently, in these rare moments the members of such a nation may, to a greater extent, be held responsible for their choice. Surely, the French Revolution and its Declaration was one of the events in European history which threw open the way for these nations in assuming a new responsibility.

Acta Juridica Hungarica
1991 33 N° 1–2, pp. 75–105

Akadémiai Kiadó,
Budapest

Endre USTOR

Developing Countries and International Law

Reporting on its work during the first twenty-five sessions the United Nations International Law Commission stated:

"The most far reaching development, whose full impact on the work of the Commission could only be felt in the course of the time, was the advent of the decolonization process. In the space of a few years, that process multiplied the number of sovereign States, thereby giving to an increasing part of mankind the opportunity to make its contribution to the the codification and progressive development of international law..."

In the same breath the report continues: "Decolonization also had vast consequences for law-making activities outside the Commission. The new chapter of international law relating to economic development and economic and technical assistance draws its essential significance from those economic and social inequalities which only became fully manifest in the process of decolonization. The new law of economic development appeals to a very old and inherent concept of all law, namely the concept of justice calling for equality of treatment of equals and, if need be, inequality of treatment of unequals in such a manner that justice may emerge in the final result..."[1]

To this it may be added that the new members of the international community, the developing States are more and more aware that the strengthening of the rule of law in international relations serves their interest. And so does codification and progressive development of international law, a process whereby the old customary law is redefined,

1 Yearbook of the International Law Commission, 1973, vol. II. p. 228, par. 158–9.

supplemented and invested with the clarity characteristic of written, conventional law.[2] Customary law, as has been rightly stated, is the law of the strong, not of the weak.[3]

The settlement of disputes by judicial means serves also the interest of the economically less developed countries being in a weaker position in international negotiations than their stronger partners.

And last but not least, they are interested in the creation of a new law of economic development, a completely new law which will assist the developing countries in their own efforts to overcome the ills of underdevelopment.

These are the themes to be discussed below.

United Nations Decade of International Law

By a unanimous resolution adopted on 17 November 1989 the UN General Assembly declared the period 1990–1999 as the United Nations Decade of International Law.[4]

It is not uncommon that the General Assembly designates ten year periods as decades for a certain purpose. Thus e.g. the years 1990–2000 (sic!) were already declared "International Decade for the Eradication of Colonialism;[5] a decision was taken to declare the 1990s as the "Third Disarmament Decade"[6] and to adopt an international development strategy for the fourth United Nation development decade.[7] In the field of international law, however this is a startling innovation, therefore it seems appropriate to take a closer look into the matter.

The history of the initiative, as reflected in the records of the General Assembly, is as follows: On 24 July 1989 the Chairman of the Co-ordinating Bureau of the Movement of Non-Aligned Countries addressed a letter to he UN Secretary General requesting the inclusion in the agenda of the 44th session of the General Assembly a supplementary item entitled: "United Nations Decade of International Law". An attached memorandum explained the motives of the request in the following way:

---

2 AGO, R.: Yearbook of the ILC, 1981, 1666th meeting, par 7.

3 MAREK, K.: Thoughts on Codification, 31 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht, p. 502, quoting from SOHM, Institutionen, Geschichte und System des römischen Privatrechts (16th ed. München, Leipzig 1920): "Das Gewohnheitsrecht ist der Freund des Starken. Es unterliegt dem Einfluss der herrschenden Klassen. Das Gesetzesrecht ist der Hort der Schwachen; es bändigt die Macht der Herrschenden durch den geschriebenen Buchstaben. Das Aufkommen des Gesetzesrechts hängt daher ganz regelmässig mit dem Aufsteigen der Niederen zusammen. Es ist die der Menge zugute kommende 'plebejische' Form der Rechtserzeugung" (pp. 62–63).

4 A/Res/44/23 of 17. Nov. 1989

5 A/Res/43/47 of 22. Nov. 1988

6 A/Res/43/78 L. of 7. Dec. 1988 and A/Res/44/118 H–15 of 15 Dec. 1989

7 A/Res/43/182 of 20 Dec. 1988 and A/Res/44/169, 19 Dec. 989

"1. The Movement of Non-Aligned Countries held a ministerial meeting at The Hague, from 26 to 29 June 1989, on the topic "Peace and the rule of law in international affairs".

2. The Declaration emanating from the meeting and adopted by the Ministers is officially referred to as "The Hague Declaration of the Meeting of the Ministers of Foreign Affairs of the Movement of Non-Aligned Countries to Discuss the Issue of Peace and the Rule of Law in International Affairs".

3. In the Declaration, the Ministers call upon the General Assembly of the United Nations to declare a decade of international law, beginning in 1990 and ending in 1999, to coincide with the celebration of the centennial of the first International Peace Conference, held at The Hague in 1899.

4. During the decade, a commission, led by a distinguished jurist, would be established to organize and conduct the activities of the decade of international law and to prepare a third peace conference at its conclusion.

5. The work of the decade of international law would emphasize, *inter alia*, the following:

(a) The promotion and enhancement of peaceful methods for the settlement of disputes between States, including resort to the International Court of Justice and compliance with its judgments;

(b) The achievement of general and complete disarmament, in particular nuclear disarmament, and the elimination of weapons of mass destruction;

(c) The promotion of the respect for international legal principles against the threat or use of force, intervention, interference and other measures in international relations;

(d) Public education for the better understanding of international law;

(e) Preparations for and commencing of a third peace conference at the conclusion of the decade of international law, which would consider and adopt appropriate international instruments for the enhancement of international law and the strengthening of methods for the peaceful settlement of international disputes, including the role of the International Court of Justice.

6. A copy of "The Hague Declaration of the Meeting of the Ministers of Foreign Affairs of the Movement of Non-Aligned Countries to Discuss the Issue of Peace and the Rule of Law in International Affairs" is appended to the present memorandum.[8]

The request for the inclusion of the item in the agenda was granted and subsequently on 15 November 1989 a draft resolution was submitted which—as a result of extensive consultations among the different groups of States—reflected a streamlined version of the Non-aligned States' Memorandum.[9]

This draft—which during the ensuing debate was praised in the plenary meetings of the General Assembly as a compromise formula—was sponsored not only by 46

8 A/44/191

9 A/44/L. 41 and add. 1.

nonaligned States but also by 19 members of the Western European and Others group, among them by France, the United Kingdom and the United States. The Soviet Union and 8 Eastern European States were among the sponsors also.[10]

The test of the draft, which after a relatively short debate has become resolution of the General Assembly[11] and will certainly attract world-wide attention, is reproduced here *in extenso:*

"The General Assembly,

Recognizing that one of the purposes of the United Nations is to maintain international peace and security, and to that end to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace,

Recalling the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[12] and the Manila Declaration on the Peaceful Settlement of International Disputes,[13]

Recognizing the role of the United Nations in promoting greater acceptance of and respect for the principles of international law and in encouraging the progressive development of international law and its codification,

Convinced of the need to strengthen the rule of law in international relations,

Stressing the need to promote the teaching, study, dissemination and wider appreciation of international law

Noting that, in the remaining decade of the twentieth century, important anniversaries will be celebrated that are related to the adoption of international legal documents, such as the centenary of the first International Peace Conference, held at The Hague in 1899, which adopted the Convention for the Pacific Settlement of International Disputes[14] and created the Permanent Court of Arbitration, the fiftieth anniversary of the signing of the Charter of the United Nations and the twenty-fifth anniversary of the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nation,

1. *Declares* the period 1990-1999 as the United Nations Decade of International Law;

2. *Considers* that the main purposes of the Decade should be, *inter alia:*

(a) To promote acceptance of and respect for the principles of international law;

---

10 Adopted on 17. Nov. 1989

11 See above, note 4.

12 Resolution 2625 (XXV), annex

13 Resolution 37/10, annex.

14 See Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915).

(b) To promote means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice;

(c) To encourage the progressive development of international law and its codification;

(d) To encourage the teaching, study, dissemination and wider appreciation of international law;

3. *Requests* the Secretary-General to seek the views of Member States and appropriate international bodies, as well as of non-governmental organizations working in the field, on the programme for the Decade and on appropriate action to international peace conference or other suitable international conference at the end of the Decade, and to submit a report thereon to the Assembly at its forty-fifth session;

4. *Decides* to consider this question at its forty-fifth session in a working group of the Sixth Committee with a view to preparing generally acceptable recommendations for the Decade;

5. *Also decides* to include in the provisional agenda of its forty-fifth session the item entitled 'United Nations Decade of International law'."

Some points made in the debate of the General Assembly

The Rule of Law. All representatives who took the floor in the course of the debate[15] preceding the adoption of the resolution upheld the idea that there is a "need to strengthen the rule of law in international relations". Thus the representative of Yougoslavia who introduced the draft in the name of the non-aligned sponsors, said that "current developments had thrown into sharp focus the respect for international law and for the rule of law in international relations ... this was the proper way to promote peace, social and economic justice, human rights and ecological equilibrium ... not everything can be achieved by purely legal means yet the transition from confrontation to co-operation can not be accomplished without the strengthening of the rule of law."

Several speakers used the word "primacy", but most of them not in the traditional sense namely as primacy of international law over municipal law. Thus the delegate of Austria stated that his country had consistently advocated and upheld that the "primacy of the law in international relations must lead to the recognition by the States of the possibility to settle their disputes by resorting to international judiciary including the International Court of Justice."

The delegate if the USSR quoted from the message of Mr. Shevardnadze, the Minister of Foreign Affairs of his country addressed to the Hague meeting of non-aligned countries in the following terms: "From our point of view the guaranteeing of a stable international state of law presupposes the primacy of law in the policy and practice of States, the priority of international obligations over international regulations

15 A/44/PV 59 and 60

and the universal application of the generally recognized international principles and rules of international law."

The speaker referred also to the USSR memorandum entitled "On enhancing the role of international law"[16] which stated *inter alia* that "the philosophy behind the Soviet Union's foreign policy is based on the need to ensure the primacy of law in the policy and practice of States".

It was in this sense that Australia "emphasized the necessity for Member States to recognize the primacy of international law", that France—on behalf of the 12 States Members of the EEC—"believed in the primacy of law, both within the organization of (their) societies, where it serves to ensure justice and democracy, and in international relations".

The Ukraine spoke about "upholding the primacy of international law in politics", New Zeeland demanded "respect for the primacy of the rule of law" and the United States stressed "the fundamental importance of international law to everything we do in the international arena, and that fully justified the idea of a decade dedicated to strengthening the role (sic!) of law."

Obviously, too much importance cannot be attached to the diversity in the way the delegates expressed their support for the idea of strengthening the rule of law—or the role of the law—in international relations; the General Assembly is after all not a meeting of legal theorists. (It must be noted that the expressions and phrases quoted above are based on the provisional verbation records of the Assembly, the final texts not being available at the time of the preparation of this paper.)

The programme for the decade. Few delegations launched in the debate suggestions concerning the programme of the decade. Among those who did, Mexico ventilated the following ideas:

1) A carefully planned appeal should be made to all Member States of the UN to issue a declaration accepting the binding jurisdiction of the ICJ. At present only 30.8 per cent of the membership (as calculated by Mexico) has accepted the compulsory jurisdiction of the Court.

2) Judgements and advisory opinions of the Court should be available not only in English and French but also in the other official languages of the UN "This in order to enhance international law in all corners of the world and to avoid its remaining the private reserve of only a small segment of the world."

3) A campaign should be launched to broaden participation in UN treaties so that they would not remain dead letters in the archives. On the other hand, caution is advised concerning further proliferation of international instruments.

4) The responsibilities of the General Assembly should be widened in the following sense: The UN Secretary-General should prepare yearly reports on "the legal advances that have been made within the United Nations and all other forums where international

16 A/44/585 of 2 Oct. 1989

legal instruments are being negotiated." These reports would be presented to the Sixth Committee, so that the committee could consider not only the work of the International Law Commission and the UN Commission of International Trade Law (UNCITRAL), but practically all other works produced in the field of progressive development and codification of international law.

5) A forum of a least one week's duration should be convened within the framework of the Sixth Committee every year for the purpose of overseeing and assessing the fulfilment of the Decade's programme and reviewing its plans for the subsequent years. Participating in this forum would be the chief legal advisers of the foreign ministries, the UN Legal Counsel, the directors of the legal departments of the Specialized Agencies, the President of the ICJ and the chairman of the International Law Commission.

On the expansion of the domain of international law. Several speakers drew attention to this relatively new phenomenon. The representative of Uruguay said that international law "has expanded its parameters, enriched its content and increased its functions; it has gone from the form of law which governed relations between a small number of States to a universal legal order which is binding in regard to many diverse subjects—binding not only on States but also on international organizations and individuals. Up to a short time ago it was not much more than a system of norms which governed only questions relating to the political sovereignty of States, security and wars; now it has become a complex network of principles and norms which govern practically all areas of human activity. Once a law of prohibition, made up of norms which established limits on the exercise of national sovereignty, it has become a law of cooperation and coordination; and, recently, in the light of increasing acute global threats, such as deterioration of the environment, drugs and poverty, it has become an instrument providing social direction."

Guatemala referred to the specialization which takes place in the field: "We are entering the terrain of international economic law, international humanitarian law and international law relating to ecological systems and space."

The representative of Canada held *inter alia* that "the programme for the decade should foster the development of the rules of international law on State responsibility, requiring States exploiting their resources to act more carefully so as to avoid harm to other States and the international community. The adoption in recent years of legal instruments on such questions as the protection of the ozone layer and the movement of hazardous wastes was testimony to the ability of the world community to respond to potential and actual environmental threats. However, much more effort was needed to address the many pressing environmental problems that threaten our planet, including the greenhouse effect, marine pollution, acid rain, land degradation and the extinction of numerous animal and plant species. The decade should help galvanize the international efforts in that domain."

On the importance of a general agreement. The delegate of France speaking also on behalf of the European Economic Community expressed satisfaction over the fact that the desire for consensus prevailed in the negotiations on the draft resolution and wished that the same spirit would be in evidence in the course of the preparation of the

programme for the decade. This would be the responsibility of the working group in the Sixth Committee which could do an effective job only if it applies the rule of general agreement—the delegate of France stated.

The representative of the United States declared in a similar vein: "...while our action today is only a beginning, it is a good beginning ... because all concerned have recognized the fundamental importance of the decision to declare a decade being taken by consensus... Consensus is important for all our work in the United Nations, an institution which has as one of its purposes 'to be a center for harmonizing the action of nations in the attainment of ... common ends'. Consensus strengthens the message of every resolution so adopted and negative votes and abstentions have the opposite effect. If this reasoning is generally true, it is particularly true in the field of international law. It is inherent in the legal regime of equal sovereign States that consent plays a critical role in the legal field. That is why the most noteworthy achievements of the Legal Committee have all been the outcome of work done on the basis of full recognition of the essential need for consensus. There is no other basis for work in this field that can yield positive results."

Caution with respect to financial implications. Several speakers (Australia, France, Canada) reminded the audience of the guidelines worked out by the Economic and Social Council[17] which recommended that proposals for international decades should *inter alia* indicate the modalities of financing the envisaged programmes. These delegations, however, went no further and joined the others in adopting the resolution.

"Developing countries are the greatest advocates of respect for international law". Zimbabwe was the chief organizer of the Hague meeting of the Movement of the Non-Aligned Countries, as it was the chairman of the Movement in 1989. Its representative in a pathetic speech referred to the increased interdependence of States. "If they cannot find a basis for common security, in the end nobody will be secure. From security to development, from the environment to drug-trafficking our interdependence is complete"—he stated. "Anarchy in the international system works most of all to the disadvantage of the smaller countries, which makes those countries the greatest advocates of respect for international law"—the delegate of Zimbabwe concluded, obviously inferring that this is *ad oculos* demonstrated by the initiative of the non-aligned countries concerning the international law decade.

Excursus: The UN Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice

In the course of the debate on the decade of international law, several speakers (Austria, Zimbabwe) warmly greeted the striking initiative of the Secretary-General who in a Press Release dated 18 August 1989 made public his intention and on 1 November

17 E/1989/INF/7, upon instructions of G.A.res.42/171

1989 formally announced to the General Assembly the creation of the Trust Fund. From the document containing the terms of reference, guidelines and rules of the Secretary-*General's Trust Fund, the following portions may be quoted here:*

"3. Legal disputes may arise in various parts of the world over a wide variety of issues. There are occasions where the parties concerned are prepared to seek settlement of their disputes through the International Court of Justice, but cannot proceed because of the lack of legal expertise or funds. There may also be cases where the parties are unable to implement an ICJ decision because of the same reasons. In all such cases the availability of funds would advance the peaceful settlement of disputes.

*4. ...The administrative costs of the International Court of Justice are borne by the United Nations. But ... the parties must bear the costs of agents, counsels, experts, witnesses, and the preparation of memorials and counter-*memorials, etc. The total can be considerable. Thus cost can be a factor in deciding whether a dispute should be referred to the International Court of Justice. ...

6. ...The purpose of the Fund is to provide, in accordance with the terms and conditions specified herein, financial assistance to States for expenses incurred in connexion with: (i) a dispute submitted to the International Court of Justice by way of a special agreement, or (ii) the execution of a Judgement of the Court resulting from such special agreement.

7. The Secretary-General invites States, intergovernmental organizations, national institutions, non-governmental organizations, as well as natural and juridical persons to make voluntary financial contributions to the Fund. ...

9. For each request for financial assistance, the Secretary-General will establish a Panel of Experts composed of three persons of the highest judicial and moral standing. The task of the panel is to examine the application ... and to recommend the amount of financial assistance to be given and the types of expenses for which the assistance may be used: e.g. preparation of memorials ... interpretation ... cartographic evidence ... costs relating to the execution of an ICJ judgement (e.g. demarcation of boundaries).

10. The work of the Panel of Experts shall be conducted in strict confidentiality. ...

15. An annual report on the activities of the Fund will be made to the General Assembly."[18]

The Making of International Economic Development Law

At its thirtiest session, in 1975 the General Assembly had before it a draft resolution entitled: "Consolidation and progressive evolution of the norms and principles of international economic development law", submitted by the representative of the Philippines.

---

18 For a full text see: 28 International Legal Materials 1589 (1989)

According to the draft "there has been a long-felt need for a comprehensive code of economic behaviour, based on equity, sovereign equality, interdependence, common interest and co-operation, that should guide international economic relations, particularly at this time when the world is faced with a general economic crisis and with mounting problems of underdevelopment in most developing countries"

Consequently the Secretary-General was requested "to study the question of the consolidation and progressive development of the norms and principles of international economic development law, and the feasibility of their codification."[19]

This was in 1975 and ever since the item has been on the agenda of the Sixth Committee, year after year. The title of the item was modified twice. The latest version is: Progressive development of the principles and norms of international law relating to the New International Economic Order.

During the years States were asked for comments on the matter. These came in rather sparingly.

In 1980 the UN Institute for Training and Research (UNITAR) was requested to prepare an analytical study.

That request was complied with in 1984 and the study was promptly submitted by the Secretary-General to the General Assembly.[20]

Five more year elapsed. The last resolution of the General Assembly adopted up to the present is dated 4 December 1989 and numbered 44/30. This shows a modicum of progress. While the Assembly "...requests the Secretary General to continue to seek proposals of Member States concerning the most appropriate procedures to be adopted with regard to the consideration of the analytical study [of UNITAR] as well as the codification and progressive development of the principles and norms of international law relating to the new international economic order..."; "[it] recommends that the Sixth Committee should consider making a final decision at the forty-sixth [i.e. 1992] session of the General Assembly on the question of the appropriate forum within its framework which would undertake the task of completing the elaboration of the process of codification and progressive development of the principles and norms ... etc."

Like most of the previous resolutions this one was adopted with 24 abstentions. The abstaining votes were those of the "Western and Others" group of States.

The system of the UNITAR analytical study. The study identifies the following "principles and norms":

a) preferential treatment for developing countries;

b) stabilization of export earning of these countries;

c) permanent sovereignty over natural resources;

---

19 See in: Resolutions adopted by the General Assembly during its thirtiest session, Supplement No. 34/A/10034/, page 78. For a fuller history of these developments see: ELIAS, T. O.: The United Nations and Law in Development. in: International Law at the Time of its Codification, Essays in honour of Roberto Ago, Milano, 1987, vol. II. p. 167

20 UN Doc. A/39/504/Add. 1. 23 Oct. 1984, Annex III.

d) right to benefit from science and technology;

e) entitlement of developing countries to assistance;

f) participatory equality of developing countries in international economic relations;

g) common heritage of mankind.[21]

It is apparent—the study states—that all these principles derive from and revolve around two of the most fundamental principles of international law, namely sovereign equality and the duty of States to co-operate with all others.[22]

The study explains that it uses the term "principle" to describe a norm of a general nature and scope. General principles, however, are rarely self-sufficient—it says—and have to be complemented by more specific norms and rules, to which they, in turn, provide a *rationale* and a direction.[23]

In the following the main points made by the UNITAR study are summarized and commented upon. In doing so a certain weight will be given to the views and comments coming from the world of the developed countries and particularly from those belonging to the so called Western and Others group. It is obvious that if the purpose of the endeavours of the General Assembly is to achieve tangible results, then the views of those States must be given particular attention.

While these views are sometimes couched in diplomatic language they do permit the conclusion that these States are not willing to enter into a general discussion and possibly into arrangements which can satisfy contrary interests.

Thus can be read a cautious comment of the United Kingdom made "on behalf of the European Community and its twelve member States" dated 22 August 1986.

"While the [UNITAR] study reveals a considerable measure of agreement within the international community on the nature of the problem and the action which is needed, it does not conceal the difficulties which have been encountered and the differences of opinion which have emerged. In general, it is a valuable survey which permits evaluation of the progress and gradual clarification of the principles and techniques of international economic co-operation."

True, the longish comments of the EEC come to the following conclusion: "... the UNITAR study offers an in-depth analysis of the evolution of international economic relations as reflected in the texts adopted in particular within the framework of the United Nations. In the above comments we have stressed the complexity of the issues involved and have indicated some of the areas in which we see particular difficulties. The Community and its member States therefore conclude that, following this comprehensive study, no further work appears to be called for."[24]

---

21 UNITAR study, par. 33

22 Ibid. par. 34

23 Ibid. par. 9–18

24 A/41/536, 15. Sept. 1986, par. 3 and 26 and see below: *The question of further procedure.*

The principle of preferential treatment for developing countries. If we accept—the UNITAR study explains—that the main purpose of the New International Economic Order (NIEO) is to re-equilibrate international economic relations ... the positive discrimination or preferential treatment would in one way or another be at the basis of all corrective actions. ... Thus all the principles which follow can be reduced, *in toto* or in part, to the principle of preferential treatment.[25]

The rationale of the principle is thus very general and capable of application to all rules of international law regulating international economic relations—the study asserts.[26]

The principle is enunciated in abstract and general language in article 19 of the Charter of Economic Rights and Duties of States which reads as follows: "With a view to accelerating the the economic growth of developing countries and bridging the economic gap between developed and developing countries, developed countries should grant generalized preferential, non-reciprocal and non-discriminatory treatment to developing countries in those fields of international economic co-operation where it may be feasible."[27]

To what extent can it be said that this concept of preferential treatment has crystallized in international law, at least in international trade law, particularly as reflected in the Generalized System of Preferences?—the study asks and replies as follows:

"The GSP is both preferential and non-reciprocal, thus fulfilling the substantive requirements of affirmative action. But it is neither general nor non-discriminatory. Indeed the developed countries could not agree on a single uniform system of preferences, so they went ahead with individual schemes... The result is that we do not have a generalized system, but a multiplicity of individual schemes which are not uniform in content and from which each preference-giving country or group of countries can exclude certain or certain categories of developing countries; and can, as well, modify or withdraw preferences in whole or in part being that they do not consider the grant of preferences as constituting a legally binding commitment."[28]

The GSP, the "enabling clause" and the necessity of further study. The quoted parts of the UNITAR study seem to be a correct analysis of the situation. They do not take full account, however, of the fact that the enumerated features of the system are part and parcel of the GSP, which was adopted as a matter of compromise between developed and developing States.[29]

---

25 UNITAR study par. 138

26 Ibid. par. 140

27 Ibid. par. 141

28 Ibid. par. 144

29 For a fuller analyses see: YUSUF, A.: Legal Aspects of Trade Preferences for Developing States, A study in the influence of development needs on the evolution of international law, Martinus Nijhoff, 1982.

The "Agreed Conclusions" reached in 1970 contain a detailed provision concerning the "Legal status" of the "tariff preferences to be accorded within the framework of the Generalized System of Preferences to the beneficiary countries by each preference giving country individually". According to this provision the legal status of the tariff preferences will be governed by the following considerations:

(a) The tariff preferences are temporary in nature;

(b) Their grant does not constitute a binding commitment and, in particular, it does not in any way prevent:

(i) Their subsequent withdrawal in whole or in part; or

(ii) The subsequent reduction of tariffs on a most-favoured-nation basis, whether unilaterally or following international tariff accommodations;

(c) Their grant is conditional upon the necessary waiver or waivers in respect of existing international obligations, in particular in the General Agreement on Tariffs and Trade."

Such a waiver was granted on 25 June 1970 under Article XXV:5 of the GATT.

In a further development on 28 November 1979 the Contracting Parties of the General Agreement in the framework of the Tokyo Round adopted by consensus a "Decision on differential and more favourable treatment, reciprocity and fuller participation of developing countries" what is now commonly known as the "enabling clause". The essence of this clause was summarized in a letter by the GATT Secretariat as follows: "... This decision allows GATT contracting parties to provide differential treatment in favour of developing countries in respect of: (a) tariff preferences accorded under the Generalized System of Preferences, (b) non-tariff measures governed by codes negotiated under GATT auspices, (c) tariff and, under certain conditions, non-tariff preferences granted to one another by developing countries in the framework of regional or global trade arrangements; and (d) special treatment of least developed countries. The decision requires that any action taken under it be designed to facilitate and promote the trade of developing countries and to respond positively to those countries' development, financial and trade needs. Arrangements providing for differential treatment of developing countries must not prevent the further reduction of trade barriers on a most-favoured-nation basis nor create obstacle to the trade of countries not parties to the arrangements. Differential treatment by way of GSP preferences or under codes regulating the use of non-tariff measures, can be modified to respond to the changing needs of developing countries. The decision establishes consultation procedures that may be used to deal with any difficulties arising from such modifications or from other aspects of the operation of arrangements covered by it..."

What kind of change does UNITAR envisage in respect of the GSP? This has not been made sufficiently clear for the reader. According to the UNITAR study the donor countries "evidently resist the advent of a horizontal institutional set-up (or general

system), where decisions are collective and based on purely objective criteria or considerations".[30]

Another complaint is that "the structural components required to transform the substance from the level of particular arrangements into a general norm or principle of the international law of cooperation" have not been generally accepted.[31] What is needed—according to the study—is "a self-sufficient normative proposition on the operational level" and further a "specific legal regulation is necessary in order to determine in each content, *inter alia,* the nature, scope and extent of the preferences, the conditions under which they are given, the preference-giving and receiving States, the procedures, and mechanisms for their administration."[32]

These ideas obviously need further study and elaboration.

In this connection the twelve member States of the European Community in their above mentioned comments point out *inter alia* that "...the enabling clause allows but does not oblige contracting parties to accord differential and more favourable treatment ...". And further: "... the Community, like other developed countries, views its scheme of generalized preferences as an autonomous arrangement, though this in no way prevents it taking part in talks at the United Nations Conference on Trade and Development about preferences or trying to improve the scheme to the greatest extent possible."[33]

Preferences for developing countries in the Law of the Sea Convention. While under the heading "The principle of preferential treatment" the UNITAR study does not deal with the numerous provisions of the 1982 United Nations Convention on the Law of the Sea (it does so later when it comes to discuss the principle that assistance has to be given to developing countries and to the principle of the common heritage of mankind), it might be instructive to quote some of these provisions as follows:

Article 140 of the Convention, under the heading "Benefit of mankind" provides that "activities in the Area (i.e. the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction) shall ... be carried out for the benefit of mankind as a whole ... taking into particular consideration the interests and needs of developing States and of peoples who have not yet attained full independence or other self-governing status recognized by the United Nations in accordance with General Assembly resolution 1514/XV/ and other relevant General Assembly resolutions."

Article 143 on "Marine scientific research" provides *inter alia* that "States Parties shall promote international co-operation in the Area by ... ensuring that programmes are developed ... for the benefit of developing States with a view to:

(i) strengthening their research capabilities;

---

30 UNITAR study, par. 145

31 UNITAR study, par. 146

32 UNITAR study, par. 147

33 A/41/536, 15. Sept. 1986, par. 18

(ii) training their personnel...;

(iii) fostering the employment of their qualified personnel in research in the Area;..."

Article 148 on "Participation of developing States in activities in the Area" provides that "The effective participation of developing States in activities in the Area shall be promoted ... having due regard to their special interests and needs..."

Article 150 on "Policies relating to activities in the Area" provides that "Activities in the Area shall ... be carried out in such a manner as ... to promote international co-operation for the over-all development of all countries, especially developing States, and with a view to ensuring:

(h) the protection of developing countries from adverse effects on their economies or on their export earnings resulting from a reduction in the price of an affected mineral, or in the volume of exports of that mineral..."

Article 152 on "Exercise of powers and functions by the Authority" provides that:

"1) The Authority shall avoid discrimination in the exercise of its powers and functions, including the granting of opportunities for activities in the Area.

2) Nevertheless, special consideration for developing States ... shall be permitted."

Similar and other types of preferences are given to developing States in a large number of other provisions of the Convention e.g. in Article 61 on the "Conservation of the living resources" [in the exclusive economic zone], in Article 62 on "Utilisation of the living resources" [in the same zone], in Article 119 on the "Conservation of the living resources of the high seas", in Art. 160. on the "Powers and functions of the Assembly (which none of the principal organs of the Authority), in Article 161 on the "Council" (another principal organ of the Authority), its "composition, procedure and voting", in Article 164 on the "Economic Planning Commission" (an organ of the Council), in Article 202 on "Scientific and technical assistance to developing States" [in the field of protection and preservation of the marine environment], and in Article 203, entitled: "Preferential treatment for developing States". This reads as follows: "Developing States shall, for the purposes of prevention, reduction and control of pollution of the marine environment or minimization of its effects, be granted preference by international organizations in:

a) the allocation of appropriate funds and technical assistance; and

b) the utilization of their specialized services."

The list of these provisions is not exhaustive.

The "soft law" character of these provisions. What is strikingly peculiar in the quoted provisions of the 1982 Law of the Sea Convention is the way of their drafting. They are intentionally not precisely worded and do not specify the exact obligations undertaken or the rights granted. The reason for drafting the quoted provisions in this way was evidently to ensure special favours for developing countries but combined with flexibility and freedom to manoeuvre according to the requirement of the given circumstances.

This kind of drafting is not uncommon in the realm of international law relating to development. A typical example is Part IV of the General Agreement on Tariffs and Trade entitled "Trade and Development". This text, notwithstanding its uncertain wording ("The developed contracting parties shall *to the fullest extent possible* ... give

effect ... etc.") provides a legal basis for systematic examinations of the trade problems of developing countries and the search for solutions to them. This kind of drafting—because couched in treaty form—is called by some writers "legal soft law" in contradistinction to non-binding or voluntary resolutions and codes of conduct, or guidelines formulated and accepted by international and regional organizations ("non-legal soft law")[34]

The principle of stabilization of export earnings of developing countries. The main points made in the UNITAR study are the following: International commodity markets are characterized by a high degree of instability i.m. frequency and wide margins of price fluctuations; the tendency for stocks to accumulate and for prices to collapse.[35]

After the second world war, the Havana Charter of 1947 developed the modern concept of commodity agreements, associating on an equal footing both producers and consumers...[36]

With the advent of UNCTAD in 1964, the main concern becomes the secular adverse movement of the terms of trade of commodities, which constitute the bulk of the exports of developing countries, against industrial goods, which constitute the bulk of their imports. In consequence, the aim of commodity agreements becomes not only the stabilization of commodity prices against short-term fluctuations, but their stabilization in the long run at a "remunerative and equitable" level compatible with the requirements of development.[37]

The Programme of Action on the Establishment of a NIEO provides:

Until satisfactory terms of trade are achieved for all developing countries, consideration should be given to alternative means, including improved compensatory financing schemes for meeting the development needs of the developing countries concerned.[38]

Two such schemes functioned at the time of the preparation of the UNITAR study, "one ... on interregional level within the Lomé Conventions between the EEC and the associated ACP countries; the other on a more general, or universal level, namely the Compensatory Financing Facility (CFF) established within the IMF in 1963. In addition several schemes were under study, the most important among these being UNCTAD's "Proposal for a Complementary Facility for Commodity Related Shortfalls in Export Earnings."[39]

---

34 CHINKIN, C. M.: The Challenge of Soft Law: Development and Change in International Law, in: 38 International and Comparative Law Quarterly, 1989, p. 851.

35 UNITAR study, par. 150

36 Ibid. par. 151

37 Ibid. par 152

38 G. A. res. 3202/S-VI/

39 UNITAR study, par. 156

Since the preparation of the UNITAR study, CFF has been replaced by the Compensatory and Contingency Facility (CCFF) in August 1988. This continues to provide resources to help countries meet shortfalls in export receipts and/or excesses in the cost of cereal imports, and can provide members pursuing Fund-supported adjustment programs with broader protection against adverse changes in external economic conditions.[40]

The facility is formally not limited to developing countries though in practice this is the case.[41]

Compensatory financing is thus a species of corrective remedial action, which applies after the fact, thus avoiding any tampering with the market forces. It merely purports to mitigate or alleviate the hardships these forces may cause.[42]

Can we speak of a principle of compensatory financing?—the study raises the question. The question is legitimate, indeed. The answer of the study is unable to go further than this:

"... in spite of the widening acceptance of the principle ... it does not constitute a selfcontained normative proposition. In merely defines the aim or objective and serves as a general framework which has to be filled in each context by a specific regulation providing for the conditions and modalities of the functioning of the particular scheme, including the institutions needed for its implementation."[43]

To this the comments of the European Community are worth quoting: "... the very fact that a number of compensation systems—differing in aims, methods and level of participation—exist, does not in the Community's view mean that there is a generalized desire to establish compulsory machinery..." And further: "... it would probably be a mistake ... to fix a be-all and end-all type of intervention which ... does not of itself sufficiently solve the basic problems facing developing countries in the field of commodities ... efforts must also be made to diversify output, increase productivity, and step up processing and marketing activities ... this more comprehensive flexible approach to commodity problems, with due attention paid to long term market trends, can promise an effective and lasting solution."[44]

Permanent sovereignty over natural resources. Quoting Jessup (A Modern Law of Nations, 1952, pp. 95-6) the study states: "This is an old question which was subject to much controversy and litigation between capital exporting and capital importing countries during the 19th and early 20th century. The outcome of these confrontations necessarily reflected the balance of power between these two categories of States."[45]

---

40 IMF Survey, August 1989, Supplement on the Fund. p. 11.

41 UNITAR study, par. 157

42 Ibid. par. 159

43 Ibid. par. 161

44 A/41/536, 15. Sept. 1986

45 UNITAR study, par. 52

In the era of the United Nations the General Assembly made it a point to situate the principle within the framework of general international law, declaring "that the right of people freely to use and exploit their natural resources is *inherent in their sovereignty* and is in accordance with the purposes and principles of the Charter of the United Nations".[46]

The Charter of Economic Rights and Duties formulates the general enunciation of the principle in Article 2, par. 1, as follows:

"Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities."[47]

Article 4 (e) of the Declaration on the Establishment of a New International Economic Order[48] is more specific in its articulation of the relationship between the natural resources, the economic activities relating to them and the exercise of permanent sovereignty: "In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation..." But it is the extent of this control and whether it is subject to any limitations imposed by international law, and if so which ones, that constitutes the crux of the matter.[49]

Both the provisions of General Assembly resolution 1803 of 1962 (paragraphs 2, 3, and 8) and those of the Charter of Economic Rights and Duties of States of 1974 [Article 2, paragraph 2 (a)] affirm the right of the State to regulate foreign investment according to its own economic objectives. Beyond that the Charter emphasizes the freedom of the State, by prescribing that it shall not be compelled to grant preferential treatment to foreign investment, while resolution 1803 of 1962 goes on to specify that once the State authorizes foreign capital, the investment will be governed by the terms of the authorization, national legislation and international law, and that agreements freely entered into should be observed in good faith.[50]

Nationalization is the breaking point in the relation between the State and the foreign investor. General Assembly resolution 1803 of 1962, in its paragraph 4, provides: "Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned,

---

46 G. A. res. 626/VII/, par. 56

47 UNITAR study, par. 57

48 G. A. res. 3201/S-VI/ of 1. May 1974

49 UNITAR study, par. 61

50 Ibid. par. 63

settlement of the dispute should be made through arbitration or international adjudication."[51]

The Charter of Economic Rights and Duties of States provides in Article 2, paragraph 2 (c): "Each State has the right: ... To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means."[52]

The study then analyzes these provisions from various points of view and deals with the problem of compensation. This is—according to the study—the most important and most controversial question in the practice of nationalization or the taking of foreign property.[53]

What is the meaning of the term "appropriate compensation"?—the study asks and admits that a generally accepted elucidation of that meaning might prove impossible.[54] In any event it is necessary to distinguish between "compensation" as an element of "lawful" nationalization and "reparation" for injury caused by a "delictual" or "illegal act" of nationalization.[55]

Invoking the maximalist claim of "prompt, adequate and effective" compensation on the one hand and the widespread practice of global settlement agreements amounting to partial compensation on the other,[56] the study concludes as follows: "... beyond the meaning that some compensation has to be paid (whose quantum would thus depend on the particular circumstances of each case) the normative content of the requirement of compensation is undeterminable for lack of sufficient consensus on a common understanding.[57]

On the settlement of disputes over compensation the study points out that the above quoted both texts prescribe recourse to and exhausting remedies provided by national jurisdiction and that recourse to international procedures is a pure matter of agreement and depends on the consent of the State or the States concerned.[58]

---

51 Ibid. par. 68

52 Ibid. par. 69

53 Ibid. par. 76

54 UNITAR study, par. 79

55 Ibid. par 80

56 Ibid. par. 88

57 Ibid. par. 92

58 Ibid. par. 94–95

Lastly the study refers to the passive obligation incumbent on all other States to respect the exercise of the right to permanent sovereignty i.e. not to interfere with, hinder or set obstacle to such exercise and *a fortiori* not to take reprisals (in the legal sense) by reason of it.[59]

It must be evident from these excerpts that the UNITAR study has no magic formula for a text which would solve all the problems related to the principle of permanent sovereignty over natural resources. This does, however, not detract from the usefulness of the study which may serve as a good basis for fruitful discussion and could lead to the adoption of a comprehensive consensus text on this matter. A consensus in this respect would be all the more desirable also from the point of view of the developing countries, as a too rigid attitude on their part would hurt their own interest if it hindered the influx of foreign investments.

The principle of the right to benefit from science and technology. The Declaration on the Establishment of a New International Economic Order provides as one of its principles: "Giving to the developing countries access to the achievements of modern science and technology and promoting the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies."[60]

The Programme of Action on the Establishment of a New International Economic Order provides in its Part IV, entitled "Transfer of Technology" as follows:
"All efforts should be made:

(a) To formulate an international code of conduct for the transfer of technology corresponding to needs and conditions prevalent in developing countries;

(b) To give access on improved terms to modern technology and to adapt that technology, as appropriate, to specific economic, social and ecological conditions and varying stages of development in developing countries;

(c) To expand significantly the assistance from developed to developing countries in research and development Programmes and in the creation of suitable indigenous technology... etc."[61]

The Charter of Economic Rights and Duties contains the following general statement:

"Every State has the right to benefit from the advances and developments in science and technology for the acceleration of its economic and social development."[62]

The UNITAR study refers to two on-going negotiations where efforts are made at concretizing the principle by elaborating a more specific international regulation. These are: the United Nations Conference on an International Code of Conduct on the Transfer of Technology and the seventh revision of the Paris Convention for the Protection of Industrial Property.

---

59 Ibid. par. 96

60 G. A. res. 3201/S-VI/ par. 4

61 G. A. res. 3202/S-VI/

62 G. A. res. 3281/XXXIX/ Art. 13, par. 1

The difficulties facing these negotiations are substantial. They are increased by the fact that most of the technology sought by developing countries is patented and the patent holders are in most cases private persons or corporations.[63]

(On the western view concerning this principle see below the comments of the European Economic Community relating to the principle of entitlement of developing countries to development assistance.)

Not mentioned in the UNITAR study are several provisions of the 1982 United Nations Convention on the Law of the Sea which provide for the transfer of technology to developing States. Thus Part XI, Section 2 of the Convention dealing with the "Principles governing the Area" contains Article 144 entitled "Transfer of technology" providing as follows:

"1. The Authority shall take measures in accordance with this Convention: ...

b) to promote and encourage the transfer to developing States to such technology and scientific knowledge so that all States Parties benefit therefrom.

"2. To this end the Authority and States Parties shall co-operate... In particular they shall initiate and promote:

a) programmes for the transfer of technology to the Enterprise and to developing States with regard to activities in the Area, including, *inter alia,* facilitating the access of the Enterprise and of developing States to the relevant technology, under fair and reasonable terms and conditions;

b) measures directed towards the advancement of the technology of the Enterprise and the domestic technology of developing States, particularly by providing opportunities to personnel from the Enterprise and from developing States for training in marine science and technology and for their full participation in activities in the Area."

Part XIV of the Convention is entitled: "Development and transfer of marine technology. Within this Part of the Convention Article 266 on "Promotion of the development and transfer of marine technology", Article 268 on "Basic objectives", Article 270 on "Ways and means of international co-operation", Article 272 on "Cooperation of international programmes", Article 273 on "Co-operation with international organizations and the Authority", Article 274 on "Objectives of the Authority" and Article 276 on "Establisment of regional centers" deal with various aspects of transfer of technology to developing States and their nationals.

It is apparent that these provisions of the 1982 Law of the Sea Convention are of the same "legal soft law" character as demonstrated above with respect to other provisions of the Convention granting preferential treatment for developing countries.

The principle of entitlement of developing countries to development assistance. Although—this is the starting point of the UNITAR study with respect to this principle—each developed country devotes a certain amount of resources each year to development assistance, and each developing country receives every year from diverse

63 UNITAR study, par. 166–170

sources a certain amount of assistance and may rely on it, it is not legally possible yet to assert that there is a legal obligation resting on the former with a corresponding right in favour of the latter.[64]

Efforts at specifying the content of the principle all build on Articles 55 and 56 of the Charter of the United Nations. The former directs the Organization to promote "higher standards of living, full employment, and conditions of economic and social progress and development". The latter clause provides significantly that: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."

In 1960, at the beginning of the United Nations (First) Development Decade, the General Assembly adopted Resolution 1522 /XV/, entitled "Accelerated flow of capital and technical assistance to the developing countries" in which it "expresses the hope that the flow of international assistance and capital should be increased substantially so as to reach as soon as possible approximately 1 per cent of the combined national incomes of the economically advanced countries..."[65]

By 1970 the G. A. resolution on the International Development Strategy for the Second United Nations Development Decade (res. 2626 /XXV/) expressed the hope that (as a sub-target) "each economically advanced country will exert its best efforts that 70 per cent of this 1 per cent should be in official development assistance (ODA) and that the conditions of assistance should be improved (terms softened, financial aid unencumbered or without strings, etc."[66]

In fact, however, for almost two decades now, development assistance has been moving away from, rather than towards, these targets, especially the target of 1 per cent of the gross national product in assistance.

Developed countries particularly resist the claim for the progressive increase of the proportion of assistance flowing through multilateral channels and procedures, i.e. for increasing institutionalization. Indeed, most development assistance is by nature subjective and is always based on a consideration, strategic, political, economic, or other.

Institutionalization would make it possible to treat development assistance legally as a right or entitlement of developing countries vis-à-vis the international community at large.[67] To this the observation can be made that "institutionalizing" of development assistance is very close to the idea of a "Global development tax on international trade" which would constitute "a promising new source of international finance for developing

64 Ibid. par. 179

65 Ibid. par. 181

66 Ibid. par. 182

67 Ibid. par. 186–188

countries."[68] The idea of another type of tax was put forward by Judge Bedjaoui, namely 1 per cent on military budgets.[69]

One cannot but concur with the remark made in the UNITAR study that "such proposals remain for the time being politically moot" and that "we cannot count [on the establishment of an income tax] in the foreseeable future".

There is, however, one instance which in the future may open a direct and autonomous source of assistance for developing countries. This is the United Nations Law of the Sea Convention of 1982. This proclaims the "International Area" of the sea-bed (that lying beyond national jurisdiction) "and its resources ... the common heritage of mankind" (Article 136), and establishes an international institution, the International Seabed Authority, to regulate and administer the exploitation of these resources (Articles 156–158). This exploitation can take place either directly by the Authority through its operational arm, the "Enterprise" (article 170), or indirectly through the granting of licenses to public or private enterprises against a fee and a proportion of their net proceeds (Annex III). The revenues are to be distributed on a "non-discriminatory basis" (article 140, par. 2), according to a formula that will take "into particular consideration the interests and needs of developing States..." [article 160 (f-i)].[70]

Apart from this unique example it can be said that the need for massive financing is generally recognized, and the development assistance from developed countries, though insufficient, continues to flow. But what is missing from a normative point of view is the legal and institutional framework of relating the one to the other—concludes the study of UNITAR.[71]

On this principle the comments of the European Community can be summarized as follows—and these comments apply *mutatis mutandis* also to the principle of the right of developing countries to the benefits from science and technology: "... The flow of external resources is generally held to be an indispensable element of support for the developing countries' own efforts. Aid targets have been set out in a number of internationally endorsed texts... Most developed countries have an aid heading in their budget... The Community and its member States devote considerable sums to aid... Can we speak of a 'right to aid'? There [is] certainly a presumption ... that aid is necessary ... to that extent it may be legitimate to speak of 'expectations' ... but not 'right' in the strict sense of the word..."[72]

The principle of participatory equality of developing countries in international relations (full and effective participation in international economic decisions). The Declaration on the Establishment of a New International Economic Order provides, in

68 Ibid. par. 193

69 BEDJAOUI, M.: Propos libres sur le droit au développement, in: Etudes en l'honneur de Roberto Ago, vol. II. p. 42 in fine

70 UNITAR study par. 190

71 Ibid. par. 194

72 A/41/536, 15 Sept. page 16, par. 12–13

article 4 (c) as one of the principles on whose full respect the NIEO should be founded: "Full and effective participation on the basis of equality of all countries in the solving of world countries..."[73]

Similarly, Article 10 of the Charter of Economic Rights and Duties of States provides: "All States are juridically equal, and as equal members of the international community, have the right to participate fully and effectively in the international decision-making process in the solution of world economic, financial and monetary problems, *inter alia,* through the appropriate international organizations in accordance with their existing and evolving rules, and to share equitably in the benefits resulting therefrom."[74]

Both resolutions speak of "full and effective participation" but neither instrument specifies the modalities of such participation, i.e. whether it necessarily implies "equal participation" in the sense of equal weight in the decision-making process.

It is significant that Article 10, when referring to "the appropriate international organizations" (those "through" which *"inter alia"* this principle is to be applied), takes care to add: "in accordance with their existing and evolving rules." In other words, the claim is not for a revolutionary normative proposition overriding existing instruments, but for an evolutionary one, which would work itself out through these arrangements towards the attainment of the objective it sets for them.

The real problem is with the existing rules of the Bretton-Woods institutions, which adopt a weighted voting formula and that gives the Western States a comfortable majority.

The major economic decision in the international monetary field in recent years (if not since the creation of the Fund), namely the severance of the link between the United States dollar and gold in 1971, was taken unilaterally by one State, though it has profoundly affected and changed the international monetary system, including the IMF, and greatly eroded the monetary reserves of the developing countries.

What is called for—the study concludes—in a more balanced "power-sharing" formula at the decision-making level which would not reflect exclusively either economic power or the sheer weight of members, but would accomodate or take into account, i.e. associate and aggregate, all the interests present. Thus while taking into account "economic power", it would give developing countries a greater say in the process and would allow them to bear more substantially on it, where the process particularly affects and conditions their situation.[75]

One may be permitted to observe in this connection that the transformation of the cited ideas of the UNITAR study into reality will undoubtedly need a large measure of bold imagination and political skill.

---

73 Res. 3201/S-VI.

74 Res. 3281/XXIX/

75 UNITAR study par. 108-118

The principle of common heritage of mankind. This is a relatively new principle—the study states—having come to prominence in the process leading to the adoption of the United Nations Convention on the Law of the Sea of 1982–as was briefly described above in the context of the principle of entitlement of developing countries to development assistance.

The main elements of this principle were expressed already by the Charter of Economic Rights and Duties of States whose Article 29 provides as follows:

"The sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as the resources of the area, are the common heritage of mankind. On the basis of the principles adopted by the General Assembly in resolution 2749 /XXV/ of 17 December 1970, all States shall ensure that the exploration of the area and exploitation of its resources are carried out exclusively for peaceful purposes and that the benefits derived therefrom are shared equitably by all States, taking into account the particular interests and needs of developing countries; an international regime applying international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon."

While it is commonly known that the system as adopted by the 1982 Convention on the Law of the Sea did not enter yet into force, the study finds it important to note that the developed countries which did not sign the Law of the Sea Convention and which have adopted national legislation permitting enterprises within their jurisdiction unilaterally to explore and exploit the resources of the "international area" without submitting to the regulatory and institutional regime of the Convention, have provided for earmarking of the proceeds for assistance purposes. They thus recognize the existence of an obligation in this regard, or accept the "common heritage" principle in its equitable sharing of benefits component, though they do not yet accept its regulatory and institutional, i.e. structural dimension—concludes the study on a rather optimistic note.[76]

There is another sphere where the "common heritage" principle has gained ground, namely outer space.

In a general way the principle has been declared in the 1963 General Assembly Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (Res. 1962/XVIII) ("The exploration and use of outer space shall be carried on for the benefit and in the interest of all mankind").

Similarly in the 1867 Treaty on Principles Governing the Activities of States in the Exploration and use of Outer Space, including the Moon and other Celestial Bodies. ("The exploration and use of outer space, including the Moon and other celestial bodies shall be carried out for the benefit and in the interest of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.") Lastly the Agreement Governing the Activities of States on the Moon and

76 Ibid. par. 204

other Celestial Bodies, adopted by the General Assembly on 5 December 1979 provides as follows:

"Article 11. Par. 1. The Moon and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this Agreement, in particular in paragraph 5 of this article... Par. 5. States Parties to this Agreement hereby undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the Moon as such exploitation is about to become feasible..." (Annex to G. A. resolution 34/68).

Can this principle find further specific application beyond the two spacial areas already declared "common heritage of mankind", namely the sea-bed beyond national jurisdiction and outer space?—the study raises the question and holds that the proclamation as common heritage of mankind of these areas was made politically feasible by the fact that no appropriation claims were asserted over them. Optimistic is about the future Castaneda, who writes as follows: "Le régime de la Convention [sur le droit de la mer], dont nous espérons qu'il deviendra une réalité, aura pour effet d'attribuer la propriété des ressources des fonds marins, pour la première fois, à l'ensemble de l'humanité, tout au moins en ce qui concerne leur exploitation et leur administration équitable. L'humanité jouira d'un patrimoine propre, différent du patrimoine de ses composants. L'organisation chargée de l'exploitation de ces ressources représentera l'ensemble de l'humanité dans la défense de ses intérêts. Ainsi est crée, en conséquence, une nouvelle forme de personnalité juridique internationale pour l'humanité. Il y aura, en définitif, une entité, il est vrai que partielle, mais reconnue juridiquement, pour la protection d'une propriété identifiée comme étant la sienne propre. Elle créera des organes qui agiront en son nom et veilleront sur ses intérêts. Cette conception nouvelle et revolutionnaire est riche en possibilités futures.

En fait le principe révolutionnaire du 'patrimoine commun de l'humanité' aidera les peuples à surmonter les barrières qui les séparent et à comprendre que leurs interêts convergent fréquemment au-delà des frontlères."[77]

In the world of utopia leads us the idea of judge Bedjaoui who in his highly interesting article writes as follows: "On jugera sans doute utopique la proposition que nous faisons à cette occasion de considérer toutes les *'ressources alimentaires mondiales essentielles'* dont les peuples ont besoin, comme appartenant à l'ensemble du genre humain. Elles doivent être déclarées 'patrimoine commun de l'humanité'. Utopie aujourd'hui en ces temps crus. Mais il est dangereux d'enfermer quatre milliards d'hommes dans ce qu'on ramène trop commodément à des incantations exaltées."[78]

Right to development-one of the principles of human rights law. After several years of committee-work, the International Law Association adopted at its Seoul session in 1986 a *Declaration on the Progressive Development of Principles of Public International*

77 CASTANEDA, J.: La conférence des Nations Unies sur le droit de la mer et l'avenir de la diplomatie multilaterale, in: Etudes en l'honneur de Roberto Ago, Milano, 1987, vol II. p. 84

78 BEDJAOUI: Op. cit. p. 42

Law relating to a New International Economic Order. At the time of the adoption of that Declaration the Association was informed of the UNITAR analytical study for which it "expressed great appreciation" and, indeed, heavily relied on it. The Declaration identified beyond the seven principles set out in the UNITAR study (giving them partly different names) five more. These are as follows: The Rule of Public International Law in International Economic Relations, Pacta sunt servanda, The Duty to Co-operate for Global Development, The Right to Development, The Principle of Peaceful Settlement of Disputes.

From among these the principle of the right to development needs some comments. The Declaration explains briefly that "the right to development is a principle of public international law in general and of human rights law in particular and is based on the right of self-determination of peoples". The next two paragraphs state that both individuals and peoples have a right to development.

This is in conformity with General Assembly resolution 34/46 of 23 November 1979 which declares that the right to development is a human right and with Article 1 of both Human Rights Covenants which declare that one of the attributes of the right of the peoples to self-determination consists in the free pursuit of their "economic, social and cultural development".

It was after the adoption by the ILA of the Seoul Declaration in August 1986 that the General Assembly adopted resolution 41/128 of 4 December 1986 proclaiming the Declaration on the Right to Development. 146 States voted for, one (US) against the resolution and only eight delegations abstained from voting.

The cornerstone of the Declaration is paragraph (1) of the first article stating:

"The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

One of the preambular paragraphs states that "the efforts to protect human rights on the international level should be accompanied by efforts to establish a new international economic order."

On the "right to development" the UNITAR study states in its conclusions that "such a right is not just necessary for equitable and harmonious global development and the fulfilment of the ideals of justice and equality of the Charter of the United Nations. More concretely it is a *conditio sine qua non* for the full realization of the economic, social and cultural rights of the individual, which together with civil and political rights make up what is known as internationally recognized human rights..."[79]

What is the status of the principles in International Economic Development Law? One of the preambular paragraphs of the Declaration adopted at Seoul explicitly acknowledges that the Declaration includes "principles in the sense of generally recognized legal principles as well as others that need acceptance by treaty or as

79 UNITAR study, par. 214

customary international law in order to obtain binding force." This text of the Declaration was critized on the ground that it failed to distinguish with sufficient clarity between the provisions which were to be regarded as falling within the category of generally recognized principles and those which were not.[80]

No such problem arises in connection with the analytical study of UNITAR that holds of the status of the principles as follows:

"The New International Economic Order consists of a bundle of economic objectives and policy measures which can be classified in a few clusters, each addressing itself to a major area in North-South economic relations..."

"NIEO is meant to be a blueprint for the international community (what the French call "un project de société')..."

"NIEO cannot be brought about at once by a single decision or act ... it would be a long progressive process to have it translated from 'law on the book' to 'living law'."

"In the present conditions of the international community, NIEO can only be realized progressively through a multitude of negotiations in various fora and through the behaviour and practice of States and other international economic agents."[81]

All this sounds rather like a programme and thus largely coincides with the conclusions of Seidl-Hohenveldern, who in his Hague lectures bluntly explains—if not always fully supports—the northern position in the North-South dialogue.

Audiatur et altera pars. The New International Economic Order as proclaimed by the General Assembly and other international organs is not yet part of contemporary international economic law—at least in its entirety. Exceptions are Part IV of the GATT in general and GSP in particular, being part of "living international law", says Seidl-Hohenveldern.[82]

According to the same author the principles and rules of the New International Order have been embodied in the various resolutions because the States of the Third World dispose of comfortable voting majorities in most world-wide organizations. However, these principles and rules are not accepted by the industrialized market-economy countries, which still dominate world-wide economic relations. Hence the manifestations of the resolutions differ greatly from the rules actually applied.

And further: No one would deny to a sovereign State the right to develop by its own force as it sees fit. However a corresponding duty to development assistance is only of a moral character and exist legally only insofar as special commitments have been entered to such effect. The International Court of Justice can be quoted as having held that the giving of aid is "more of a unilateral and voluntary nature" (Judgement of 27 June 1986, Nicaragua v. USA, Merits, ICJ reports 1986, p. 138, par. 245).

---

80 FREELAND, Sir J.: Report of the Sixty-second Conference of the International Law Association held at Seoul, August 24 to 30, 1986, p. 477

81 UNITAR study, par. 2-7

82 Recueil des Cours, vol. 198, p. 26

Summarizing obviously the extreme position of the "Western and Others" group the argument goes on:

"The North, in principle, agrees to support the quest for development of developing countries. It does so without recognizing any legal obligation, but out of a spirit of world-wide solidarity. The North thus hopes to stave off the danger of a world-wide rebellion of the poor agaist the rich States. Yet, in the mind of the North, such solidarity can be no one-way street. The North tends to make its assistance dependent on the South granting the North access to coveted raw materials and on the political alignment of the Southern States, often accompanied by some camouflage phraseology of "aid without ties". At least, when granting assistance, Northern States will require the receiving countries they assist to increase the efficiency of the aid grants by measures to be adopted by them in the field, e.g. of family planning and agrarian reform, or by cuts in military expenditures."

The distinguished author hastens to add that "such open or implied conditions attached to Northern grants of development aid are bitterly resented by the recipient States. Even where the elites in the newly independent countries basically agree on the necessity of these measures they resent such paternalistic intervention in their domestic affairs."[83]

Unanimity in principle—compelling need for action. "One would have to be a moral defective not to recoil at the persistence of grinding poverty and the dreadful social conditions under which so many of our species live." These are the words of Prof. M. Reisman from Yale [84] and who would not agree with him? "Poverty anywhere constitutes danger to prosperity everywhere" remind us P. H. Pareekh from New Delhi.[85] "The existing inequalities are revolting in more than one sense of the word: they are shocking and prone to lead to revolutions" warns Prof. Seidl-Hohenveldern from Austria.[86]

A considerable amount of ingenuity will be necessary to change this sad state of affairs and for that purpose—among many other things—creation of a new law of economic development is needed.

As stated in the report quoted in the introduction to this paper the new law of economic development appeals to a very old and inherent concept of all law, namely the concept of justice.

However old this concept, it is firmly anchored in the determination expressed in the Preamble of the Charter "to establish conditions under which justice ... can be maintained" and "to promote social progress and better standards of life in larger freedom".

---

83 Ibid. p. 27

84 Report of the fifty-ninth ILA Conference held at Belgrade, 1980, page 298

85 Report of the sixty-second ILA Conference, Seoul, p. 478

86 Op. cit. Recueil des Cours, vol. 198. p. 30

Justice demands concerted action by the rich States and also by the poor ones which—let us not forget that principle—bear primary responsibility for their own development as stressed in the Charter of Algiers and in the resolution on International Development Strategy for the Second United Nations Development Decade.[87] Steps toward economic planning on a worldwide scale will probably be needed.[88]

"The real difficulty concerns the further lawmaking process—we are told by an eminent teacher of international law—its growth at a speed commensurate to the urgent needs of those most concerned. The profound crisis, the risk of catastrophy call for mutual comprehension and agreement, decisive action and change, enshrined by law, so that it can be effective and, indeed, usher us into a new era of economic co-operation and new quality of life for the great majority of mankind."[89]

The "further law-making process" has not been moving forward up till now at a particular speed. Still the milder international political climate, the seemingly better chances for effective disarmament—which may release funds—improve the prospects. Last not least, General Assembly resolution 44/30 of 4. Dec. 1989, envisaging the creation of "an appropriate forum within the framework of the Sixth Committee" for the purpose of the elaboration of the principles and norms relating to the new international economic order, augurs well for progress.

The question of further procedure. The summary records of the Sixth Committee reveal that the group of "Western and Other" States is not altogether happy with the terms of the above quoted G. A. resolution 44/30 of 4 December 1989 because it envisages the continuation of the work begun. While these States did not oppose the adoption of the said resolution, their abstention was seemingly nothing more than a nice way of saying no.

According to the records the delegate of France in the name of the twelve States of the EEC said on 11 October 1989 that "they did not believe that the time had come for the codification of law in the field under consideration. A prerequisite for the codification of that law was that there should be a certain amount of agreement among the members of the international community on what principles and norms would be acceptable. There was, however, no such agreement as yet. International economic co-operation was constantly evolving and any initiatives that might artificially bring that process to a halt should be avoided."[90]

The statement made by the representative of the United States on 21 November has been recorded as follows: "... serious consideration [should] be given to the possibility of putting an end to further deliberations on the item. Since there was no point in

87 G. A. res. 2626/XXV/, A/11

88 Op. cit. at note 1, p. 104

89 LACHS, M.: The Development and General Trends of International Law in Our Time, Hague Receuil, 1980, IV. vol. 169, page 100

90 A/C.6/44/SR.16, par. 9

discussing draft resolutions on an item which created divisions. The divergent views and the interests and concerns of States should be reconciled and a consensus should be achieved before principles and norms were formulated which were not sanctioned by international custom or practices."[91]

To these objections the developing States could reply that it was certainly not fortunate to employ the expression "codification" in the text of a resolution entitled: "Progressive development of principles ... etc." It was mostly not codification they were aimed at. Their purpose was "progressive development of international law" in the sense as defined in the Statute of the International Law Commission namely "preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not been sufficiently developed in the practice of States". That means in plain language that the developing countries think of creating completely new law based on the study of UNITAR and on compromise texts to be agreed upon in the course of negotiations where mutual concessions are made and ultimately consensus is reached.

The negotiators will also have to agree on the form to be given to these texts; they will have to choose the treaty form or any other and to decide whether they wish to establish hard and fast rights and obligations or "softer" commitments and corresponding rights—following *inter alia* the example of Part IV of the GATT or the numerous provisions of the 1982 Law of the Sea Convention, e.g. those referred to earlier in this paper.

If the representatives of the States participating in the negotiations make use of their freedom, act in good faith and employ their bold imagination, then it can be hoped that their efforts will bring fruit—during the 90s, the years of the "decade of international law".

91 A/C.6/44/SR.44. par. 86

Acta Juridica Hungarica
1991 33 N° 1–2 pp. 107–111

Akadémiai Kiadó,
Budapest

KALEIDOSCOPE

Raising Rights Consciousness

Report on the 1991 Workshop

For the four weeks of June 1991 a group of 23 specially selected English-speaking lawyers from the emerging democracies of Eastern Europe met in Budapest, Hungary, for an intensive four-week workshop on the foundations of Western jurisprudence. The participants represented Albania (one lawyer from Tirana), Bulgaria (three from Sofia), the Czech and Slovak Federated Republic (one from Brno, one from Bratislava), Estonia (one each from Tallinn and Tartu), Hungary (four from Budapest), Lithuania (one from Vilnius), Poland (two from Warsaw, one from Cracow), Romania (three from Bucharest, one from Satu Mare) and Yugoslavia (one each from Novi Sad, Belgrade, and Skopje).

As we learned during the banquet opening the workshop on June 3, the Albanian expression for "cheers" is "Gsoor". Thereafter toasts were frequently heard, and of course we relied upon this salutation from the latest country in the region to break away from single party rule.

The sponsors and organizers of the workshop were the Democracy after Communism (DAC) Foundation in Budapest, Katalin Koncz, Director, and the Center for Law and Democracy at the Columbia Law School in New York City, George P. Fletcher, Director. All participants received room, board, and travel expenses. Funding came from the National Endowment for Democracy and the German Marshall Fund, both in Washington, D.C.

The faculty consisted of eleven distinguished professors from the United Sates and Europe plus eight guest lecturers representing the best of the Hungarian legal and political community. The faculty prepared case law, textual and statutory materials in advance, which were reproduced as a series of coursebooks at the Columbia Law School and then transported to Hungary. The on-the-ground organization by DAC was

impeccable. All participants were met at the train station and airport. The logistics of the entire month proceeded without a hitch.

The first week of the workshop focussed on constitutional and human rights. Professor Charles Fried from the Harvard Law School offered four extended seminars as an introduction to civil liberties under the United States Constitution. Among his themes were the currently controversial issues of abortion and flag burning. His seminars introduced the Eastern Europeans to the socratic method as traditionally used in American law schools, and the students proved adapt at responding to Professor Fried's probing questions. An Estonian showed how quickly he had mastered the intricacies of the Bill of Rights. In response to Professor Fried pressing the students from a textual justification for the right to sexual privacy, the newcomer to the U.S. Constitution suggested that the foundation for the right lies in the first amendment's guarantee of peaceable assembly. With this witty beginning, the students continued to be adroit interpreters of the constitutional text.

Professor Cole Durham from the Brigham Young Law School offered a daily course for first two weeks on the relationship of Church and State under the Constitution. The questions posed under the establishment clause proved to be of lesser relevance to the participants, for their countries regard the governmental funding of religious schools as proper and legitimate. Yet the free exercise question posed in cases like Yoder (whether the Amish sect must send their teenage children to public schools) engaged the interest of everyone. On the whole, however, the participants showed themselves reluctant to recognize religious convictions as a basis for special exemptions from laws of general application.

Parallel to these courses on American constitutional rights, Professor Guy Haarscher from the Free University of Brussels offered a course on the European Convention on Human Rights against the background of a general theory on the categories and development of human rights. The Convention was of utmost practcal relevance to the participants; in Hungary, Poland, in the Czech and Slovak Federated Republic, and presumably in the rest of the region as well, the Convention will soon be enforcable law. The juxtaposition of the European Convention with the American Bill of Rights stimulated interest and demonstrated the value of comparative legal analysis.

Professor Haarscher typically taught at 9:30 A.M. and his hour came to be known as *l'heure francaise.* His lectures flowed in impeccable English, but at meals and during breaks the francophones in the group, mostly from Romania, delighted in having a French-speaking colleague. Haarscher's successor in *l'heure francaise* was multi-lingual Professor Michel Rosenfeld from Cardozo Law School in New York, who beginning in the second week of the workshop, offered a course on the subject of his expertise: equal protection and affirmative action. In response to Rosenfeld's socratic style, the participants quickly mastered the intricacies of the American case law. They began using the terms "strict scrutiny" and "rational relation test" as though the same analysis were indigenous in their home legal systems. Admittedly, affirmative action was an innovative

idea for them, and this as well as other recurrent themes directed attention to the explosive minority issues in Eastern Europe.

With Professor Sajo's short course on environment law, the focus shifted slightly from human rights to more general policy issues troubling the region. No answers emerged from the seminars on environmental policies, but the participants became sensitive to the range of market and non-market devices that might be used in cleaning up the befouled environmental legacy of socialist state economies.

Professor Kent Greenawalt arrived at the beginning of the third week and offered a series of three seminars on the jurisprudential issues raised by his forthcoming book "Law and Objectivity". The seminar introduced the Eastern European to current disputes in American jurisprudence, including the perennial question whether legal rules entail unequivocal answers. The participants proved to be as adept as American lawyers in their employing legal imagination to search out ambiguities and find a way around language that appears, at first glance, to be clear. A seminar on feminist jurisprudence generated a spirited debate among the lawyers, approximately half of whom were women, about the impact of Communist rule on the family and the status of women.

The last two weeks of the course shifted attention away from constitutional law to the private law of property and torts in a market economy. Professor Michael Moore from the University of Pennsylvania offered a series of lectures of the foundations of property law. A centerpiece in his argument was a recent California case resulting from University doctor's removing the plaintiff's cancerous spleen and, without informing the plaintiff, using the spleen tissue to develop a patentable cell line from the spleen tissue that turned out to have a multi-billion dollar commercial value. As it happened, on the day of this lecture we received a visiting delegation of American judges, including Chief Justice Malcolm Lucas of the California Supreme Court, who had joined in an opinion holding that the patient did not have a property right to his spleen after it was separated from his body. With Chief Justice Lucas sitting in the back of the seminar room, Professor Moore engaged in systematic dissection and critique of the Court's opinion.

This exercise, as well as the professors' participating in each other's lectures, yielded one of the most valuable lessons of the workshop. Used to an authoritarian system both of government and university education, the Eastern European participants were surprised to find professors publicly criticizing judges and even more significantly, professors challenging the legal arguments presented in their colleagues' lectures. Observing that no one felt insulted by the jury system as superior to a trial dominated by a professional judge, he encountered stiff resistance from Hungarian, Slovak and Polish lawyers.

In addition, in the area of private law, Professor Heidi Hurd from the University of Pennsylvania offered a course on the theoretical foundations of liability for causing physical injury. Her leading case was a famous California opinion on the legal consequences of a coke bottle's exploding in a waitress's hands. The next day Hurd found a coke bottle on the lectern, together with as sign reading "Danger". Though they had presumably never been exposed t o the rich literature on tort theory in the

United States, the participants greeted this systematic and principled approach with enthusiasm. On the basis of their study of socialist codes, the basic concepts of fault, causation and risk analysis seemed familiar to them. At the end of their two courses, Moore and Hurd joined forces in a joint seminar on the economic analysis of property and tort law.

In counterpoint to the analysis of private legal relations, Professor Sanford Levinson presented a series of seminars on the foundations of the welfare state. He began with a case in which the state was not liable to a young boy who suffered permanent damage from child abuse; though the beating could have been avoided if the social worker in charge had been more attentive, the Supreme Court held that the state owed nothing to the boy. This case became a metaphor for the official indifference to second generation human rights–rights against the state to a minimal level of welfare. Professor Levinson correctly anticipated post–Communist resistance to the idea of a welfare state and therefore sought to challenge converts to the market system with a more traditional socialist perspective. As one student put in her anonymous evaluation of Levinson's teaching: "Very interesting to see a man with such views from the United States".

A large number of participants had a strong interest in criminal law and therefore were pleased by Professor Fletcher's introducing lectures on the trial of Bernhard Goetz. Each participant received a paperback copy of Fletcher's book about the case, 'A Crime of Self–Defense". Professor Fletcher conducted discussions on the theories and evidentiary issues raised by the Goetz case and Professor Meir Dan-Cohen from Berkeley began a series of lectures on the theoretical structure underlying the norms of the criminal law. His view that many doctrines in the criminal law can be analyzed as the interplay of decision rules directed to judges and conduct rules directed to citizens struck a responsive chord; most participants were disappointed that more time could not be spent on the theoretical issues raised by the criminal law.

In the last week of the seminar the participants were exposed to two simulated trial experiences. A group of state and federal judges, including Malcolm Lucas, came from California to demonstrate a jury trial. Five of the participants appeared as witnesses (on the basis of materials distributed in advance) and twelve served as jurors. The trial posed problems of witness credibility and evidentiary sufficiency. At the end of the day, the jury was hung, ten votes for guilt and two for innocence.

The following day the entire class saw the actual two-hour videotaped confession in the Goetz and then four of the more active students conducted oral argument. A Croatian legal advisor and an Estonian professor took the prosecution, and a young Hungarian specialist in criminal law and a lawyer of Tallinn shared the duties of the defense. Twelve members of the class constituted the jury and voted on the charge of attempted murder. The first vote was to eight for guilt, four for innocence—not much different from the first polling of the jury in the actual case.

In addition to these lectures, the group enjoyed guest presentations on various topics ranging from economic development to the politics of the Hungarian Constitutional Court. All of this, taken together, generated a very heavy workload. The participants

spent an average of five to six hours a day in session. From the level of participation and sophistication, it seemed obvious that most of the participants devoted several hours every day to preparation. None of the 23 fellowship recipients took a casual attitude toward the program.

There were several reasons that morale and commitment remained high. First, the accommodations were, on the whole, comfortable and conducive to serious study. The first week was spent in at the Panorama Hotel in the hills above Budapest, where the faculty and students had occasion to become acquainted at the swimming pool. For the second and third weeks, we retired to the Savoy Castle in Ráckeve on the Danube, about an hour by train south of Budapest. The castle provided a remarkably friendly and uplifting environment. There were no distractions, no amusements, but the setting of this refurbished, early 18th-century palace created the perfect framework for study and reflection. Admittedly, the delicious cuisine kept spirits high and on more than one occasion students and teachers were espied, after hours, dancing to the mind-clearing beat of local musicians.

By the end of the third week, the pace had worn down even the most enthusiastic students, and therefore a weekend respite in the Mátra mountains was well appreciated. We returned to the Buda hills for the final week of intensive work.

The most remarkable feature of the workshop was that the sessions were sufficiently interesting for the teachers to attend and contribute to each other's classes. They thereby raised the general tone of the workshop and, as mentioned above, their interventions demonstrated that figures of authority may disagree with each other. The discussions at meals were no less important. By spending time chatting and engaging in serious discussion with the participants, the teachers demonstrated respect for their Eastern European colleagues. At no time did the Eastern Europeans express the feeling that the Westerners had come to teach them "what law was all about". The student participants were treated as responsible lawyers and they responded by working hard and committing themselves to a serious intellectual exchange.

George P. FLETCHER

Acta Juridica Hungarica
1991 33 N° 1–2 pp. 113–114

Akadémiai Kiadó,
Budapest

OBITUARY

Imre SZABÓ
(1912–1991)

Professor Imre Szabó, ordinary member of the Hungarian Academy of Sciences, died before completing the age of 80, leaving behind an enormous *oeuvre*, the real value of which we are unable even to estimate correctly at present.

Academician Imre Szabó was a truly creative scholar. His creative mind has been reflected in his scholarly and educational work as well as in his activities in organizing and animating legal science in Hungary. His creative scholarship was permeated with unflagging zeal and devotion, as evidenced in his more than 100 scientific publications. His interest ranged over the entire domain of theory of law. His contribution to legal theory earned him international recognition, expressed not only in the publication in foreign languages inside and outside Hungary of several of his books, but also in his becoming honorary President of the International Vereinigung für Rechts- und Sozialphilosophie. Besides taking an interest in legal theory, he thoroughly studied problems of comparative law, and was appreciated by the Association Internationale des Sciences Juridiques and the Académie Internationale de Droit Comparé by electing him President.

Imre Szabó was persevering and tireless in pursuing research and writing in jurisprudence as much as in teaching and educating generations of Hungarian lawyers. As a young man he became university professor, and worked at the Department of Political an Legal Theory of the Faculty of Law of Eötvös Lóránd University for more than 30 years. The quality and standard of his teaching and scholarship are hallmarked by honorary degrees he received from Eötvös Lóránd University (Budapest) and the University of Paris.

His career and work took him beyond the realm of jurisprudence. He headed the Institute of Legal and Administrative Sciences of the Hungarian Academy of Sciences for more than 25 years. We can safely say that his tenure marked the brightest period of the Institute.

A long time is yet to pass before we grow fully aware of all what his respectable personality, deeply penetrating legal philosophy and his activity of education of generations of lawyers have meant for jurisprudence, the teaching of law, legal practice, and for the entire legal profession in Hungary.

Acta Juridica Hungarica
1991 33 N° 1–2 pp. 115–126

Akadémiai Kiadó,
Budapest

BOOK REVIEW

M. KLOEPFER–E. REHBINDER–E. SCHMIDT-ASSMANN (in collaboration with Ph. Kunig): **Umweltgesetzbuch. Allgemeiner Teil**, Berlin, Verl. Schmidt, 1990, pp. 504.

The Environmental Law of the Federal Republic Germany (FRG) occupies a rather prominent place even by international comparison. (Of course, historical priority is undoubtedly taken by US legislation). At the same time, the German legal material constitutes an intricate maze of enactments and decrees as well as a vast body of administrative regulations by the Federal Republic and Federal States (Bundesländer). A similar situation naturally obtains in other countries too.

Given the German propensity for systematization, several well known lawyers have for some time emphasized the need for codification of the relevant legal instruments. It is probable that their views have to some extent influenced the Ministry for Environmental Protection in its decision to set the ambitious goal of proposing a comprehensive and unified code incorporating the fundamental general rules of environmental law. This is in contrast to a more conventional approach involving a legal regulation based chiefly on environmental media (soil, water, air) and hence necessarily particular in nature. The preparatory work on the General Part of the Code on the Environment started in 1988 and was finished in a 1990 Draft which is likely to be of international significance. The Draft was prepared by three leading scholars in the field of German environmental law.

The Draft consists of 169 articles and falls into 12 chapters, namely; General Provisions (I), Environmental Rights and Duties (II), Planning (III), Study of Environmental Impacts (IV), Direct Control Provisions (V), Indirect Control Provisions (VI), Environmental Information (VII), En-

vironmental Liability and Compensation (VIII), Participation of Interest Groups and Publicity concerning Procedure (IX), Legislation and Administrative Rules (X), Organization and Administrative Responsibilities (XI), Final Provisions (XII).

Structure of the Draft: the introductory part (pp. 1 to 36) is followed by the text of the Draft Code (pp. 37 to 104) and the underlying rationale for each chapter. The arrangement of the latter is particularly instructive. The pattern for each chapter is as follo/ws: I. Point of Departure 1. Subject-matter of regulation; 2. Current state of law: a) current law; b) experience acquired with the current law; c) previous proposals for reform; 3. Legal frameworks. II. Proposals 1. Concept; 2. Detailed rationale (for the draft provisions). From the outset, the primary goal of the codification was to harmonize and unify the current law.

The present review, however, singles out the proposed legal solutions which reflect departures of the Draft from prevailing regulations, and which, above all, demonstrate the Code's progressive, forward-looking character by international comparison.

1. Extraterritorial elements. According to Draft Sec. 1 (4), the Code seeks to fulfill transnational functions of environmental protection, too, as it is alive to the international and European concerns in this field. This provision is stated to be of relevance for the interpretation of some of the other provisions of the Code. In particular, the Draft proceeds, on the one hand, from forms of behaviour relevant to domestic environmental protection in cases of transboundary environmental pollution. On the other hand, it covers activities in other countries which can be influenced (as far as possible) or prevented by domestic measures, considering that effective environmental protection can often only be achieved through cooperation at the international or at least European level. According to the rationale, European cooperation in the protection of the environment is far from being limited to the member states of the European Community, but extends to Eastern Europe (mainly to the immediate neighbours of Germany), the Scandinavian countries, Austria and Switzerland, which are not members of the European Community.

The legal basis for international cooperation in environmental protection is provided by customary international law, bilateral treaties, and "the general principles of law recognized by civilized nations" (Art. 38 (1), of the Statute of the International Court of Justice).

The extraterritorial approach is also evident in other draft articles. We refer, by way of example, to the provision on environmental research (Sec. 103), which states, *inter alia*, that "in the field of environmental research efforts shall be made towards cooperation with the European Community and with international organizations".

2. Basic principles of environmental law. The three basic principles elucidated in German legal literature and evolved earlier are formulated in the Draft as ones governing legislation. These are: (a) principle of preventive-precautionary action (Vorsorgeprinzip); (b) principle of liability (Verursacherprinzip); (c) principle of cooperation *(Kooperationsprinzip)*. The related provisions of the Draft are forward-looking in terms of legal policy and legal theory alike. (a) The *principle of preventive-precautionary action* means the need "to ensure, by

appropriate measures, in particular by planning with foresight and by restriction of emission of pollutants as reasonably achievable by the degree of technical development, that any degradation of the environment either or avoidable with unforeseeable adverse consequences should be prevented as far as possible" (Sec. 4).

The principle of prevention as spelled out in this fundamental provision covers the following cases, which generally occur in practice: prevention of hazards distant in time and space; prevention of adverse events with little likelihood of occurring; preventive measures where hazards can reasonably be supposed to occur; prevention of discharge of pollutants which present no hazard separately but tend to cause damage in combination, where their elimination is technologically possible.

The rationale for this provision makes adoption of preventive measures subject to two essential formal requirements: the purpose and means of prevention must be duly substantiated (clarified); regulators taking such measures must state their reasons.

(b) The rule on *liability* (polluter pays principle) (Sec. 5) provides:

"(1) Whoever causes damage to or endangers the environment or creates environmental hazards shall bear responsibility for such acts.

(2) Where there is no one having caused an event or otherwise responsible for it or no one can be identified or identified in due time, or it would be unjust for the latter to be called to account, responsibility shall lie with the community."

In effect, this provision regulates liability in two ways: responsibility rests primarily on the person to whom the occurrence of an event is imputable (subjective liability) and subsidiarily on the community (objective liability). As is stated in the rationale, German law essentially recognizes environmental liability based on imputability, but the latter has no legislative coverage of a universal character, nor is the content of this legal principle clearly defined. This calls for inclusion of this provision in the Code.

(c) The *principle of cooperation* expresses the general rule of cooperation between citizens and the State. Thus, "the authorities shall not perform environmental functions except when citizens are unable or fail to do so" [Sec. 6 (1)]; "measures which leave scope for citizens to decide at their own option ... shall take precedence over prohibitive rules and administrative regulations" [Sec. 6 (3)]; and "the authorities may assign (environmental) tasks to other than State organs ..., but shall retain control over the fulfilment of those tasks" [Sec. 6. (4)]. New ground *(juristisches Neuland)* is also broken by Draft's definition of the principle of cooperation. According to the rationale, the need for this regulation is mainly justified by the recognition that environmental protection is not a task solely for the State, but one to be addressed jointly by citizens and the State; it is desirable to define the tasks that are primarily for the State to solve; it is desirable to give priority to flexible legal means; it is necessary to control the fulfilment of environmental tasks of citizens.

It should be noted that the Draft means by "citizen" even enterprises owned by citizens, so the notion of citizen is far from being limited to natural persons.

As can be seen, the principle of cooperation is characterized by its subsidiary nature: the State leaves performance of environmental functions chiefly to the private sphere, to citizens, only joining in this activity secondarily, when the need arises.

3. *Environmental planning.* Although the government regularly adopts periodic environmental programmes *(Umweltprogramme)*, they cannot be considered as comprehensive integrated plans for the protection of the environment. Therefore the Draft envisages comprehensive planning guidance for environmental management *(Umweltleitplanung)* that will embrace all environmental media (soil, water, air). The theoretical basis for this provision (Sec. 20) is the principle of preventive-precautionary action as well as the general rule of co-operation. The goal is to introduce a comprehensive regime of far-reaching environmental planning, one intended to replace the current widespread practice of adopting *ad hoc* measures and rather random decisions. Environmental planning implies a certain measure of legal security and predictability in respect of actions by state authorities, thus rendering such actions more satisfactory and more acceptable.

It is not desirable to draw up plans for environmental protection and land development which require years of effort to be substantiated by surveys and analyses. Such plans have little chance of realization and face stronger opposition. It would therefore be more convenient to formulate mediumterm plans focusing on priority areas *(Grundlinien und Hauptpunkte)*, while aggregating the results of the existing system of specialized planning.

After defining the concept of planning for environmental management, the Draft provides for the regulation of two hitherto employed methods of planning, namely preparation of plans for pollution abatement and programmes for environmental protection. However, the Draft deliberately omits provisions on the planning of large establishments and plants, as their planning falls within the domain of integrated area development plans.

4. *Indirect control.* Indirect management of environmental protection is concerned with influencing the behaviour of those interested, namely by allowing them some scope for decision-making. By the use of these legal means the State establishes for its citizens certain behaviourial expectations (which it seeks to encourage through incentives or sanctions), but undesirable behaviour contrary to expectations is not against the law.

Heading the list of means employed for indirect control is provision for environmental charges *(Abgaben)* hitherto levied for pollution (Sec. 77 to 81). These environmental charges are, together with other means of indirect control, supplemented by socalled flexible means, such as benefits of use, representing a novelty in German law too, and various types of compensation. By benefits of use *(Benutzungsvorteile)* is meant a legal institution which serves to exempt low-waste or non-waste plants or manufacture of such products from the application of prohibitive or restrictive rules (Sec. 88). According to the rationale, this provision seeks to promote innovative activities, a field where the "frindly to environment" requirement imposed upon products, is likely to be relative as it naturally applies only in comparison with products on the market. It is deemed desirable to provide incentives for the manufacture and marketing of such products.

The compensation envisaged by the Draft for industrial plants (Sec. 89) has a role to play first and foremost in connection with the protection of air purity, abatement of noise hazards, and disposal of dangerous industrial waste. The related Draft article provides for exceptional treatment of

installations discharging pollutants below established emission levels and allows room for joint treatment of several installations which are collectively discharging pollutants above established levels.

In like manner, the Draft envisages compensation in case of other activities of environmental relevance. As is stated in the rationale, this provision may be of importance in, for example, agricultural production, the manufacture of motor cars, or in the production of packaging materials, where it is similarly possible for the product-mix of industrial enterprises (the entire spectrum of activities involving low-waste or less polluting technologies) to be considered as a whole.

However, application of these flexible means (incentives) is subject to the precondition that environmental pollution or hazards must not increase in the aggregate or that pollution must at least remain at the same level or must be reduced to a greater extent than required by regulations in force.

5. The Corporate Contribution to environmental protection. The Draft's incursion into the sphere of company law is a noteworthy feature. It provides that every enterprise operating in the form of joint stock company or limited liability company must appoint a manager-in-charge of environmental protection (Sec. 94) to direct the full scope of relevant activities. That manager may, of course, have other responsibilities too, but the essential point is that he must act to secure environmental protection at the level of enterprise management. The Draft retains the institution of officer-in-charge of environmental protection which was established in previous regulations, in order to deal with "everyday matters". The rationale recommends that the status of the environmental manager be similar to that of the personnel manager.

6. *Environmental information.* Environmental information is construed by the Draft in the broad sense as including environment research (Sec. 103), (which the current law does not require the State to do), provision of information on the environment (Sec. 106), briefings on the environment (Sec. 109), and the use of an Environment Label *(Umweltsiegel).* Inclusion of legislative provisions on the latter (which refers to the "Blue Angel", the emblem of the United Nations Environment Programme which has been used on thousands of products for nearly 20 years), is justified, in my view, mainly by the fact that judicial interpretation has raised several queries about this useful label. In some cases the Courts, including the Supreme Court, have objected to the use of this label of certification on the ground that its imprecise information content renders it apt to mislead consumers. These Court decisions have invited a heated debate in legal literature. The Draft seeks to take the wind out of the sails of the protagonists, by stating, *inter alia*, that "the user of the Environment Label may, in his advertising, include the fact that his competitor is not qualified to use the Label on similar products". Such a legislative exemption from the prohibition on comparative advertisements will, I believe, remove the difficulties under the present law of unfair competition, relations to the use of the Environment Label, which already acquired great popularity among consumers in the last years.

I*n conclusion,* it is worth mentioning that preparatory work on the Special Part of the Code on the Environment has also started. The task of drafting has been assigned to an 8-member Commission of Pro-

fessors *(Professorenkommission)*, which naturally includes the three professors who drafted the General Part. The Commission, likewise headed by Professor Kloepfer, has to complete work on the Special Part by the middle of 1993.

At the same time the preparation of the General Part has arrived at a new stage: it is being considered by an Expert Committee composed of representatives of legal practice and science. The result of this work will constitute the basis of the Ministerial Draft, which will be the subject of a broader debate before its submission to the Parliament *(Bundestag)*.To complete the picture, it is worth mentioning that a comprehensive Code on the Environment of similar nature exists only in Switzerland. The preparation of the German legislation is therefore of international significance. Apart from a number of substantive points of interest and some solutions offered by the Draft, the great foresight, diligence and thoroughness, characteristic of German lawyers, is exhibited in the preparation of this Code as is the technique of the legislative drafting as well. It can thus be said without exaggeration that the Code is likely to bring influence to bear on the future of Europe as a whole.

Alexander VIDA

Bruno DENTEN–Francesco KJELLBERG: **The Dynamics of Institutional Change.** SAGE Publications, London–Newbury Park–Beverly Hills–New Delhi 1990. pp. 191.

The subtitle of the volume is "Reorganisation of Local Government in Western Democracies". In 1984 the Salzburg-based European Consortium for Political Research organized a series of consultations on, among others, the theory of reorganisation of local government. The two authors had already discussed this problem, which has become an urgent topical issue of the day in Eastern Europe. They point out an obvious discrepancy between the mass of empirical facts and the lack of analytical frameworks and theoretical perspectives in this field. All countries in East and West alike had to face the complex set of problems concerning the reorganization of local self-government, for the development of society creates imperative needs to be met. The public sector has greatly widened in scope and has presented new requirements for quality. The theoretical comparison of institutions and their operation calls for new methods, because inquiries should be made into the dynamics of events. The question arises whether there is a need for a single reorganisation or for several consecutive reforms. Not all changes which take place within institutional frameworks are directly consequential upon some political or administrative decision, but, e.g., several micro-decisions may result in one substantive and unexpected institutional change.

The next chapter deals with the decentralisation of the welfare state. The changing intergovernmental frameworks give rise to several problems in the field of social services. The new social tasks do not require a nationwide approach, but need solutions with due adjustments for local conditions. The authors deal with efforts at the local

solution of social policy problems in different countries.

A very interesting chapter informs us about the local government reforms in Scandinavia. In recent decades all four Scandinavian countries Sweden, Norway, Denmark and Finland have changed their local government structures completely.

It is worthwhile to take a look at the structural and functional reforms in the development of the welfare state, with special attention to the autonomous model of local authorities and the integration model of relations between the central and local organs. Undoubtedly, there is a disquieting tendency towards changing the welfare state into an interventionist state in the most different spheres. Also, this chapter deals with the territorial reforms, which have taken place in the Scandinavian countries during the east decades, listing the successes and failures of the reforms. In Denmark these reforms have surpassed to Swedish and Norwegian reforms in terms of their political attributes as well as of the depth of reorganisations in the public sector. The quickening pace of urbanization in that country presented an imperative need for a comprehensive reform. In Finland too, it was thought that the relationship between the central and local organs constituted the key factor in modernizing the government structure. In Finland there are three main organisations of localities *1)* Finnish Urban Association; *2)* Association of Finnish Municipalities (with mostly villages as its members); *3)* Association of Swedish-Speaking Finnish Municipalities.

Each Finnish locality is a member of one of these organisations. The activities and plans of organizations and localities are carried out by the municipal economic committee and the collective conciliation committee, both of which were set up in the early 1970s. A tendency can also be observed in Finland to bureaucratization of the self-governing local community, which is becoming a professional institution providing municipal services, more or less as specified by central directives and regulations.

In the next chapter the reader is informed about the transformation of local government in the United Kingdom and about the lessons to be learnt from it. The chapter deals with the significance of administrative boundaries and their relative flexibility. It quotes the witty aphorism of Tocqueville: The kingdoms and republics are forks of man, but the cities seem as if they were created by God himself. Thus, according to the authors, the rationality of the emergence and development of cities surpasses the rationality of the development of states. It is emphasized that citizens in smaller communities can be made more active and more interested in settling their own affairs than at the national level. Interesting data are given in the table which compare the share of central government in general state expenditures between 1950 and 1973. The ratio is highest in Australia, where the central government and its organs received 55.6 % of government appropriations as late as 1973. The lowest is in the United Sates, where only 38.3% was spent for this purpose.

The French experience of recent years is summarized as one of radical reform and marginal change. Since 1958 the central government has made almost yearly attempts to introduce some reform of local government with so few system-wide results. It should be kept in mind that the French concept of state organisation is one of a traditionally centralized, hierarchical

system, in which the initiative has always come from above and that the *préfets* in all the 96 *départements* are representatives of the central government responsible for public administration as a whole. Links between local governments are rather difficult and multifaceted in that country, where the cleavage between cities and villages can be considered as a tradition.

This chapter deals with the comprehensive reform effort of President Mitterand, too.

His reform was completed with more or less difficulties in 1985. There can be no question that it was the most important reform in this century and that it was carried out despite systematic obstructions by, and at times the active resistance of, numerous political factors, local as well as national.

Last but not least, the volume covers the experience of the United States, the largest Western democracy, where there are nearly 83.000 local government units, a large part of them municipalities, which provide various municipal services for the population, but some of them, e.g. the local school boards, deliver only one service. The causes of change in local services are usually very pragmatic and run into thousands every year. The active participation of citizens and limited scope of government activity are really durable, but by no means the only, values of American politics. The Americans are especially appreciative of effectiveness in the public service and of the moral integrity of the public servants who manage community programmes. The volume explains that regionalism has an important role to play in the United States, particularly in view of the country's size. It is also a characteristic American feature that the mayors of some big cities have much more national influence than the senator or governor of the given state.

The last chapter of the volume treats the theoretical problems of local government reform and of legitimacy. The volume is complete with extensive lists of literature added to each chapter and with an index at the end of the book. This topical collection of essays is a higly useful source of information for theoretical and practical specialists in local government.

Miklós UDVAROS

Ludwik GELBERG: **Rechtsprobleme der Ostsee** (Legal problems of the Baltic Sea). Hamburg, Sample Verlag, 1989. pp. 175.

This monograph presents the grave crisis of the current international law of the sea and the efforts directed towards its solution. Chapter I describes the history and geography of the Baltic Sea and the surrounding countries, pointing out that the geographical specifics of this Sea decisively determine the possibilities of traffic, the fishing industry and commerce in its region. This Sea can be regarded as a virtually landlocked sea connected with the world oceans by nothing but the Danish Straits only a few kilometers in width. However, the Baltic Sea and its coastal states play a highly important role in the world economy as the trade flows of the seven countries involved account for 22 % of world trade. About 13 % of shipping takes place on this

Sea, and the rate of increase in the commercial fleets of these countries has surpassed the world average in the last 10 to 20 years. Trade turnover, which is expected to increase owing to favourable events of world politics in recent years, is handled by not less than a thousand seaports, smaller and larger. The struggle of countries for hegemony will therefore shift from the political–military to the economic sphere. As early as the 16th and 17th centuries, these countries tried to find a way of regulating the rights of each country in this area within the framework of "dominium Maris Baltic", while guaranteeing the freedom of the seas at least for the surrounding nations. Of course, during the past centuries, including ours, this area was also visited by smaller or bigger military clashes, struggles for hegemony on land and at sea. The freedom of the seas and its possibilities have always been subject to different interpretations such was the case after the Second World War, too, when the military forces of NATO and the Soviet-led Warsaw Pact-countries faced each other. The volume points out that the Baltic Sea offers extraordinary opportunities for its users if they abide by the regulations on international maritime traffic. Recently the problems of more than a hundred important sea straits and the extent of territorial waters have given rise to a great deal of debate, especially at the international conference on the United Nations Conference on the Law of the Sea. The relevant agreements have regard for the interests and rights of the coastal States, while they guarantee free passage for the ships of all countries. This volume gives a detailed account of the regulations on passage through the Baltic Straits and famous legal cases involving conflicting interests of some countries concerning the use of sea straits. Countries lay claim to different extents of territorial waters; e.g. since the summer of 1966 Sweden has claimed 12 sea miles of territorial waters in width against the similar law. By contrast, some other countries like Finland or the former GDR had been content with 3 sea miles of territorial waters, although the GDR later came to claim 12 sea miles.

The next Chapter dealswith the legal problems of the continental shelf. On the whole, the Baltic Sea is rather shallow, its average depth varies between 60 and 150 meters, meaning that a relatively small area is deeper than 200 meters, so under the Geneva Convention of 1958, it is suitable for exploitation of natural resources. So far no oil resources as rich as those in the North Sea have been found in the Baltic, ut significant phosphorus and metal reserves lie hidden in the continental shelf. Although the Baltic countries have accepted the Geneva Convention, each of them has given a different interpretation to some of its provisions, which has given rise to a sea law dispute between the Federal Republic of Germany, Denmark and the Netherlands; the dispute was finally settled by the International Court of Justice. The volume dwells on the living resources of the Baltic Sea, particularly the possibilities of seafishery. No doubt that in recent years the Baltic Sea has become one of the busiest and most polluted seas of the world, a fact which has dealt a serious blow to fishery. The Gdansk Agreement, which was signed by the seven Baltic nations in September 1973 and entered into force in July 1974, was intended to protect the living resources of the Sea and the fishing interests of these nations. The efforts to save the living resources of the Baltic sea and the measures for environmental protection have been to

little purpose despite the fact that no serious tanker catastrophe has occurred in this area. The rest of the volume discusses questions concerning the legal status of the Baltic Sea and mutual assistance in case of accidents at sea. The volume is rounded off by the full texts of 12 significant documents ranging from the Agreement on the Straits of Sund and Belt (Copenhagen, 1857) to the Polish-Swedish Agreement on Fishery (1978).

This volume is a source of useful information for readers taking an interest in studying the problems of the Baltic Sea as a special geographic area.

Miklós UDVAROS

Philip G. CERNY: **The changing architecture of politics.** SAGE Publications, London–Newbury–New Delhi 1990. pp. 167.

This volume is about the structure and institutions of States and the future of the State itself. Mention is made already in the introduction of the comprehensive structural changes which shape our world and of the need for a new way of thinking to promote the further development of politics and the State. There is no doubt that modern society in the twentieth century has failed to devise systems of political and state institutions capable of preventing the emergence of dictatorships, while opening new vistas for society to achieve social justice and build a civilized way of life.

First of all the volume surveys the historical periods of development of the modern State, the characteristic features marking the appearance of different structures, the laws governing change in decision-making processes and institutions during successive historical periods. It mentions that already in Platon's work "Republic" there show up some contradictions between aspects of culture and pragmatism, between ethics and imagined, or hoped-for alternatives on the one hand and between material reasons of the moment and action suggested by the results of cost-benefit analysis, on the other. The mainsprings of society's development are sometimes apt to invite even self-destruction, a fact recognized back in ancient times. The related views, ideas, explanations and opinions crystallized over time into theories which remained valid for shorter or longer periods. The volume deals with the ideological trend known as "structural state theory" and points out the contrast between a democratic state of law, marked by a delicate political balance, and a centralized and bureaucratized dictatorship, and the "transitions" between the two. Some authors go so far as to claim that the structural roots of political modernisation are to be traced back to the development of political parties (Huntington).

In the next part the author calls on efficient market, the hierarchies and the different fields of political allocation as the driving forces of modern society. He argues that in the economic and political markets there can be neither order nor progress in the absence of comprehensive frameworks and without observance of the relevant rules

applicable to all, because these are essential attributes of a sovereign State. In this context he is concerned with the problems of effective pluralism and the specifics of public and private goods.

Concerning the further possibilities open to the modern state at the crossroads, the author discusses the new opportunities for political action. He quotes Alvin Toffler, who maintains that change itself is a special precondition of stability in complex structures and that inertia and hesitation in the face of rapid development are liable to provoke destructive changes in the state and society. He deals with the types of state autonomy, namely he divides states into groups that are autonomous or dependent on their external relations. In them, the institutional systems develop in accordance with political possibilities, following cultural traditions and depending on economic conditions.

The volume deals with the limitations of political power, too, inquiring into the most important factors shaping the state and law of the 21st century. It refers to the growing importance of national peculiarities and to the objective laws governing the emergence of classical political elites and possible coalitions. It divides leadership styles into four categories: a) routine leadership, which combines representative with individual leadership. Here the author quotes Max Weber's words about the "routinization" of extraordinary, charismatic leadership; b) integrative leadership, which seeks to build consensus for its own activities; c) catalytic leadership, the essense of which lies in initiatives, but these are not always in line with its intentions; d) transformative leadership, which, unlike routine leadership, requires a certain type of "crisis" management in an effort to change the norms and structures of the State itself.

The volume gives a comprehensive and detailed analysis of events at the end of the 20th century, and outlines the options for future development in the light of present-day realities. The volume is complete with an extensive bibliography and index. Its interesting analyses arouse the attention of readers taking interest in the paradigms of political and social sciences, either from a purely theoretical or an empirical point of view.

Miklós UDVAROS

Acta Juridica Hungarica
1991 33 N° 1–2 pp. 127–140

Akadémiai Kiadó,
Budapest

HUNGARIAN LEGAL BIBLIOGRAPHY

1990 1st PART

Edited by Katalin BALÁZS-VEREDY

This bibliography contains works of Hungarian authors issued in Hungary between the 1st of January and the 30th of June 1990, including books, material of periodicals (articles) papers and studies published in collective works.

Hungarian legal bibliography for the period 1945–1980 is to be found in the following publication: Bibliography of Hungarian legal literature, 1945–1980. Budapest, Akadémiai Kiadó, 1988. pp. 429

The material published from the 1st of January, 1981 is currently processed half-yearly in the Acta Juridica, beginning with the Tomus 23, 1981. Nos 3–4.

Periodicals processed in this bibliography:

ÁJ 2/1989. [1990.]; JK 9–12/1989. [1990.], 1–4/1990; MJ 1–5/1990; MKözigazg. 1–6/19–90; MTud. 1–6/1990; TSZ 1–6/1990; Valóság 1–6/1990.

For abbreviations of periodicals and other abbreviations regularly used see in Acta Juridica Nos 1–2 of 1989.

Collective works processed in this bibliography and their abbrevations:

Dolg. állam és jogtud. köréből. 20. évf. 1989. = Dolgozatok az állam és jogtudományok köréből. 20. [évf.] Szerk. Ádám Antal. Kiad. a Janus Pannonius Tudományegyetem Állam és Jogtudományi kara. [Studies in legal and administrative sciences. Vol. 20.] Pécs, Pécsi Szikra ny. 1989. [1990.] pp. 173 [2]

Jogtört. előadások. 2. köt. 1990. = Jogtörténeti előadások. 2. [köt.] Szerk. Mezey Barna. [Közzéteszi az] /Eötvös Loránd Tudományegyetem, Állam és jogtudományi kar. [Lectures on the history of law. Vol. 2.] Bp. Tankönyvk. 1990. pp. 205

Krim. tanulm. 27. köt. 1990. = Kriminológiai és kriminalisztikai tanulmányok. 27. [köt.] Szerk. Gödöny József. Közzéteszi az Országos Kriminológiai és Kriminalisztikai Intézet. [Studies in criminology and criminalistics. Vol. 27.] Ed. Gödöny József Bp. Közgazd. és Jogi K. 1990. pp. 405 [2]

Quest. int. law. Vol. 4. 1988. = Questions of international law. Hungarian perspectives. Vol. 4. Ed. Bokor[né] Szegő Hanna. Transl. Simon Sándor. Bp. Akad. K. 1988. pp. 265

COLLECTIONS OF STATUTES

Törvények és rendeletek hivatalos gyűjteménye. 1989. 1–2. köt. Közzéteszi az Igazságügyi Minisztérium–Minisztertanács Hivatala. [Official collection of statutes and decrees. 1989. Vols 1–2.] Bp. Közgazd. és Jogi K.1990. XXXV, 723, [6], pp. 25–1308 [2]

Változások mutatója a Hatályos jogszabályok gyűjteményéhez. 1988-1989. Összeáll.: Liskáné Nagy Anna–Glatt Gábor. [Index of changes to the Collection of Statutory Rules in Force. Compiled by Liskáné Nagy Anna–Glatt Gábor 1988–1989.] Bp. Közgazd. és Jogi K. 1990. pp. 208 [2]

COLLECTIONS OF STUDIES

Dolgozatok az állam és jogtudományok köréből. 20. [évf.] Szerk. Ádám Antal. Kiad. a Janus Pannonius Tudományegyetem Állam és jogtudományi kara. [Studies in legal and administrative sciences. Vol. 20.] Ed. Ádám Antal. Pécs, Pécsi Szikra ny. 1989. [1990.] pp. 173 [2] Bibliogr. passim. Dt. Zusammenfassung.

Jogtörténeti előadások. 2. [köt.] Szerk. Mezey Barna. [Közzéteszi az] Eötvös Loránd Tudományegyetem, Állam és jogtudományi kar. [Lectures on history of law. Vol. 2.] Bp. Tankönyvk. 1990. pp. 205 Bibliogr. passim.

Kriminológiai és kriminalisztikai tanulmányok. 27. [köt.] Szerk. Gödöny József. Közzéteszi az Országos Kriminológiai és Kriminalisztikai Intézet. [Studies in criminology and criminalistics. Vol. 27.] Ed. Gödöny József. Bp. Közgazd. és Jogi K. 1990. pp. 405 [2] Bibliogr. passim. Russk. soderz.; Eng. summary; Dt. Zusammenfassung; Res. franc.

Questions of international law. Hungarian perspectives. Vol. 4. Ed. Bokor[né] Szegő Hanna. Transl. Simon Sándor. Bp. Akad. K. 1988. pp. 265 Bibliogr. passim.

I. PHILOSOPHY OF LAW

Book

SAMU Mihály: Jogpolitika–jogelmélet. [Legal policy–legal theory.] Bp. Közgazd. és Jogi K. 1989. 275, [2] p. Bibliogr. passim.

Articles

ÁGH Attila: Választások előtt. Vázlatpontok a választói viselkedésről. [Before elections. Sketches on voting behaviour] Valóság 1/90:42–53.

BALOGH Zsolt: A hatalommegosztás dimenziói. [Dimensions of the separation of power.] JK 1/90:1–8.

JAKAB István: Jogalkotás, jogalkalmazás, jogállamiság. [Legislation, application of law and the rule of law.] MJ 3/90:259–263.

PACZOLAY Péter: Moór Gyula jogfilozófiája. [The philosophy of law of Gyula Moór.] JK 10/89:505–512.

PESCHKA Vilmos: Barangolás Gustav Radbruch életútján Arthur Kaufmann kalauzolásával. [Along Gustav Radbruch's life with Arthur Kaufmann.] ÁJ 2/89:544–553.

POKOL Béla: A jog rétegei. Kutatások a jog szövegrétege alatt. [The strata of law. Researches underlying the text of law.] JK 4/90:201–209.

PRUGBERGER Tamás: Vita a jogról, mint professzionális intézményrendszerről. [A debate on law as a professional system of institutions.] JK 10/89:540–542.

RÉVÉSZ Béla: Változatok a jogállamiságról. [Remarks on rule of law.] JK 4/90:218–220.

SAMU Mihály: Az emberi jogok és a demokrácia összefüggése: a szocialista gondolat fejlődése és differenciálódása. [Human rights and democracy: development and differentiation of the socialist thought.] MJ 4/90:314–320.

TAMÁS András: A jog mint modernizációs technika. [Law as a technique of modernisation.] JK 10/89:520–530.

VARGA Csaba: Tény és proceduralitás a bírói ténymegállapításban. [Fact and procedure in the judicial statement of facts.] ÁJ 2/89:496–543.

ZSIDAI Ágnes: Tény és érték. Moór Gyula és Horváth Barna jogfilozófiai vitája. [Fact and value. A legal–philosophical debate between Gyula Moór and Barna Horváth.] JK 10/89:513–519.

II. PUBLIC LAW & CONSTITUTIONAL LAW

Books

Colloquium on Hungarian electoral law. Budapest, February 8 and 9, 1990. Sponsored by National Election Committee, Hungarian Lawyers Association and National Republican Institute for International Affairs. [Publ.] National Republican Institute for International Affairs, Republican Programs of International Political Development. [Bp.] Litográfia, [1990.] 100, [2], 66 p.

DEZSŐ Márta–BRAGYOVA András: A választási rendszerek általános vonásai és a jelölések a nyugat-európai országokban. [Közzéteszi a] Magyar Tudományos Akadémia Államtudományi kutatások programirodája. [Electoral systems and nomination of candidates in Western European countries.] Bp. [mimeogr.] 1990. pp. 29 [4]

Külföldi törvények a politikai pártokról. Szerk. és bev.: KILÉNYI Géza. [Közzéteszi a] Magyar Tudományos Akadémia Államtudományi kutatások programirodája. [Statutes on political parties in foreign countries.] Bp. [mimeogr.] 1990. pp. 182 [2]

LENGYEL Mihályné: A közjogi felelősség érvényesítése az országgyűlés állandó bizottságainak ellenőrző tevékenysége útján. [Közzéteszi az] Eötvös Loránd Tudományegyetem, Állam és jogtudományi kar. [Responsibility in public law through the control of the standing committees of the Parliament.] Bp. [mimeogr.] 1989. [1990.] pp. 53 /A jogi felelősség és szankciórendszer elméleti alapjai 10./ Bibliogr. 42-43.

Nyugat–Európa legújabb alkotmányai. [Görögország, Hollandia, Portugália, Spanyolország, Törökország.] Szerk. KOVÁCS István–TÓTH Károly. [Közrem.]: KISS Barnabás, HEGEDŰS Éva. [Recent constitutions in Western Europe. Greece, The Netherlands, Portugal, Spain, Turkey.] Bp. Közgazd. és Jogi K. 1990. pp. 446 [2] /Alaptörvények és alkotmányok./ Bibliogr. passim.

The regulatory conception of the law on self-government. [Publ.] Ministry of Home Affairs. Bp. s.p. 1990. 92 lev.

Szabadon választott. Parlamenti almanach. 1990. [Lezárva:] 1990. ápr. 20. [Elected free. Parliamentary Almanach. 1990. Closed: April 20, 1990.] Bp. Idegenforgalmi Propaganda K. 1990. pp. 272

Articles

ÁDÁM Antal: Az egyházak alkotmányjogi helyzetéről. [The position of the churches in constitutional law.] = Dolg. állam és jogtud. köréből. 20. évf. 1989. 5–29.

BAKA András: Nemzetiségi vagy kisebbségi törvény? [Act on nationalities or act on ethnic minorities?] MTud. 4/90:385–393.

BALLA Róbert: Caligula cirkuszától a Szent Péter bazilikáig. Jog a szociális és egészségi biztonsághoz. [From Caligula's circus to St. Peter Cathedral. Right to social and health security.] TSZ 4/90:36–46.

JURASITS Zsolt: A lelkiismereti és vallásszabadság törvényi szabályozásának elvi kérdései. [Theoretical problems of the regulation of freedom of conscience and religion.] MJ 2/90:142–156.

KILÉNYI Géza: Gondok az Alkotmánybíróság házatáján. [Uneasiness around the Constitutional Court.] MJ 5/90:391–398.

KULCSÁR Kálmán: A törvénysértő elítélések semmissé nyilvánításáról. [Nullification of unlawful sentences.] MJ 5/90:385–390.

MOLNÁR István: A főkormányzói monarchikus föderáció változásai. Kanada és Ausztrália. [The changes of monarchistic federations under a governor–general. Canada and Australia.] JK 2/90:101–105

NÉMETH Jenő: A helyi jogalkotás helyzete és az önkormányzati jogalkotás kialakulásának szükségessége. [The local legislation and the necessity of the development of self–government legislation.] MKözigazg. 2/90:147–154.

PETRÉTEI József: A hatalommegosztás alkotmányjogi kérdéseiről. [Problems of the separation of powers under constitutional law.] = Dolg. állam és jogtud. köréből. 20. évf. 1989. 131–155.

SCHMIDT Péter: A hatalommegosztás és a köztársasági elnök jogállása. [The separation of powers and the legal status of the president of the republic.] Valóság 5/90:1–10.

SZOBOSZLAI György: A politikai átmenet és a jogállamiság alkotmányos keretei. [The political transition and the framework of the constitutional state.] TSZ 3/90:26–34.

TAKÁCS Albert: Az alkotmányosság és a törvényesség védelme bíróságok útján. [Protection of constitutionality and the rule of law through courts of law.] JK 9/89:443–455.

III. ADMINISTRATIVE LAW

Books

BIRÓ Endre: Mit tehet az állam a polgáraival? Az állam hatósági tevékenységéről és a hatósági eljárások jogi szabályozásáról. [Lezárva: 1988. dec. 31.] What can the state do with citizens? On administrative procedure. Closed: December 31, 1988.] Bp. Közgazd. és Jogi K. 1990. pp. 283 Bibliogr. passim.

The economic and financial situation of Hungary; characteristics of the Hungarian economic reform. [Publ.] Ministry of Finance. Bp. Perfekt Print. 1990. pp. 14 /Public finance in Hungary 63./

A gazdálkodásra vonatkozó legfontosabb jogszabályok. 1990. 2. átdolg. kiad. Lezárva: 1990. ápr. 17. [Fundamental statutory rules on law of economy. 1990. 2nd ed. Closed: April 27, 1990.] [Bp.] Unió K. 1990. pp. 304

Hatályos egészségügyi jogszabályok gyűjteménye. 1947–1989. 1–2. köt. Főszerk. HÁROMSZÉKI Ilona. Társszerk: ANDRÁS Anna–BOCSI Zsuzsanna–BOTYÁNSZKI András–SZABÓ Erzsébet. Lezárva: 1988. III. 31. Függ. lezárva: 1989. jún. 30. [Collection of the statutory rules in force bearing upon public health. 1947-1989. Vols 1–2. Closed: March 31, 1988. Appendix closed: June 30, 1989.] Bp. Pallas K. 1989. [1990.] 1119, [2], pp. 1125–1987

LŐRINCZ Lajos: Magyar közigazgatás: dilemmák és perspektiva. [Közzéteszi az] MTA Állam és Jogtudományi Intézete. [Hungarian public administration: dilemmas and perspectives.] Bp. Akad. K. 1988. pp. 107 /Jogtudományi értekezések./

RÁCZ Attila: A törvényesség és a közigazgatás. [Rule of law and public administration.] Bp. Akad. K. 1990. pp. 206 [2] Bibliogr. passim.

RAKVÁCS József: A lakás és üdülőtulajdon kézikönyve. Lezárva: 1987. dec. 31. [Manual of the ownership of appartments and rest-houses. Closed: December 31, 1987.] Bp. Közgazd. és Jogi K. 1988. pp. 333 [2] Bibliogr. 309.

SZATMÁRI Lajos: A bírság a magyar államigazgatásban. Szerk. MADARÁSZ Tibor–SZATMÁRI Lajos, ifj. [Közzéteszi az] Eötvös Loránd Tudományegyetem, Állam- és jogtudományi kar. [Fines in Hungarian public administration.] Ed. Madarász Tibor–Szatmári Lajos, ifj. Bp. [mimeogr.] 1990. pp. 313 /A jogi felelősség és szankciórendszer elméleti alapjai 12./ Bibliogr. 279–286.

Articles

AGG Zoltán: Hogyan lesz az állami tulajdonból önkormányzati tulajdon? A megyei szerveződés vállalatok sorsáról. [How state property will be transformed into local community property? On the future of enterprises owned by counties.] MKözigazg. 5/90: 385–390.

ANTAL J. László–NOVOTNIK Imre: Kezdeményezés a magyarországi integrált falufejlesztési (-felujítási) program kidolgozására és beindítására. [Initiative to adopt and launch an integrated village-development program in Hungary.] MKözigazg. 4/90:304–311.

BODÁNÉ PÁLOK Judit–SZENTESI Mária–VÁRADI Vilmos: A hatósági munka az ítélkezési gyakorlat tükrében. [The activities of the administration reflected in the court's practice.] MKözigazg. 2/90:111–124.

BOROS Ferenc–FODOR Lászlóné–GROSSER [Lagos Enrique]–KÁCSOR József: Szempontok a területgazdálkodás továbbfejlesztéséhez. [Proposals for improving regional planning.] MKözigazg. 4/90:289–303.

CSÉPAINÉ SZÉLL Pálma–FOGARASI József: A közszolgálat tudatos választása és a pályaválasztási motivációk közötti néhány összefüggés. [Civil service and career choice motivations.] MKözigazg. 1/90:21–29.

DUDÁS Ferenc: Dereguláció a közigazgatásban. Az eddigi munka gyors mérlege. [Deregulation in public administration. A brief balance of the work accomplished.] MKözigazg. 5/90:464–467.

FOGARASI József: Káderpolitika, személyzeti politika, közszolgálati politika?! [Cadre policy, personnel policy, civil service staff policy?!] MKözigazg. 2/90:97–110.

FÜRCHT Pál: Európai önkormányzati fórum. Budapest, 1990. febr. 13–16. [Forum on European self-government Budapest, February 13–16, 1990.] MKözigazg. 3/90:223–229.

GERGELY András, A.: Területi uralmi folyamatok. !–2. r. [Regional power processes.] MKözigazg. 3/90:251–258., 4/90:358–364.

GÜNTHER Béla: A megyei szakigazgatási szervezet korszerűsítésének egyes kérdései. [Some questions of modernisation of the county administration.] MKözigazg. 5/90:424–435.

HORVÁTH Ferenc: A semmisség jogintézménye az államigazgatásban. [Nullity of administrative acts.] M Közigazg. 3/90:271–275.

HORVÁTH Gyula: Regionális politika és szerkezetátalakitás a depressziós térségekben. Nyugat–európai tapasztalatok. [Regional politics and structural change in depressed areas. Experiences from Western Europe.] MKözigazg. 2/90:135–146.

HORVÁTH István–PÁL Lajos: A közalkalmazottak sztrájkjoga? [The right to strike of public servants.] MKözigazg. 5/90:455–461.

HORVÁTH M. Tamás: Pártok a helyi képviseleti rendszerben. [Parties in the local representative system.] MKözigazg. 3/90:242–250.

KARA Pál: Önkormányzatok Ausztriában. [Self–government in Austria.] MKözigazg. 4/90:325–337.

KISS Gábor: Helyiségbér–helyiségviták. A nem lakás céljára szolgáló helyiségek bérének 1985. évi újraszabályozása a bírói gyakorlatban. [Disputes on the rent and use of premises. The new regulation of the rent of premises not used for living quarters in 1985 as applied in the judicial practice.] MJ 2/90:127–141.

KOMÁROMI László: A tartományok helye és szerepe az osztrák közigazgatásban. [The place and role of Länder in the Austrian public administration.] MKözigazg. 1/90:39–46.

KÖNYVES TÓTH Pál–VARGA Lajos: A közérdekű adatok megismerése és terjesztése. [The knowledge and dissemination of data of public interest.] MKözigazg. 3/90:259–270.

MÁNDY Endre: A vadászati jogról. [On the right to hunt.] MJ 2/90:157–162.

MÜLLER György: Önkormányzati törvények a Német Szövetségi Köztársaságban. [Legislation on locaal self-government in the Federal Republic of Germany.] MKözigazg. 4/90:338–357.

Nemzetközi fővárosi igazgatási konferencia. Róma, 1989.ápr.2. [International conference on metropolitan administration. Rome, April 2, 1989.] MKözigazg. 2/90:125–134.

PAJCSICS József–FINSZTER Géza: Az állambiztonsági tevékenység alkotmányos szabályozása. [Constitutional regulation of state security activity.] MJ 1/90:31–41.

PÉTERI Gábor: Körzeti szolgáltatások finanszírozása. [Financing public services in districts.] MKözigazg. 1/90:13–20.

POROSZ Tibor: Modernizáció és önkormányzat. [Modernization and self–government.] Valóság 5/90:11–18.

PRUGBERGER Tamás: Az erdőket érintő tulajdoni és használati viszonyok jogi szabályozásának korszerűsítéséhez. [On the modernization of the legal regulation of property and use of forests.] MJ 4/90:321–331.

SALAMONNÉ SOLYMOSI Ibolya: Versenytörvény Magyarországon. [The Hungarian law on unfair competition.] MJ 4/90:289–304.

SZABÓ Gábor: A szakigazgatási intézmények és az önkormányzati közigazgatás. [Public services and local self–governments.] MKözigazg. 2/90:182–192.

SZABÓ Lajos: Gondolatok a tanácsok társasági vállalkozásainak tapasztalatairól. [On the experiences with enterprises owned by local councils.] MKözigazg. 4/90:365–373.

SZAMEL Lajos: A rendőrségi jog szabályozásának alapelvei. 1–2. r. [The basic principles of police law.] MKözigazg. 3/90:230–241., 4/90:312–324.

SZIGETI Ernő–MOLNÁR Ferenc–WIRTH Gyula: A területi politika új irányai. [New directions interritorial management policy.] MKözigazg. 5/90:416–423.

TARR György: A környezeti károk meghatározásának szakértői módszertana. [Expert methodology for the determination of environmental damages.] MJ 5/90:452–458.

TATAI Zoltán: A területi közigazgatás 1945 utáni változásai. [Changes of county–level public administration after 1945.] MKözigazg. 2/90:173–181.

A települési önkormányzatokról szóló törvény szabályozási koncepciója. [Government report on the projected act on local self–government.] MKözigazg. 3/90:193–217.

ZONGOR Gábor: Gondolatok a helyi–területi érdekérvényesítés mechanizmusáról (avagy miért vergődnek a tanácstestületek?). [On the represantation of local and territorial interests.] MKözigazg. 1/90:212.

IV. FINANCIAL LAW

Books

Act [XXXVIII of 1989] on the State Audit Office. [Publ.] Ministry of Finance. [Bp.] Perfekt Print. 1989. [1990.] pp. 17 /Public finance in Hungary 57./

Act [XLV of 1989] on personal income tax. [Publ.] Ministry of Finance. Bp. Perfekt Print. 1990. pp. 116 [2] /Public finance in Hungary 61./

Act [V of 1990] on securities and the stock exchange. [Publ.] Ministry of Finance. Bp. Perfekt Print. 1990. p. 114 [2] /Public finance in Hungary 64./

Acts on the A/ State Assets Management Agency [Act VII of 1990] and the B/ Protection of state property entrusted to enterprise [Act VIII of 1990. Publ.] Ministry of Finance. [Bp.] Perfekt Print. 1990. pp. 64 /Public finance in Hungary 65./

Az adórendszer. Szerk. Gyulai Ferenc. [The tax system.] Bp. MTI ny. 1989. pp. 31 /Information./ Eng. summary; Dt. Zusammenfassung; Russk. soderz.; Rés. franc.

Decree on property balance–sheet. [Decree 30/1989.(XII.1.) of the Minister of Finance [on] the property balance-sheet attached to the Transformation Act. Publ.] Ministry of Finance. [Bp.] Perfekt Print. 1989. [1990.] pp. 9 /Public finance in Hungary 58./

Decree on the state bank surveillance. [Decree of the Council of Ministers 106/1989.(X.29.) MT. Publ.] Ministry of Finance. [Bp.] Perfekt Print. 1989. [1990.] pp. 25 /Public finance in Hungary 56./

The scope of authority and duties of the minister of finance. Up-dated and amended. [Publ.] Ministry of Finance. Bp. Perfekt Print. 1990. pp. 30 /Public finance in Hungary 62./

Some practical legal rules concerning foreigners' investments in Hungary. Bp. Perfekt, 1990. pp. 20 /How to do business in Hungary 1./

State budget. 1990. [Publ.] Ministry of Finance. Bp. Perfekt Print. 1990. pp. 71 /Public finance in Hungary 66./ Statutory rules on general turnover tax. [Publ.] Ministry of Finance. Bp. Perfekt Print. 1990. pp. 128 /Public finance in Hungary 60./

V. CIVIL LAW

Books

LEHOCZKYNÉ KOLLONAY Csilla: "Alanyok" és "viszonyok" a vállalaton belül. ["Subjects" and "relations" in the enterprise.] Bp. Közgazd. és Jogi K. 1990. pp. 410 [2] Bibliogr. passim.

ÚJLAKI László: Méltányosság a polgári jogban. [Equity in civil law.] Bp. Közgazd. és Jogi K. 1990. 290, [2] p. Bibliogr. 283-291.

Articles

BALÁSHÁZY Mária: Társulási jogi megoldások néhány európai szocialista országban. [Partnership law solutions in some European socialist countries.] JK 11/89:588–595.

FERENCZY Endre: Tulajdon és pénzügyek. [Property and finances.] JK 2/90:89–100.

GÖDÖLLE István: Gondolatok a szabadalmi bejelentés módosításáról, különös tekintettel egyes külföldi jogokra. [Ideas relating to the amendment of the patent applications with special regard to certain foreign laws.] JK 3/90:162–168.

JOBBÁGYI Gábor: Magzatvédelem–embervédelem. [Embryo protection–human protection.] MTud. 2/90:138–146.

KIRÁLY Miklós: A Magyar Beruházási Kódex lehetőségei és korlátai a külföldi tőkebefektetések növelésében. [Possibilities and limitations of the Hungarian Investment Code relating to the increasing of foreign investments.] JK 3/90:144–149.

LENKOVICS Barnabás: A magzat élethez való jogáról. [The embryo's right to live.] MTud. 2/90:162–166.

NOVOTNI Zoltán: Társasági tulajdon avagy a tulajdonosok társasága? [Corporate ownership or partnership of owners?] JK 2/90:63–69.

PETRIK Ferenc: Hiánycikk: a hatékony tulajdon. [Wanted: efficient property.] Valóság 2/90:33–43.

PETRIK Ferenc: Tárgyilagosan a társadalmi tulajdonról. [On state property without prejudice.] JK 2/90:53–62.

PRUGBERGER Tamás: Megjegyzések a tulajdon és a tulajdonelmélet reformjához. [Remarks on the reform of ownership and property theory.] JK 9/89:491–493.

PRUGBERGER Tamás: Vállalkozás, szövetkezet és munkahelybiztosítás kérdései tulajdonjogi megközelítésben. [The problems of enterprise, co-operative and job security from the aspect of ownership.] JK 2/90:70–79.

SÁNDOR Tamás: A társasági jog alapjai Svájcban. [Outlines of the law of companies in Switzerland.] ÁJ 2/89: 436–495.

TAMÁS Lajos: Adalékok a bizományi szerződés szabályozásának továbbfejlesztéséhez. [Contributions to the regulation of the conract of commission .] JK 9/89:470–480.

TAMÁS Lajos: A kötelem (szerződés) szerkezeti sajátosságai, a többalanyú kötelmek fajai. [The structural features of multisubject contracts.] JK 4/90:194–200.

VI. LABOUR LAW

Books

HÉTHY Lajos–CSUHAJ V[ARJÚ] Imre: Labour relations in Hungary. [Publ.] Institute of Labour Research, Hungarian State Office for Labour und Wages. Bp. s.p. 1990. pp. 120

A társadalombiztosítás új szabályai. Összeáll. SZIKSZAINÉ BÉRCES Anna. 1990. Lezárva: 1990. febr. 1. [New rules of the social security. Closed: February 1, 1990.] [Bp.] Unió K. 1990. pp. 185

Article

MAKÓ Csaba–GYEKICZKY Tamás: Rugalmas foglalkoztatás, aktív munkaerőpiac. [Flexible employment, active labour market.] TSZ 5/90:23–37.

VII. FAMILY LAW

Article

ÁDER János: Egy jogszabálymódosítás szociológiája. [Sociology of the amendment of the family code.] JK 9/89:481–485.

VIII. LAND LAW

Articles

LENKOVICS Barnabás: Földosztás–hatalomosztás. [Repartition of land–division of power.] Valóság 5/90:77–83.

MOCSÁRY József: A földkérdésről. [On the land problem.] Valóság 4/90:26–32.

TANKA Endre: Törekvések a szövetkezeti földviszonyok jogi korszerűsítésére. [Efforts for the legal modernization of cooperative land use regulation.] MJ 3/90:239–245.

TANKA Endre: Üzemméret és földhasznosítás a lengyel földviszonyokban. [Farm size and land utilization in Polish agriculture.] JK 9/89:486–490.

HEGEDŰS István: A szövetkezeti tulajdonjog reformjáról a mezőgazdasági termelőszövetkezetben. [The reform of cooperative ownership in co–operative farms.] JK 2/90:80–88.

IX. CRIMINAL LAW. CRIMINAL SCIENCES

Books

A büntető törvénykönyvről szóló 1978. évi IV. törvény módosításokkal egységes szerkezetbe foglalt szöve ge. Összeáll. az Igazságügyi Közlöny Szerkesztősége. [Act IV of 1978 Criminal Code. Consolidated text with amendments.] Bp. Pallas K. 1990. pp. 47

Kriminológiai és kriminalisztikai tanulmányok. 27. [köt.] Közzéteszi az Országos Kriminológiai és Kriminalisztikai Intézet. [Studies in criminology and criminalistics. Vol. 27.] Bp. Közgazd. és Jogi K. 1990. pp. 405 [2] Bibliogr. passim. Russk. soderz.; Eng. summary; Dt. Zusammenfassung; Rés. franc.

WIENER A. Imre: Economic criminal offences. A theory of economic criminal law. Bp. Akad. K. 1990. 107 p. Bibliogr. 103–108.

Articles

BIRÓ András: Kriminalisztikai ismeretek az ügyészi munkában. [Criminalistics in the work of public prosecutors.] = Krim. tanulm. 27. köt. 1990. 307–350.

FEHÉR Lenke: Kényszergyógykezelés: a patológia terápiája, avagy a terápia patológiája? [Compulsory treatment: the therapy of pathology or the pathology of therapy?] JK 12/89:630–637.

HORVÁTH Anna: A büntetőjogi trichotomia visszaállítása és a hozzá kapcsolódó problémák. [The reintroduction of trichotomy in criminal law and its problems.] ÁJ 2/89:361–406.

IRK Ferenc: Az erkölcs és a büntetőjog elméleti kérdései. [Morals and theoretical problems of criminal law.] = Krim. tanulm. 27. köt. 1990. 7–62.

KEREZSI Klára: A kiskorúak sérelmére elkövetett szexuális bűncselekmények viktimológiai megközelítése. [A victimological approach to sexual crimes against minors.] = Krim. tanulm. 27. köt. 1990. 124–145.

KRISTON László: Adalékok a kriminalisztikai talajvizsgálatok rendszeréhez. 1.r. [Contributions to the system of soil examinations in criminalistics. Part 1.] = Krim. tanulm. 27. köt. 1990. 351–380.

LÉVAI Miklós: A fiatalkorúak igazságszolgáltatási rendszerére vonatkozó ENSZ-minimum szabályok: a "Pekingi szabályok". [UN minimum rules concerning the administration of justice to juveniles, the "Peking Rules".] JK 12/89:664–668.

MOLDOVÁNYI György: A büntető jogszabályok módosítása. [Amendment of the criminal code.] MJ 2/90:110–126.

MÜNNICH Iván–VÁG András: A férfi bűnelkövető felnőttkori jellemzői és személyiségének jellemzése az MMPI teszt magyarországi standardjai alapján. [Features of male perpetrators in adult age and characterization of their personality on the basis of the MMPI test standards in Hungary.] = Krim. tanulm. 27. köt. 1990. 243–276.

NAGY Ferenc: A nyugatnémet és a magyar szankció– és büntetésvégrehajtási gyakorlat összehasonlítása. [Comparing the West German and Hungarian practice of the execution of criminal sanctions and prison sentences.] MJ 3/90:226–238.

PATERA Antal: A visszaesőkkel szemben folytatott büntetőeljárások hatékonyságának vizsgálata. [Examination of the efficiency of criminal procedures against recidives.] = Krim. tanulm. 27. köt. 1990. 202–242.

POÓR János: A javító–nevelő munka büntetés végrehajtásának néhány problémája. [Problems relating to the execution of the reformatory educational work.] JK 3/90:181–182.

PUSZTAI László: A bűnözés előrejelzése. [Prediction of criminality.] = Krim. tanulm. 27. köt. 1990. 63–123.

RÁCZ György: A közösségi és az egyéni bűnmegelőzés összevetése. [Comparing the community and individual prevention of crime.] JK 12/89:670–671.

SZÉKELY János: A halálbüntetés. [The death penalty.] MJ 3/90:246–258.

SZIJÁRTÓ Károly: Növekvőben a bűnözés. [The growth of criminality.] MJ 4/90:305–313.

ÚJFALVI Annamária: Egy érzékeny emberi jog: az ártatlanság vélelme. [A sensitive human right–the presumption of innocence.] JK 1/90:42–45.

VIGH József: A büntető igazságszolgáltatás néhány problémája. [Some problems of the administration of criminal justice.] MJ 2/90:102–109.

VIGH József: Társadalmi ellenőrzés és felelősség. [Social control and responsibility.] MJ 5/90:429–437.

VIRÁG György: A csalás néhány alaktani kérdéséről. [Some formal problems of fraud.] = Krim. tanulm. 27. köt. 1990. 146–201.

VÓKÓ György: A büntetésvégrehajtási jog fejlesztése. [Improvement of the law governing the execution of punishments.] MJ 4/90:332–335.

VÓKÓ György: Az elítéltek jogi helyzetéről, mint reszocializálásuk kiindulópontjáról. [The legal situation of convicts as the initial point of their resocialization.] JK 12/89:626–629.

X. JUDICIAL SYSTEM

Articles

KULCSÁR Kálmán: A bírósági szervezet fejlesztéséről. [Development of judicial system.] MJ 1/90:1–10.

PETRIK Ferenc: Tizenöt kérdés és tizenöt válasz a bírósági szervezet reformja köréből. [Fifteen questions and replies on the reform of judicial system.] MJ 1/90:11–30.

POLATSEK Edit–LANKÁS Magdolna: Reflexiók Bókai Judit: "Eretnek nézetek" a közjegyzői szervezet korszerűsítéséről c. cikkéhez. [Comments on Judit Bókai's article entitled "Heretic views" on the modernization of the notary.] MJ 4/90:336–339.

SZIGETI Ágnes: Az új bírósági szervezet kialakításának feltételei. [Conditions of setting up a new judicial system.] MJ 2/90:97–101.

ZOLTÁN Ödön: A bíróságok autonómiája. [Autonomy of courts.] MJ 3/90:193–214.

ZOLTÁN Ödön: A bíróságok jogalkalmazó tevékenységéről. [Law applying of the courts.] MJ 5/90:399–416.

XI. CIVIL PROCEDURE

Articles

BÁCS Erzsébet: A csődjog nyugat-európai felfogásából adódó tanulságok, különös tekintettel az angol reformra. [Experiences in Western European concept of bankruptcy law, in particular the English reform.] JK 11/89:596–601.

BAUER Miklós–ÚJLAKI László: A kamarai választottbíróság új eljárási szabályzatának elvi alapjai a reformatív szabályok tükrében. [The theoretical bases of the new rules of procedure of arbitration with the Hungarian Economic Chamber.] JK 3/90:169–179.

CSIKY Ottó: A bíróság békítő tevékenysége házassági bontóperekben. [The mediation of the court in divorce cases.] JK 1/90:27–31.

CSIKY Ottó: Bontójogunk problémái. [Problems of the Hungarian law of divorce.] MJ 5/90:417–428.

FARKAS József: Még egyszer a harmadfokról a polgári eljárásjogban. [Once more on the third instance in civil procedure.] MJ 1/90:46–50.

KENGYEL Miklós: A magyar polgári igazságszolgáltatás a nyolcvanas években. A jogérvényesítés feltételeinek empirikus vizsgálata. [The administration of justice by Hungarian civil courts in the 80ies. An empirical study of the effiency of law.] = Dolg. állam és jogtud. köréből. 20.évf. 1989. 89–113.

SZÉKELY László: Legitimálható-e a legitimálhatatlan? A titkos hangfelvételek perbeli felhasználhatósága. [Legitimation of the illegatimate? Possibility of using secret tape records in evidence.] ÁJ 2/89:566–594.

ÚJLAKI László: Visszaélés a joggal a polgári eljárásban. [Abuse of law in civil procedure.] JK 9/89:455–461.

XII. CRIMINAL PROCEDURE

Book

KATONA Géza: Valós vagy valótlan? Értékelés a büntetőperbeli bizonyításban. [True or false? Assessment of evidence in criminal procedure.] Bp. Közgazd. és Jogi K. 1990. pp. 358 [2] Bibliogr. passim.

Articles

BÓCZ Endre: A büntető eljárási törvény novellájához. [1989. évi XXVI. tv. [On the act amending the Code of Criminal Procedure. Act XXVI of 1989.] MJ 1/90:42–46.

ERDEI Árpád: Kodifikációs megfontolások a büntető eljárás elvei ürügyén. [Considerations on codification on the pretext of the principles of criminal procedure.] MJ 3/90:215–225.

KELEMEN Ágnes: Az opportunitás eljárási intézményei és gyakorlati tapasztalatai Angliában. [Discretionary prosecution and its practical experiences in Britain.] MJ 2/90:166–176.

KISS Anna: Megismerés a büntetőeljárásban. [Establishment of facts in criminal procedure.] = Krim. tanulm. 27. köt. 1990. 277–306.

TREMMEL Flórián: Jogállam és büntető eljárás. [Rule of law and criminal procedure.] JK 12/90:619–625.

XIII. INTERNATIONAL LAW

Books

Magyar részvételű nemzetközi egyezmények. Természetvédelem. Környezetvédelem. International conventions with Hungarian participation. Nature protection. Environment protection. Összeáll. LAKOSNÉ H. Alojzia. Közrem. Gábri Mihály. [Közzéteszi a] Környezetvédelmi és Vízgazdálkodási Minisztérium. Bp. OMSZ háziny. 1989. [1990.] pp. 87, 204 /A környezet és természetvédelem, valamint a vízgazdálkodás nemzetközi dokumentumai 12./

Questions of international law. Hungarian perspectives. Vol. 4. Ed. Bokor[né] Szegő Hanna. Transl. Simon Sándor. Bp. Akad. K. 1988. pp. 265 Bibliogr. passim.

Articles

BOKORNÉ SZEGŐ Hanna: Az emberi jogok egyes csoportjainak megkülönböztetése és az alkotmányfejlődés. [Distinction between some groups of human rights and development of the constitution.] ÁJ 2/89:329–360.

BOKOR[NÉ] SZEGŐ Hanna: International organisations of universal character and the domestic legal order of states. = Quest. int. law. Vol. 4. 1988. 930.

BRUHÁCS János: International legal problems of environmental protection. = Quest. int. law. Vol. 4. 1988. 31–45.

FICZERE Lajos: Decision-making in the Council for Mutual Economic Assistance. = Quest. int. law. Vol. 4. 1988. 47–72.

HARMATHY Attila: Trends in Hungarian arbitration. Disputes arising from ongoing economic relations. = Quest. int. law. Vol.4. 1988. 73–91.

HERCZEGH Géza: A nemzeti kisebbségek védelme a nemzetközi jogban. [Protection of national minorities in international law.] MTud. 4/90:376–384.

HERCZEGH Géza: A sociological approach to international law. = Quest int. law. Vol. 4. 1988. 93–107.

LAMM Vanda: Comments on the international conventions on liability for nuclear damage. = Quest. int. law. Vol. 4. 1988. 125–142.

MÁDL Ferenc: Legal problems of international economic relations in the eighties (the aftermath of GATT) a Hungarian viewpoint. = Quest. int. law. Vol. 4. 1988. 143–175.

NAGY Károly: Invalidity of international acts as a sanction for the violation of law. = Quest. int. law. Vol. 4. 1988. 205–226.

SIEBER Edit: Az Európai Közösségek belpiaca közösségi szociális alapjogok nélkül? [The internal market of the European Communities without fundamental social rights?] JK 3/90:180–181.

USTOR Endre: Comments on the codification of the law of most-favourednation clauses. = Quest. int. law. Vol. 4. 1988. 227–246.

VALKI László: International conflicts and legal sanctions. = Quest. int. law. Vol. 4. 1988. 247–265.

XIV. PRIVATE INTERNATIONAL LAW

Articles

BURIÁN László: A deliktuális felelősség a magyar nemzetközi magánjogban. [Delictual responsibility in Hungarian private international law.] JK 3/90:150–161.

BURIÁN László: A nemzetközi gazdasági kapcsolatok jogának mai kérdéseiről. Az ELTE Polgári jogi és nemzetközi magánjogi tanszékének 1988. máj. 12–13-i munkakonferenciája. [Problems of international economic law. Conference of the Civil Law and Private International Law Institutes of the Loránd Eötvös University, Budapest, held on May 12–13, 1988.] JK 11/89:610–613.

CSABA László: A Szovjetunió megváltozó szerepe a KGST ipari együttműködési politikában. [The changing role of the Soviet Union in the industrial co-operation policy of CMEA.] JK 11/89:563–571.

FICZERE Lajos: A közvetlen vállalatközi kapcsolatok és közös vállalkozások a KGST-együttműködés rendszerében. [The direct relations between enterprises and joint ventures in the system of CMEA.] JK 11/89:555–562.

KATONA Péter: Joint companies in Hungary. = Quest. int. law. Vol. 4. 1988. 109–124.

LONTAI Endre: Iparjogvédelmi együttműködés a KGST keretében. [Cooperation in the protection of intellectual property within the framework of CMEA.] JK 11/89:572–576.

MÁDL Ferenc: Ius Commune Europae. JK 3/90:117–132.

MEZNERICS Iván: Securities for payments in international trade. = Quest. int. law. Vol. 4. 1988. 177–203.

SÁNDOR Tamás: A teljesítést megelőző szerződésszegés és részletekben történő teljesítésre vonatkozó szerződés szabályai az 1980. évi bécsi egyezményben. [Rules of the 1980 Vienna Convention on the anticipatory breach of contract and partial fulfilment.] JK 3/90:137–143.

TAKÁTS Péter: A KGST 1968/1988. évi Általános Szállítási Feltételek. [The General Conditions of Delivery of CMEA. 1968/1988.] JK 11/89:577–582.

ÚJLAKI László: Az 1968/1988. évi ÁSZF reformatív szabályainak viszonyítása az eddigi szabályokhoz. [Comparison of the reform rules of the General Conditions of Delivery of the CMEA from 1968–1988 to the previous rules.] JK 11/89:603–610.

VÖRÖS Imre: A KGST-beli termelésszakosítás és kooperáció Általános Feltételei gyakorlati problémái. [Some problems of the specialisation of production in CMEA and the General Conditions of Cooperation.] JK 11/89:602–603.

XV. HISTORY OF STATE AND LAW

Books

SCHEUER Gyula: A Budapesti Értéktőzsde. A magyarországi értékpapírpiac a két világháború között. [A] Magyar Tőzsdealapítvány kiadványa. [The Budapest Stock Exchange. The Hungarian market of securities during the interwar period. Paper published by the Hungarian Stock Exchange Foundation.] Bp. Dorogi ny. 1990. pp. 122 [2] /Tőzsdeelméleti tanulmányok 4./ Bibliogr. 121–122.

Sorsdöntések. A kiegyezés–1867. A trianoni béke 1920. A párizsi béke–1947. [Dokumentumgyűjtemény.] Összeáll., szerk., előszó és magyarázó szöveg Gerő András. Közrem. Bíró Judit, Nóvé Béla. [Fatal

decisions. The Austro–Hungarian Compromise–1867. The Trianon Peace Treaty–1920. The Paris Peace Treaty–1947.] Bp. Göncöl K. [1990.] pp. 420 3 térk. mell.

SPILKNÉ KERTÉSZ Márta: Magyarországi értékpapírok története 1945ig. [A] Magyar Tőzsdealapítvány kiadványa. [The history of securities in Hungary until 1945. Paper published by the Hungarian Stock Exchange Foundation.] Bp. Dorogi ny. 1989. pp. 103 /Tőzsdeelméleti tanulmányok 3./ Bibliogr. 99–103.

Articles

BALOGH Elemér: Kemény Zsigmond választójogi reformgondolatai 1848 előtt. [Electoral law reform ideas of Zsigmond Kemény before 1848.] = Jogtört. előadások. 2. köt. 1990. 157–169.

BELLÉR Judit: Büntetőjogi reformkísérletek és törvényhozás a XVIII. század elején. [Reform projects of criminal law and penal legislation at the beginning of the 18th century.] = Jogtört. előadások. 2. köt. 1990. 109–127.

HAJDÚ Lajos: Adalékok a felvilágosult abszolutizmus erdélyi reformpolitikájának értékeléséhez. [Contributions to the evaluation of the reform policy of enlightened absolutism in Transylvania.] JK 9/89:461–466.

HALMAI Gábor: A korporációtól az egyesületig. Az egyesülési gondolat fejlődése. [From corporation to associations. Development of the concept of association.] JK 4/90:185–193.

HAMZA Gábor: Maine és a 19. század európai jogtudománya. [Maine and European legal thought in the 19th century.] = Jogtört. előadások. 2. köt. 1990. 184–196.

HORVÁTH Attila: A gazdaságot szabályozó jog modernizációja Magyarországon. [Modernization of Hungarian law regulating economic relations.] = Jogtört. előadások. 2. köt. 1990. 96–108.

HORVÁTH Pál: A liberális jogi historizmus Magyarországon. [Liberal legal historism in Hungary.] = Jogtört. előadások. 2. köt. 1990. 197–205.

JOBBÁGYI Gábor: Werbőczy [István] és a hármaskönyv. [István Werbőczy and the Tripartitum.] JK 9/89:466–469.

KAHLER Frigyes: A pizetumjog fejlődése. [Development of the right of pisetum.] = Jogtört. előadások. 2. köt. 1990. 42–60.

KÁLLAY István: Az úriszék magánjogi gyakorlata a 18-19. században. [Civil law practice of the manor courts in the 18th and 19th centuries.] = Jogtört. előadások. 2. köt. 1990. 61–75.

KALTENBACH Jenő: A közigazgatási felügyelet kialakulása és fejlődése a XIX. század végéig. [The establishment and development of administrative control until the end of the 19th century.] JK 1/90:9–16.

KALTENBACH Jenő: A magyar önkormányzati felügyelet. [Supervision of self-governing bodies in Hungary.] MKözigazg. 5/90:401–415.

MEZEY Barna: Büntetésvégrehajtás a feudalizmusban. [Execution of punishments in feudalism.] = Jogtört. előadások. 2. köt. 1990. 128–156.

PATZNER László: Legfőbb Állami Számvevőszék. 1870–1949. [Supreme State Audit Office. 1870–1949.] MKözigazg. 2/90:164–172.

POMOGYI László: A magyar feudális perjog története. [History of the Hungarian feudal civil procedure.] = Jogtört. előadások. 2. köt. 1990. 76–95.

RÁCZ Lajos: Kánoni jog vagy világi jog: a házassági jog kodifikálása a dualista Magyarországon. [Canon law or secular law: codification of the law of marriage in Hungary in the era of dualism.] ÁJ 2/89:407–435.

RÉVÉSZ Tamás: Az Állami Számvevőszék dualizmuskori történetéhez. [History of the State Audit Office during the era of the Austro–Hungarian dualism.] = Jogtört. előadások. 2. köt. 1990. 170–183.

RUSZOLY József: A választási bíráskodás: alkotmánybíráskodás. [Electoral tribunal–constitutional jurisdiction.] MTud. 4/90:405–419.

XVI. ROMAN LAW

Articles

BESSENYŐ András: A celsusi Durchgangstheorie magyarázatára alkotott elméletek. [Theories for the inter pretation of the transition theory on Celsus.] = Dolg. állam- és jogtud. köréből. 20. évf. 1989. 31–73.

FÖLDI András: A másért való felelősség római jogi gyökerei. [Roman law roots of vicarious liability.] = Jogtört. előadások. 2. köt. 1990. 31–41.

PÓLAY Elemér: A közrendet sértő magatartások elbírálása a római jogban. [Reactions to conducts contrary to public order in Roman law.] = Jogtört. előadások. 2. köt. 1990. 6–13.

ZLINSZKY János: Büntetések Rómában a XII táblás törvényig. [Punishments in Rome before the XII Tables.] Jogtört. előadások. 2. köt. 1990. 14–30.

XVII. MISCELLANEOUS

Articles

SAMU Mihály: Bevezető megjegyzések Moór Gyula életművének értékeléséhez. [Introductory remarks to the assessment of the philosophy of law of Gyula Moór.] JK 10/89:495–496.

SZABADFALVI József: Moór Gyula pályakezdése. 1900–1918. [The first years of Gyula Moór's career.] JK 10/89:497–504.

TRÓCSÁNYI László: Szemelvények az Állam és Jogtudományi Intézet dokumentációs tevékenységének történetéből. [From the history of documentary activity of the Institute for Legal and Administrative Sciences.] ÁJ 2/89:553–562.

ÚJFALVI Annamária: Francia–magyar jogásznapok Budapesten. [1989. jún. 14–18. French–Hungarian Lawyer's Symposium, Budapest, June 14–18, 1989.] JK 12/89:668–620.

ZLINSZKY János: A jogász erkölcse. [The morality of the lawyer.] JK 1/90:17–26.

PRINTED IN HUNGARY

Akadémiai Kiadó és Nyomda Vállalat, Budapest

HUNGARIAN ACADEMY OF SCIENCES

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

AUTHORS:

László SÓLYOM, Professor of Law, President of the Constitutional Court, Budapest

János ZLINSZKY, Professor of Law, Judge of the Constitutional Court, Budapest

Imre VEREBÉLYI, Professor of Law, Administrative State-Secretary Hungarian Ministry of Interior, Budapest

Zoltán PÉTERI, Professor of Law, Institute for Legal and Administrative Sciences, Hungarian Academy of Sciences, Budapest

Endre USTOR, Professor of Law, Ambassador Retired, Budapest

George P. FLETCHER, Beekman Professor of Law, Columbia University

Alexander VIDA, Professor of Law, Legal Adviser of Danubia Ltd, Budapest

Miklós UDVAROS, Research Fellow, Hungarian Academy of Sciences, Budapest

HU ISSN 0001—592X Index: 26.013

Acta Juridica Hungarica 1991

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

Vol. 33 N° 3–4

HUNGARIAN ACADEMY OF SCIENCES

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

Acta Juridica Hungarica publishes papers on all branches of legal sciences in English. Acta Juridica Hungarica is published in one volume per year, consisting of four issues by AKADÉMIAI KIADÓ, Publishing House of the Hungarian Academy of Sciences, H—1117 Budapest, Prielle Kornélia u. 19—35.
Manuscripts and editorial correspondence should be addressed to
ACTA JURIDICA HUNGARICA
H—1250 Budapest P.O. Box 25
Orders should be addressed to
AKADÉMIAI KIADÓ
H—1519 Budapest P.O. Box 245

HUNGARIAN ACADEMY OF SCIENCES

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

Vol. 33 1991 N° 3—4

CONTENTS

STUDIES

BOOK REVIEW

Acta Juridica Hungarica
1991 33 N° 3–4, pp. 143–151

Akadémiai Kiadó,
Budapest

STUDIES

Pál HORVÁTH

Reflexions on Writing Modern Legal History in East-Central Europe

The epochal changes in the last years have shaken what was earlier believed by many to be a stable body of knowledge of our recent history, and more so our perception of the historical precedents of our existing institutions. One should not overlook, of course, the fact that this state of affairs discounts nothing from the value of the factual material collected in the last decades being nevertheless a valuable addition to our knowledge of legal history. In fact, perhaps there has never been as great an interest as right now in confronting the history of contemporary positive law; no doubt, the renaissance of historical interest in law is due largely, if not exclusively, to fundamental changes in our perception of events and processes of contemporary history within and outside the domain of law.

Legal historians were among the first in Eastern European legal scholarship who addressed themselves to the realities of administration of justice and pointed out the rift between "law in books and law in action" and the legal policy errors or distortions in different historical periods. The task of realizing the wide gulf between reality and theory to which the institutions were supposed to be based, was left, however, for the most time to the readers of our publications. This is why it has become an urgent need to spell out and, where appropriate, rectify omissions and errors whether caused by political or other factors; this is substantial for the purpose of providing solid factual basis to the public discussion on recent history in Hungary (and no doubt elsewhere). No single representative of any particular discipline of legal scholarship could feel himself or herself absolved from this duty; still, we have a vested interest in respecting the results already achieved by legal scholarship, even if this is, clearly, of limited scope and sometimes methodologically questionable. They contain

nevertheless a part of the historical truth, even if we must be aware of the fact that only a part of it.

These insights may, perhaps, impart a fresh impetus to the efforts at identifying the outstanding problems of history of modern law in our region from a highly theoretical point of view. It appears to be more practicable and closer to the legal historian's mind, however, to begin the study with examining particular legal institutions.

In dealing with the development of the political and legal systems in East-Central Europe we were often mistaken, especially in the last decades, in claiming that a particular legal institution or whole branch of law reached its stage of full development. Moreover, in certain countries the prevailing opinion asserted that the legal order as a whole satisfied the needs of a highly complex, "advanced" ["socialist"] society. In reflecting on the never ceasing "expansion of democratism", we were inclined to herald the birth of a whole range of new "socialist" constitutional devices, whereas in other branches of law the characteristic features due to the contingencies of the moment were presented, for example, as a "new wave of codification". The same phenomena are now regarded, at best, as a result of political and social constraints, or even producing counterproductive effects.

This is not to question, anyway, that this particular period of legal development, called, rightly or wrongly, "socialist" or "communist" in the countries of East-Central Europe should be made in part or in its entirety a proper subject of research in legal history. Still, the extension of historical research to most recent times has, as it is well known, its own methodological problems; it is not, however, a mere experiment since modern legal scholarship, e.g. in Hungary, produced works of modern legal history, one is tempted to say, combining historical and legal methods in an exemplary way.[1]

At the same time, I think we are entitled to claim that our endeavours are not motivated by pragmatic goals, since we gave up the approach of constructing mechanical schemes deducted from theoretical (or even ideological) premises, on the supposedly "correct" way of the development of law which had, naturally enough, its impact on viewing the past. One of the basic tenets of this approach was that the history of socialist law was characterized by its break with traditional legal culture, as the development of law was determined exclusively by social and historical (that is external) factors. Consequently, the history of a particular type of legal systems and their long-term evolution, cannot be measured or evaluated by reliance to either on the postulate of *"historia est magistra vitae"* or on the long-standing requirements of "adequate historical perspectives". Thus, the modern legal history has shifted its focus, in fact, to exploring the

1 An important piece of research of that kind is the comprehensive survey of East European constitutional development entitled "Az európai népi demokráciák alkotmányai" (Constitutions of the European People's Democratic Countries) (ed. by KOVÁCS, I.) Budapest, 1983, an analysis of the whole history of "socialist" constitutional systems.

historical reality of the law in force, helping to understand an era which offers perhaps more lesson to profit from than any other for the benefit of our age.[2]

Against this background the expectation that the modern *legal historicism of today should also rely on social experiences likely to shape the future* is raised by the scientific revolution of our time, rejecting the traditional forbearance which, hiding behind the slogan of "lack of adequate historical perspectives", released legal historians until recently from their duty to study the processes of legal development directly steering the course of the time they live in. Therefore the historical processes determined by the forces and factors of the present are to be seen not as a detached but as an organic part of the legal history as a whole. What I have in mind here is not a comparative analysis of law known to be equivalent to the fashionable research into contemporary history or *(Zeitgeschichte, histoire contemporaine)* focusing on a panoramic, rather than strictly historical description of "legal systems of the world";[3] rather, I think on the worldwide resurgence of interest in "legal development" in recent times.

Collaboration between legal historians of the East-Central European countries has created several institutionalized occasions[4] concerned entirely with the development history of our particular group of legal systems. Indeed, the endeavour for collaboration led to the international conference held in Prague in 1975 which announced the need to assess the social experiences of recent history.[5] The historical study of legal development had not been unknown, as a matter of fact, earlier too; but the experience sporadically emerging in the development history of the neighbouring countries did not produce, at least as yet, results capable to serve as a sound basis for a broad historical synthesis of the modern legal history of East-Central Europe, except those similar to the Prague Conference mentioned before. Furthermore, it is of paramount importance for us that the new occasions for scholarly exchange referred to above be allowed a wide scope for source-based presentations of national legal systems, thereby laying the basis for a broader study of the recent history of the East-Central European legal systems.

Our present knowledge makes possible to analyze both the *regional* components of East-Central European laws and the national legal systems, unfolding a wealth of experience capable of generalization and likely to contribute to a better understanding

---

2 This was stated in respect to the history of "the really existing socialism" by an eminent Hungarian historican; see PACH, Zs. P.: Történetírás és tudatformálás (Historiography and Social Consciousness) in: Történetszemlélet és történettudomány (Philosophy of History and Science of History), Akadémiai Kiadó, Budapest, 1977, p. 84.

3 See, e.g. the widely read outstanding works by WIGMORE, J., SEAGLE, M., DAVID, R., SCHNITZER, A., and others.

4 See the material of the Conference on "Entstehung und Entwicklung des sozialistischen Staates und Rechtes" held in Prague from 20 to 23 May, 1985. (Prispevky k dejinam socialistického státu a práva I-III.) Ed. by Karel MALY. Universita Karlova, Praha, 1987.

5 For the two-volume material of the Conference, see Vznik a vyvoj socialistického práva. Ed. by Karel MALY. Universita Karlova, Praha, 1987.

of the timely problems of the present. Of course, *not even these problems could relegate the national characteristics of legal systems into oblivion,* but the participating scholars reached certain conclusions corroborating the existence of close historical interactions between the regional and the particular national elements. This very fact gives us encouragement to accord priority to a wider range of research by relying on the latest international experience gained in the subject.

Against this background I hardly need to explain the particular interest in the recent history of Hungarian law, but there also seems to be an obvious need for a more complex sort of research to be undertaken once we are able finally to form a more or less complete picture of the course of legal development in other Central European countries.[6]

This line of analysis should cover the contemporary period which means, for our purpose, the scope of study in legal history proper. The given period of East-Central European law embraces, however, a new and significant historical stage of legal development as well. Thus, the expectation that we shall disclose at least the some features of transition in the recent past to the recent present period of development of East-European state and law will be justified by the time our research findings will have finally reached the stage of general application.

Research in the history of law revealed already the complexity of little less than a century of development and, in several cases, defined in clear terms the typical traits of what might be called a model legal development. In this context, our thinkers were, obviously, primarily not concerned with the distinction between different groups of law or with the interactions between those which had developed in the region, but with the problems evolving in the legal systems of the neighbouring countries and mutually influencing each another; the legal systems in this group showed palpable elements of both differentiation and integration. There is no doubt that the Soviet model shaped substantial branches of law, but research in recent general and economic history points also to contours of the different regions emerging as a result of the particular conditions of transition. Gradually we shall become able to observe[7] in respect to individuals legal institutions as with respect to the legal development of the East-Central European countris[8] there where substantial differences between the economically relatively developed, mostly Central European, countries, and those relatively more backward economically.

These and similar problems became more and more apparent, even within the restricted field of the research on individual legal institutions. Thus historical analysis

---

6 See from the author: A szocialista jog fejlődése (Development of Socialist Law), Közgazdasági és Jogi Kiadó, Budapest, 1984; idem: Az európai népi demokratikus jogcsoportrégió (The European People's Democratic Group Legal Systems), in: Az állam és jog fejlődéstörténete (History of State and Law), Akadémiai Kiadó, Budapest, 1987, pp. 232 et seq.

7 As it has been pointed out in the respect of on European socialist legal system.

8 E.g. the German Democratic Republic and Czechoslovakia (as they then were).

could have noticed for instance relatively early the appearance of "economic law", as distinct from traditional civil or commercial law, in certain countries or its equally inevitable absence in others. Similar examples could be given of recurrent elements of legislation or, in other cases, of more radical models with transitory forms, in particular agrarian law. Similar ideas could be cited at length of course in the domain of the codification of public law, property law, family law, law of succession or the most recent arrangements in the wake of the systemic change with their legal relevance.

In studying the last fifty years of the East-Central European group of laws, we can refer also to scholarly research that laid the ground for a thorough analysis of the various factors of legal development in different periods.[9] These possibilities of research, however, are not exhausted completely with the arrival of a new period, although they are far from offering a historical experience suitable for generalization. Outsider observers could have every reason, naturally, to conclude that the history of certain legal systems are not relevant grounds for generalisation; rather they could be regarded as a sort of borderline case since its various components belong already to the realm of contemporary law in force. In addition, the actual material at our disposal tends to rouse the conviction that explorable historical processes remain, essentially, the processes subjected to analysis have not yet run their course. But who could question that historiography can provide direct lessons, if any, for the present precisely by probing into the most recent past.[10]

In fact, the opportunity is here to *enhance, also by the means of historical legal research, a more complex approach to the current problems* in some branches of the positive law, while systematically integrating the results obtained in this way into the research in the several branches of law, but also comparative law, sociology of law, etc. on present day problems of law in East-Central Europe.

The endeavour to disclose in a historical approach the emergence of the actual state of a legal system is, of course, not a new phenomenon in jurisprudence. On the contrary, it would not be amiss to claim that some of the relevant historical processes came to open room for summing up research results, but studies of the substance of the period reveal nevertheless, that, for instance, earlier of periodization understandably failed to serve as a guide even to delimiting the period of the so-called "people's democratic" ("socialist") state and law. Yet efforts at a comparative historical study of the group of laws were gaining momentum in historical processes. This makes it clear that the Conference in Prague mentioned earlier sought to establish a solid basic of

9 For a survey see the author's A szocialista jog kialakulásának a történelmi tapasztalatai (Historical Experiences concerning the Emergence of Socialist Law), in: Jogtudományi Közlöny XXXV (1980), Nr. 5, pp. 217-234.

10 As correctly stated by PACH, Zsigmond Pál, "the historiographer of our recent decades probes into an era in which century-old processes of our history have just run their course", see Új Történelmünk (Our Recent History) 1977, pp. 581-522.

historical periodization,[11] East-Central (socialist) legal system and that, as a result, it was then presumed that development in the countries of East-Central Europe entered into a new stage from the 1980s onwards, though with local discrepancies.

The revival of interest in the period of the "people's democratic", "socialist" in the '80s, state and law in Europe has gone far beyond, for instance, the rather narrow field of legal scholarly of jurisprudence. In this sense it may be claimed that social and historical sciences in general have shown, in both West and East growing interest in legal development. Successive generations were motivated by this noble goal, but the forcible historical detours and the concrete set of historical conditions impeded efforts, down to the end of the 1980s if not to our days, to arrive at an understanding of the fundamental socio-economic and political conditions let alone explanation of the changes.

Social changes in the countries of East-Central Europe followed one another as we remember with relatively short sequences the recent history of the region, but the complex maturing or the *time-horizon of the historical processes has varied* in intensity even by subregions. Still, it is understandable that the changes open also a possibility for a general East-European group of laws to attain its full stature. The transformation of the basic productive and property relations and the unfolding of inevitable reforms thereof have become, for instance, with a relatively short time lag, features common to such a law. Indeed, the related process did not get underway in the societies of the East European countries until the end of the 1980s and, as it is shown chiefly by social experience in recent years, it has also radically changed the structure and content of legal systems. *All these warrant the claim that new era has been inaugurated.*

With the attention too much focused now on constitutional and, therefore, politico-legal aspects,[12] the danger may be naturally that the periodisation proper to the history of public law will prevail over other fields of law, a problem particularly important right now. What has been stated so far makes it obvious, however, that none of the processes expressing the novelty of the period appears to have run out its course, so the substantive change in a given state order has not been complete either, because the said socio-economic and political conditions of the transition acquired new elements incessantly as they approached the present. Thus, for instance, the quest for possibilities of a new economic order as a general concomitant of legal development in East Europe and the full unfolding of related processes, gathering renewed momentum, cannot really be expected except in the future. In fact, this search for paths of a more intensive development has, with local variations, actually characterized legal development in the countries of East-Central Europe from as early as the second part of the 1980s. In a similar manner, stronger emphasis was laid on the need for a creative legislative activity and renewed efforts were undertaken to expand the democratism of legal life. Therefore it

---

11 See DOLEZAL, M.: Hlavní etapy socialistického statu a práva. (Main phases of the socialist state and law), in: Vznik a vyvoj socialistického práva (1976), pp. 11-29.

12 See the work referred to above, Az európai népi demokráciák alkotmányai (The Constitutions of the European People's Democratic Countries) (ed. KOVÁCS, I.), note 1.

appears practicable for us to keep track of these historical processes moulding as they do the shape of the future.

In an historiographical sense, we are naturally making no new effort to apply a comparative approach of legal history to the legal development of "contemporary societies" in Hungary and the neighbouring countries, specifically for the purpose of promoting the exploration of the lasting values produced by the history of Hungarian law. This endeavour is motivated by the fact that for the study of Hungarian legal development in modern and recent times in the context of universal history we have not been equipped so far precisely with the decisive body of adequate knowledge which "incessantly influenced" our progress and which was conditioned by the same causes as were its sources by reason of their proximity and simultaneity.[13] Of course, it is not only in view of the relevant body of facts that we have undertaken little work so far concerning the legal development in these neighbouring regions, but even conjectures about historical interactions have remained unexplored, although this era, which has, with its actual material, offered possibilities for a systematic study of our legal development[14] in the context of the history of Central and East Europe, providing a framework for the long-standing tasks we share in this region.[15] As it is stated by historical science, the relationships between universal and national histories and between neighbouring contemporary societies in the Eastern part of our continent are determined, despite their diversity, by the interdependence of modern civilizations[16], and we are gaining an understanding of these interrelationships not only by disclosing the interactions of our legal development in modern times demonstrated in the foregoing, but practically in all spheres of material culture.

Our references to the history of literature of East-Central Europe which led to us to agree with the conclusion of Sziklay stating that "parallel development has become, despite the often sharp disagreements between nations, particularly ostensible from the end of the 18th century down to the beginning of the 20th century" and even to our

---

13 "[A]nd which stem, at least in part, from a common source". This thought, which may provide guidance to us in the development of our legal historicism in recent times, is quoted from Marc Bloch, the martyred great thinker of progressive comparative science. Cf. BLOCH, M.: A történelem védelmében (In Defence of History), Akadémiai Kiadó, Budapest, 1974, pp. 70-71.

14 As we are also reminded by an apt conclusion of historical science. See BALOGH, S.—SIMON, P.: A magyar történettudomány időszerű kérdései (Topical Issues of Hungarian Historical Science), Magyar Tudomány Új Folyamata (1964), p. 488.

15 Our legal thinking, too, approaches at Hungarian legal history as deeply embedded in social, economic and political condition, which can only be studied properly "by a parallel analysis of universal historical interrelationships". Cf. Történettudományunk helyzete, eredményei és feladatai (The Situation, Results and Tasks of our Historical Science), Magyar Tudomány N.S. XIII (1968) pp. 138 et s.

16 See HEIDORN, G.: Az egyetemes és nemzeti történelem kölcsönös viszonyáról (On the Mutual Relationship of Universal and National History). Egyetemes történeti tanulmányok (Studies in Universal History) VII, Acta Univ. Debreceniensis, Seria Historica, XIX (1974), pp. 7-8.

times,[17] not being alien to the mutual development of legal culture either. On the other hand, the vacuum obviously felt in this respect in our legal historiography until very recently can be explained only by unilateral Hungarian legal thinking which came to assess the one-time uniqueness of Hungarian legal development "through underestimating the similar values of neighbouring peoples".[18] Consequently, the historiography of our time must change its approach radically with the help of research focusing on recent times lest, while being engaged in a study of the rich factual material we should "forget about the fact that the neighbouring peoples have virtually have experienced the same development of law" or lest science should produce one-sided results by ignoring the concrete interactions of history.

However, the interrelationships as suspected by many should be supported by facts in order that research on legal history should achieve really lasting results. With a closing remark we must therefore recall the idea that studying the relevant phenomena in themselves and then comparing them will facilitate the task of finding the clues to their subsequent appearance. This is why Hungarian science, concerned chiefly with general legal history, undertakes, by relying on the latest research results to give, at least a survey of the legal development in recent times of those nations which have had a shared history with us.

We accepted this challenge by presenting the complex legal development of East-Central Europe,[19] which includes the transition to modern times, in an effort to provide an insight, based on contemporary sources and on the latest research results, into the prehistory of the legal development of the respective nations in modern times. However, further progress was not possible until after the basic sources of the bourgeois-capitalistic era had been published,[20] and we had to draw from the latest international experience of methodical research too,[21] in our quest to form a picture of hopefully lasting value, by sorting out the chief components of the bourgeois (Western-capitalistic) group of laws of which not even an overall view was available previously. The northern neighbours of Hungary (the Czech, Polish and Baltic peoples), forced as they were into the imperial frameworks of the Prussian-German, Austrian and Russian state organizations were

17 See SZIKLAY, L.: Szomszédainkról. A kelet-európai irodalom kérdései (On Our Neighbours. Aspects of East European Literature), Irodalomtudományi Közlemények, pp. 365-367.

18 This exhortation was made by HADROVICS, L. as early as during the Second World War. See his A magyar és a déli szláv szellemi kapcsolatok (Hungarian and Southern Slav Intellectual Links), Budapest, 1944, p. 34.

19 See the present author's 'A kelet- és közép-európai népek jogfejlődésének főbb irányai' (Trends in the Legal Development of the Eastern and Central European Nations). Közgazdasági és Jogi Kiadó, Budapest, 1968, p. 494.

20 See: Bevezetés az egyetemes állam- és jogtörténet forrásaiba (Introduction to the Sources of History of Law and State (The Sources of Bourgeois Law)). III, Budapest, 1970; III/b, 1971.

21 See the author's Tudománytörténeti és módszertani kérdések a jogtörténet köréből (Questions of the History of Science and of Methodology in the Domain of Legal History). Közgazdasági és Jogi Kiadó, Budapest, 1974, p. 502.

covered only *per tangentem* by that survey. Rather than justifying this hiatus on the ground that those people, brought under the sway of the Prussian-German, Austrian and Imperial Russian legal systems which determined their specific features, did not have separate records of legal development at the time, we can refer to the fact that, at the same time, the multinational-based frameworks of political law carried in themselves the most important concrete body of knowledge about the legal development of the nations concerned. In this respect, therefore, Hungarian legal historical research has at lest the indispensable clues, which does not naturally eliminate the need to arrive some day at the stage of giving a fuller picture of East-Central Europe, devoting close attention to the modern legal systems of the Czech, Slovak, Polish, Ukrainian and Baltic peoples, each and all, which were equally ephemeral and developed under specific conditions of national oppression.

This inescapable task is justified not only by our multifaceted historical links in this field, but also by the fact that almost all of the neighbouring people attained some degree of independent statehood during the crisis-ridden period of capitalist law in the 20th century. Indeed, without such a complex analysis, it is inconceivable to probe into the emergence of the early crisis experienced by East Europe's legal systems of a capitalistic type and their evolution into an East-European ("socialist") group of law.[22] The question that might be said to concern the reason why modern legal history focuses its attention on that era full of contradictions in which may be considered now to be history, often intermingle with the socio-political problems of recent times.

As regards in particular the tasks of Hungarian research, this question is easy to answer but the reader is left thinking that *this most recent period of research in legal history calls* for a number of questions to be reformulated and *for a number of old paradigms to be removed.* Were it really more beneficial for educating future generations if the painful facts of history's blind alleys and detours is buried in oblivion—provided of course, that this were possible? Science must by necessity adopt a firmly negative position in this question, among others because the historical transformation of decisive importance which we are priviliged to experience prompts people to carry out really historical tasks. This process, whether it will create a historically new type of legal order (which is probable) or not in East-Central Europe, certainly badly needs reliable information on the immediate past. In this context, the task to be undertaken by science is not only labour-consuming and tremendous, but, at the same time also elevating one; it has demonstrated its viability by the accumulated findings of research, the achievements of the legal historicism of our time, which have also proved suitable to establish a wider and more adequate, that is more European, *Weltanschauung* than any of the preceding ones.

---

22 See the author's A közép- és kelet-európai szocialista jogcsoportrégió kialakulásának történelmi körülményei (Historical Background to the Emergence of the Region of the Socialist Legal Systems in Central and East Europe), in: Az állam és jog fejlődéstörténete (Development History of the State and Law). Akadémiai Kiadó, Budapest, 1987, pp. 245-266.

Acta Juridica Hungarica
1991 33 N° 3–4, pp. 153–166

Akadémiai Kiadó,
Budapest

Tibor HORVÁTH

Abolition of Capital Punishment in Hungary

I

On motion of the League against Capital Punishment, the Constitutional Court of the Republic of Hungary, in its decision published 24th October 1990, declared capital punishment unconstitutional and repealed all the statutory provisions concerning the infliction and execution of capital punishment.

This method abolishing capital punishment is unprecedented in international legal practice and the resolution of the Constitutional Court was an unexpected and surprising step to the Hungarian general public. The question is justified: what made this step possible, what were the causes leading to it and why through the medium of the Constitutional Court?

The social and political background for this step was created by the process by which the Hungarian regime changed. In 1989 it was already possible to see that in the course of building up a democratic and constitutional state, and of the change in political regime, the preservation or the abolition of capital punishment was becoming a social, political, ethical and, lastly, legal dilemma which the renewed Hungarian society would have to face sooner or later. Beyond this basic reason, several other circumstances led to the reconsideration of the problem of capital punishment. The movement against capital punishment has had very strong traditions in Hungary for over a hundred years. Since the reform period in the last century, progressive representatives of legal sciences and of the intellectual class have been consistently striving for the abolition of capital punishment or for at least its maximum restriction. However, in the last ten decades the various regimes have abused the use of capital punishment and used it primarily for the

destruction of their real or supposed political enemies. In addition, mainly legal, professional circles were aware of, and influenced by, humanist European development of law based on social rationality and the recognition of human rights which had already banned capital punishment from the arsenal of criminal law on the major part of the continent.

In the past decades it was not possible to discuss the ethical, political or legal issues of capital punishment in scientific literature, not to mention in the regular channels of information of the general public in Hungary. In early 1989, lawyers, sociologists, writers, representatives of the press and several churches established the League against Capital Punishment. Their aim was fight for the abolition of capital punishment with the means at its disposal, primarily through the might of information and explanation. Soon the League counted more than 600 enthusiastic members, who propagated the aims of the League by individual and organized actions in various parts of the country. Several lectures were held and articles published in newspapers on the topic, to which the different layers of society reacted in very different ways. Initially the rejecting of the idea of abolition expressed in the roughest way, eventually the arguments found an outlet. However, the League could not count on the majority of the society to take its side after only a few months' duration.

The government developing the political strategy of the transition was undoubtedly sympathetic to the idea of abolition, although it never committed itself to it publicly. It cannot, however, be considered to be a coincidence that Kálmán Kulcsár, the Minister of Justice in the government of the transition period and well-known legal sociologist, submitted a draft constitution to Parliament in the first half of 1989, which emphasized its intention to conform to internationally recognised norms such as those embodied in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights as well as those in International Covenant on Civil and Political Rights. The draft constitution he submitted expressed the idea specifically that "it requires consideration even on the basis of the constitutional right to life whether it can be declared that the imposing of capital punishment is not reconcilable with that right".

In its discussion of the draft constitution, Parliament did not take a stand on the question of capital punishment and the political parties formed later on also refrained from expressing their opinions. Actually there was not a single political party which supported the unpopular idea of abolishing capital punishment. At the same time, as wider and wider layers of the general public learned about the misuses of political and legal rights in the past decades, and in particular about the size and scope of the retribution after the popular uprising of 1956, the layers of the general public came to face the ethical and political dilemma of the problem and abandoned capital punishment. It can be attributed to the public's growing pressure, that Parliament carried the motion by Kálmán Kulcsár, Minister of Justice, on not imposing capital punishment for political offences (i.e. offences against the state), in the future. As a second step, Parliament accepted the motion by the Minister of Justice, undebated in the autumn of 1989, on the

re-regulation of offences against the state, one of the most essential features being that the new law did not include capital punishment among its sanctions.

At the end of 1989 the League was planning to launch an extensive campaign on the complete abolition of capital punishment, in which it strove to persuade members of Parliament to accept the idea of abolishing capital punishment. However, at the same time as the idea of abolition was spreading among the members of Parliament, where there were adherents of abolition in every political party, the political parties did not dare to set the issue of abolition as one of their objectives, presumably for tactical reasons. In addition, it became general knowledge that Parliament was so preoccupied with the preparation and debate of various statutes, mainly those facilitating political transition, that it was unable to deal with special issues like capital punishment. It was also impossible to count on Parliament addressing the issue in the course of passing the new Constitution, and in the end no comprehensive new Constitution was passed, only the old Constitution was partially amended (Act XXXI of 1989). The amendments of the Constitution stated, among other things, that: "In the Republic of Hungary all persons have a birth right to life and human dignity, which nobody can be deprived of arbitrarily". And under paragraph 2, "Nobody can be subjected to torture, to cruel, inhuman, degrading treatment or punishment..."

Considering all these factors, the League decided, because it seemed impossible for Parliament to deal with the issue of capital punishment, at this time, to take the case before the Constitutional Court formed in the meantime, because the League believed that capital punishment was irreconcilable with the principle of law expressed in Article 54 of the amended Constitution. Thereafter in April 1989, the League submitted its petition to the Constitutional Court and made a motion that the Constitutional Court declare capital punishment unconstitutional.

The reasons for the petition were presented by the President of the League in a 70-page-long study. The study set forth in detail the European traditions of the movement against capital punishment, offered a survey of the state of capital punishment and its abolition, respectively, in the world, treated the history of capital punishment in Hungary and discussed the reasons for its abolition.

II

From the earliest times capital punishment in the Hungarian legal system was the same general means of punishment as used all over Europe. Characteristically at the beginning of the 19th century the feudalistic Hungarian criminal law still imposed capital punishment in 180 criminal acts. At the same time the ideas of the Enlightenment regarding criminal justice (I refer here first of all to the activity of C. Beccaria and the French encyclopedists) appeared in Hungary as well throughout Austria and Italy at the end of the 18th century. Maria Theresa already forbade the application of torture in criminal procedure and she sought to restrict the Hungarian jurisdiction in imposing capital punishment. Joseph II became an explicit abolitionist when he abolished capital

punishment in civil procedure in 1787. However, in later years the absolutist government, frightened of the French revolution, reverted again to capital punishment. Nevertheless, as a result of the endeavours of the Hapsburg government, the infliction of capital punishment decreased considerably in the first quarter of the 19th century. And in the 1830s current European thought about abolitionalism made itself powerfully felt.

In 1839 the Hungarian Scientific Society offered a prize for examining the problem, which was awarded to the paper entitled "On Punishment, in Particular on Capital Punishment"[1] by Bertalan Szemere, the would-be Minister of the Interior and later Prime Minister of the revolution and war of independence of 1848-49. Bertalan Szemere, dismissed capital punishment without qualification and without exception. His main argument was, on the one hand, the inalienability of human life, and, on the other, the fact that capital punishment was not necessary for maintaining the social order. Szemere's arguments were accepted by the progressive public opinion of the reform period and, as a result, the draft of the Criminal Code of 1843 eliminated capital punishment from the penalty system of the Code. At the same time this was probably why the conservative powers of the Upper House did not let the bill pass.

After the political compromise of 1867 between Austria and Hungary, the institutions of a liberal constitutional state were built up with together the modernization of the legal system. While the Criminal Code of 1878 was a step back as regards to capital punishment from the radical standpoint of 1843, it still restricted the imposition of capital punishment to within extremely narrow bounds by limiting capital punishment only for cases of premeditated homicide (murder in the first degree) and for attempt on the king's life. As a matter of fact, between the enactment of the Criminal Code of 1878 and World War I, capital punishment was imposed solely for premeditated homicide. In the last decades of the 19th century the number of murder cases was rather high in Hungary compared to the European average; it was essentially at the same level as today, however, the frequency of inflicting capital punishment has decreased considerably. The number of death sentences carried out in the thirty years preceding World War I was 38. And even though the number of capital offences remained fairly consistent through the end of the century, the courts did not impose a single capital punishment between 1895 and 1900! The time when capital punishment could be definitely eliminated from the penal system seemed close at hand by the end of the century.

World War I, however, led to radical changes in the situation. The course of cataclysmatic social upheaval following World War I: the downfall of the Austro-Hungarian Monarchy, the revolution in October 1918, the Hungarian Soviet Republic of 1919, the Horthy-counterrevolution was accompanied by the imposition of capital punishment, widely applied initially against political opponents. One of the Horthy-regime's very first

1 SZEMERE, B.: A büntetésrôl s különösebben a halálbüntetésrôl. Budán, 1841. (On Punishment, Particularly on Capital Punishment. Buda, 1841.) This "forgotten" work by Szemere was republished by the League Against Capital Punishment in 1990.

measures was the introduction of capital punishment for offences against the state. This measure was followed by similar laws—the so-called law of treachery, the code of military justice, etc.—in the '30s. After the stabilization of the regime, however, civil justice resumed the liberal practice of pre-World War I. In the years between 1923 and 1941 the majority of court imposed capital punishment only for murder. The annual average of capital punishment for murder was below two. For political offences exclusively, exceptional (summary) court imposed capital punishment twice a year in 1931, 1932 and 1941.[2]

After 1945 the Hungarian justice system developed further leading to radical changes in legal practice. The wider application of capital punishment was closely related to the demand for impeaching the offenders of war crimes and crimes against humanity during World War II, and to protect the new social and political system. Later on it was used for the protection of the fundamental interests of the socialist state. Several laws facilitated the use of capital punishment to protect the public order, the economic order and, later on, that of the planned economy and social property. The imposition of capital punishment was possible for a wide range of offenses in the framework of summary justice, which was facilitated by a 1941 law which was used amply by the government from 1945 to 1953. The development of law after 1946 widely expanded the use of capital punishment, making political and economic offences, offences against property and wilful homicide all potentially capital crimes.

In 1950, Act II of 1950, replacing the general part of the old Criminal Code, regulated capital punishment as a general punishment. The preamble to the Act noted, that "As regards capital punishment, it is obvious that the rising of the cultural standard and the implementation of socialism will make this punishment dispensable...". The pathetic words of the ministerial preamble were, however, far from reality. The facts show that what followed was an expansion of capital punishment as never before seen in Hungary.

It is very difficult to give an accurate picture of how many death sentences were imposed by the courts in these decades. Reliable statistical data was not supplied after 1945. The relevant data in the official Statistical Annuals is, to say the least incomplete; it does not include, among other things, the number of capital punishments imposed by the so-called "people's tribunals" and the military courts. Accurate estimates of the number of death sentences is further hampered by the fact that in the period between 1945 and 1953, and again in the period between the end of 1956 and 1958/59, in addition to ordinary courts, several separate or "exceptional courts"—such as the people's tribunals, the military courts, the summary courts, and the separate divisions of the people's tribunals—operated which were permitted to impose capital punishment. By the cautious and critical consideration of the various data it is, however, possible to establish that, for example, for war crimes and for offences against humanity, the

2 Source: volumes 1924-1942 of Annuals of Hungarian Statistics. The data does not include death sentences imposed by military courts.

people's tribunals sentenced 414 persons to death until 31 January 1949, and at least 180 of these sentences were executed.[3] In the first half of the '50s civil courts, judging ordinary offences, imposed capital punishment in 15-20 instances on an annual average. At the same time we still do not know how many death sentences were passed in the so-called "pre-conceptioned political trials" in those years and how many of them were executed. The statistical data published is incomplete; according to the register of an independent researcher, 196 persons were executed between 1947 and 1953, among them 65 army officers. According to a statement by the under-secretary for justice, regarding the elimination process of the uprising of 1956 (counterrevolution in the official wording of the time) between 20 December 1956 and 31 December 1961 the courts imposed capital punishment on 277 persons all of whom were executed.[4] In addition, according to data from other sources, at least 55 capital punishments were executed outside the capital during the same period, bringing the number of executed persons to 322.

In 1962 a new period regarding the application of capital punishment started, its political origins can be sought in the stabilization endeavours of the Kádár-regime. It should be first of all emphasized that since 1962 the courts have inflicted capital punishment, almost without exception, solely for wilful homicide; in only six other cases was capital punishment inflicted for other offences. Between 1962 and 1987 there were a total of 119 death sentences passed in non-military cases, the annual average being 4.5. This average was highest in the '60s: 7.5, in the '70s it was 3.4 and 3.1 in the '80s; the tendency showing a definite decrease. The same tendency prevailed in military cases where 66 death sentences were passed between 1960 and 1988, with the annual average being 2.2. In the past three years capital punishment has not been imposed in a single case.[5]

The demand for restricting the use of capital punishment emerged in legislation of the '70s. The amendment in 1971 to the Criminal Code overruled the regulations of the Code which permitted the use of capital punishment for offences against property. This legal development was summed up in the Criminal Code of 1978, which permits the use of capital punishment for 25 offences. These offences include six offences against the state, that is six political offences, four offences against humanity, two offences against public order, eleven military offences and the offence of the qualified cases of pre-meditated homicide. As can be seen from the statistical data, capital punishment imposed

3 Compare: LUKÁCS, T.: A magyar népbírósági jog és a népbíróságok 1945-1950. Budapest, 1979 (The law of Hungarian people's tribunals and the activities of people's tribunals 1945-1950); MAJOR, Á: Népbíráskodás—forradalmi törvényesség. Budapest, 1988 (People's jurisdiction—revolutionary legality. Budapest, 1988.)

4 For the statement made by Borics, Gyula, under-secretary of state for the Ministry of Justice, see the daily Magyar Nemzet 11 May 1989.

5 Source: volumes 1953-1989 of Annuals of Statistics. The data on sentences passed by military courts are not included in the Annuals, they were made available for the author of the paper by the Ministry of Justice.

for premeditated homicide and for political offences is of practical importance in the long list.

III

Apart from the short official explanations in university textbooks and annotations, the Hungarian professional literature has been silent on the issue of capital punishment for decades. In the early '80s this silence was broken, first by professional meetings with selected participants and then with articles in periodicals concerned with the issue increasingly from social, political and ethical aspects.[6] The League against Capital Punishment developed its position through comprehensive discussions both for and against capital punishment and, by relying on the experiences of Hungarian and international criminological research. According to the standpoint of the League, the problem has an ethical issue at its centre: can the right of the state to deprive its citizens of life be justified. The other arguments and counter-arguments judged the efficiency, expediency or inexpediency of this particular punishment from a utilitarian point of view. The theses of the League can be summed up as follows:

1. The defenders of capital punishment suggest first of all that capital punishment is the only just punishment against offenders who have committed serious crimes. Their thesis justifying this statement is based on several thousand year old ethico-religious commandments. Indeed, as the Old Testament says: "life for life, eye for eye, tooth for tooth", that is, who has shed blood should have his own blood shed, who has killed should pay for it with his own life—this is what the people's natural sense of justice demands, or so the defenders of capital punishment suggest.

Hungarian abolitionists reject the principle of jus talionis together with its justification in any ethico-religious or philosophical form—Kant, Hegel, etc. Conversely, they argue it as an ethical requirement that the state has no right to deprive its citizens of their life. Human life is irreproducible, individual, a value which is not comparable to any other value, which cannot be sacrificed for any absolute idea or collective interest. The state is bound to acknowledge and guarantee fundamental human rights irrespective of sex, race, nationality or the fulfilment of civic duties. By acknowledging human rights in this way and enacting them in the Constitution, the right of the state to inflict capital punishment becomes unfounded.

Capital punishment cannot be ethically justified. It is an old historical experience that instead of strengthening belief in an ethical order and ethical values, the effect of capital punishment is exactly the opposite. The legal possibility of capital punishment in itself

---

6 HORVÁTH, T.: A halálbüntetés és jövője a magyar büntetőjogban (tézisek és a konferencia anyaga) Jogász Szövetségi Értekezések, 1984. [Capital Punishment and its Future in Hungarian Criminal Justice (theses and material for the conference), Papers of the Association of Lawyers, 1984.] After the conference there followed a widespread discussion on capital punishment in various periodicals (Egyetemi Lapok, Mozgó Világ, Valóság).

undermines the universal value of human life. And the infliction of capital punishment destroys public morals and brutalizes human relations.

2. The main argument of the defenders of capital punishment is of utilitarian character. They refer to the social utility of capital punishment and to the interest of the general prevention of crime. They argue that to the general preventive effect of punishment capital punishment is indispensable. They attribute a deterrent, retentive effect of capital punishment as to criminality as a whole, and particularly as to serious offences against life. It has been impossible, however, to demonstrate this deterrence effect by any reliable scientific evidence. Yet it has been possible to demonstrate the opposite.

It must be emphasized that criminality as a whole has not been, nor can it ever be influenced in a deterrent, retentive way by the individual punishments. But only by the operation of public order, legal protection systems, ethical and cultural standards of the population and the operation of social mechanisms leading to law abiding behaviour.

As for the deterrent or retentive effect of capital punishment on offences against life, sufficient evidence is totally lacking. The international studies conducted by the United Nations are well known (I refer here to the reports by Professor Marc Ancel and Professor Norval Morris submitted in 1962 and 1966, respectively) which again demonstrated that the abolition of capital punishment had not resulted in an increase in the number of homicides committed in areas which had previously imposed capital punishment.

We come to the same conclusion also when examining the practice of death sentences and the development of crimes against life in Hungary. The level and number of serious offences against life have essentially remained unchanged for decades. Somewhat simplified, it means that in Hungary 200-220 persons die every year through wilful homicide. (Here the crime of attempt of wilful homicide is ignored, the development of which is very strongly influenced by the diverse interpretation of judicial practice.) At the same time the imposition of capital punishment in such cases has undergone considerable change in the past forty years. As compared to the 1950s, our courts have passed death sentences in a really meagre number in the past decades. All this proves that neither the higher number of death sentences, nor the recent moderate judicial practice have had a deterrent, retentive or restraining influence on the development of serious offences against life.

3. The defenders of capital punishment suggest very frequently that in the case of a very serious offence only capital punishment can restore public order, which is what the public demands.

This argument appears valid. It cannot be denied that the general public in Hungary is rather intolerant and aggressive and in favour of the idea of retaliation. This attitude is supported, or at least explained, by not only the earlier centuries of our history, but by the social and political processes of the recent past and the ideological phenomena accompanying them. It follows, however, from all this that the attitude of the general public can be framed in other directions as well. We have no reason to suppose that the attitude of the general public would remain unchanged in a democratic, constitutional state with a rational criminal justice system which presupposes an objective and open

dialogue of the general public together with a free discussion of international experiences and scientific information concerning capital punishment, which, to date, has been considered taboo.

A significant change in the social judgement of capital punishment can already be felt. Today a wide strata of society—mainly the intellectuals—judge this issue more and more from an abolitionist point of view compared to five or ten years ago.[7]

4. The argument that for serious offences only capital punishment can sufficiently serve the safety of society because of the chance, however slim, that the convict will escape and commit further homicides is often made by the defenders of capital punishment in close connection with the above arguments. This argument is unpersuasive.

The safe guarding of penitentiary institutions does not present any problems with today's prison architectural and safety techniques. The data for the recent decades shows that the number of escape attempts from prisons is insignificant, the number of successful escape is even lower and can be expressed only per thousand. It is beyond doubt that such phenomena can be expected in the future as well. These are the natural effects of prison life; it is a criticism of the conditions and atmosphere in the particular institution, but this problem must not be brought in connection with the issue of capital punishment.

Finally, mention must be made of the argument of the defenders of capital punishment, which is often not worded—as it is indeed to be ashamed of—that capital punishment is less expensive than the long-term deprivation of liberty replacing it. The only answer to this can be that a society proud of its civilization, culture, social efforts does not destroy either the old, or the incurable, or deviant or expressly anti-social individuals on the basis that their sustenance lays a burden on society, that their life costs more than their death.

5. It is beyond dispute that capital punishment as compared to any other punishment—such as imprisonment fines—is an irrevocable punishment. Errors committed in this field cannot be corrected. Acknowledging all this, the defenders of capital punishment put forward the argument that though mistrial may have happened in the

---

7 The Department of Criminal Sciences of the University of Miskolc held an opinion poll among university and local intelligentsia in Miskolc in 1987. The majority of those rejecting capital punishment were physicians and lawyers, although there is no doubt about the fact that the advocates of abolition represented a minority at that time. The attitude of Hungarian society underwent dramatic changes regarding capital punishment at the time of the political changes in 1989. The research survey conducted in this year on commission by the League Against Capital Punishment, and based on a considerable database, showed that more than half of those interviewed disapproved of the view that the only way for the society to protect itself efficiently from irreformable criminals was to maintain capital punishment. At the same time it was also found that it was not a value-centered approach but a political attitude, as the break with the past aided the development of opinions and views about the issue of capital punishment. This explains why these groups regarding their political radicalism, who all had actively liberal, bourgeois or reform-socialist views and principles all strongly rejected capital punishment, while fundamentalists interested in the maintenance of status quo and the silent majority unmotivated both ideologically and politically supported it.

past, it is impossible in the present legal system. Criminal proceedings have come to include legal guarantees such as the possibility of appeal, the principle of the obligatory supervision of death sentences, the procedure for clemency, etc.—which preclude the possibility of mistrial. Both international practice and domestic experiences contradict this statement. I only make here a short mention of the judicial experience of the past forty years in Hungary, the series of judicial murders first of all in the field of political offences, but the same can be said as regards the judgement of legal crimes. This cannot be sufficiently emphasized: however advanced the criminal procedure is, however sophisticated the guarantee system is, mistrials can, and do, take place. The objective and subjective conditions and means of judicial cognition are inevitably limited. To put it in a simpler way: the court is no less infallible than any other human institution.

6. The irredeemable character of capital punishment is especially apparent in the field of political offences. Hungarian history of the recent past demonstrates it very convincingly that as soon as law becomes the direct means of political power, with the only or predominant function of which is the defense of power, justice becomes disfunctioned and the self-explanation of the law is replaced by ideological and political interpretation. The old and recent history of capital punishment both prove that the exclusive political power has always had a great propensity for using the means of capital punishment against its political opponents. There is no difference from this point of view between right-wing or left-wing dictatorships, or between "hard-line" or "soft-line" absolutist regimes.

There is only one way-out from this situation: if it becomes a provision of the Constitution that in a democratic constitutional state, criminal justice, and its sharpest means, capital punishment, cannot become a means of political showdown.

7. The international abolitionist literature has emphasized for a long time that maintaining capital punishment makes the operation of justice uncertain and unpredictable.

The effect of this factor cannot be denied in Hungary, either. It has already been mentioned that annually 200-220 persons die as a consequence of wilful homicide in Hungary according to the criminal statistics of recent years. The offences committed in 40-60-80 cases out of this number is punishable by capital punishment under Article 166, para. 2 of the Criminal Code.

Death sentences are passed in less than 10% of the cases falling in this category. This means that the courts must somehow decide between the offenders of wilful homicides whom to sentence to death. This selection process involves the greatest moral and legal dilemma of prosecution and courts. The question here is: once the law has selected the sphere of wilful homicide as those subject to capital punishment, upon what grounds does the prosecution and then the court make the further selection.

8. The opinion that capital punishment is irreconcilable with modern theories of punishment, and with up-to-date conceptions of criminal policy is gaining ground in recent Hungarian criminal legal and criminological literature. The criminal codes of the 19th century could work with capital punishment as their whole system of punishment was based on the principle of just retaliation and on the deterrent and retentive effect of punishments. Up-to-date theories of punishment and criminal policy broke with this

policy long ago, which cannot be justified in practice and has become outdated. The fundamental principle of Hungarian criminal policy enacted in statutes is the prevention of crime, which presupposes the reasonable and humane application of the means of punishment. This is why the criminal legal systems treat capital punishment as a foreign body, which legally appears in the fact that the criminal codes regulate capital punishment as an exceptional punishment. The new Hungarian criminal policy evolving in the framework of the democratic and constitutional state can solve this contradiction only by totally rejecting this foreign body from its system.

On the basis of all this the final conclusion of the League Against Capital Punishment can only be that *capital punishment, as the remnant of the age-old principle of jus talionis, cannot be ethically justified, it is irreconcilable with human rights, irredeemable and irreversible; it is an unsuitable, inexpedient means of punishment for the repression of the most serious forms of crime—in Hungary the offences against life. In a democratic, constitutional state capital punishment cannot be a means of oppressing the political opposition just as in a system of punishment based on a rational and humane criminal policy there can be no room for capital punishment.*

IV

On 16 October 1990, the Constitutional Court heard the petition of the League in a full public meeting. During the meeting the Court gave a hearing to the representative of the Minister of Justice, to the President of the Supreme Court, and to the Chief Public Prosecutor of the Republic of Hungary, respectively.

The Minister of Justice was of the opinion that capital punishment was unnecessary and inhumane, a punishment that cannot be morally justified; it did not serve the aim of punishment and was not suitable either for the protection of the society or for preventing the members of the society from committing criminal offences. The President of the Supreme Court voiced his moral and legal conviction that there was no room for capital punishment in Hungary any longer. Capital punishment was unjustifiable from the point of view of criminal law and, considering the relation between criminal legal regulation and the Constitution, it was anti-constitutional. After mentioning in advance that he himself was opposed to capital punishment, the Chief Public Prosecutor stated that Article 54, para. 1 of the Constitution itself did not render capital punishment arbitrary and that the decision required the interrelated interpretation of Article 8, para. 2 and of Article 54, paras. 1 and 2 of the Constitution. He was convinced that the most competent authority for making this decision would be Parliament but he did not assent that the Constitutional Court could not avoid giving a substantial answer.

The full meeting included the statements previously invited experts. J. Földvári, university professor, did not consider capital punishment to be a justified punishment on the basis of the statutory wording of the aim of punishment. However, he considered the abolition of capital punishment to be not an issue of criminal law, but one of morals and politics. According to A. Sajó, university professor, capital punishment was anti-

constitutional as it was an arbitrary and cruel punishment, offended human dignity and was contrary to the ideas of a constitutional state. L. Korinek, university professor, examined the statistical and criminological aspects of capital punishment and held the view that capital punishment was neither an expedient nor necessary means in the fight against crime.

During the meeting the President of the League also made a speech and summarized the position of the League in response to the expert opinions.

Subsequently the Constitutional Court, which consisted of 9 judges on the occasion, decided to abolish capital punishment by a vote of 8:1. According to the minority opinion, the decision on the issue did not fall under the competence of the Constitutional Court and it should be submitted to Parliament together with a summary of the arguments against capital punishment in order to solve the constitutional controversy. Incidentally, the opinions of the judges of the Constitutional Court differed widely regarding the reasons of the decision, and in addition to the majority's opinion, five judges submitted parallel opinions.

The Constitutional Court based its decision not on political, historical, criminal law, or criminological arguments, but exclusively on the natural legal conception of human life. Therefore it emphasized in its decision the following:

The Constitution declares that "the Republic of Hungary acknowledges the inviolable and inalienable fundamental human rights, their respect and protection are duties of the state of primary importance". (Article 8, para. 1.) Later on the Constitution declares that "in the Republic of Hungary all persons have a birth right to life and human dignity, of which nobody must be arbitrarily deprived". (Article 54, para. 1.) Under Article 8, para. 4 the right to life and human dignity is qualified as a fundamental right the practice of which cannot be suspended or limited, in times of emergency, martial law or other danger.

By collating the provisions of the Constitution cited, it can be established that in Hungary the right to life and human dignity is the birth right of every person—irrespective of citizenship—a fundamental right which is inviolable and inalienable. As regards the right to life and human dignity, the Hungarian state has it as its duty of primary importance to respect and protect this right. Article 54, para. 1 of the Constitution states that "nobody can be arbitrarily deprived" of his/her life and human dignity. The formulation of this prohibition in itself does not exclude the possibility of depriving somebody of their life or human dignity in a non-arbitrary way.

When judging the constitutionality of the statutory permitting capital punishment, it is, however, not Article 54, para. 1 of the Constitution, but Article 8, para. 2 provisions (inserted by Act XL of 1990 passed by Parliament on 19 June 1990 and coming into force on 25 June 1990) prohibiting the legislator to restrict the 'substantial contents' of fundamental rights. The Constitutional Court held that the provisions of the Criminal Code and of related regulations on capital punishment were contrary to the prohibition of limiting the substantial contents of the right to life and human dignity. Namely, the regulations on capital punishment not only limited the substantial contents of the fundamental right to life and human dignity, but represented its complete and ir-

recoverable nullification. Therefore the Constitutional Court declared these criminal laws to be anti-constitutional and therefore void.

In the last analysis of the Constitutional Court human life and human dignity constitute an inseparable unity and are the highest value preceding everything else. The right to human life and human dignity is a fundamental right constituting a unity which is the source and precondition of several other fundamental rights. The rights to human life and human dignity as absolute values represent a limitation against the punishing power of the state.

Article 6, para. 1 of the International Covenant on Civil and Political Rights—to which Hungary is a party and which was promulgated by Law-Decree 8 of 1976 in Hungary—declares that "every person has a birth right to life. This right must be protected by law. Nobody can be arbitrarily deprived of their life". The Covenant expects a process of development with a tendency to the abolition of capital punishment. Article 2, para. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, acknowledges the legality of capital punishment, however, Article 1 of the sixth supplementary protocol adopted on 28 April 1983, provided that capital punishment was to be abolished. Nobody could be sentenced to death and capital punishment could not be executed. Article 22 of the declaration on "the basic rights and fundamental freedoms" adopted by the Council of Europe's Parliamentary Assembly on 12 April 1989, also declares the abolition of capital punishment. The development of the Hungarian Constitution is following this direction when, after creating Article 54, para. 1 not definitely excluding capital punishment, it re-formulates Article 8, para. 2 to exclude the statutory limitation of the substantial contents of a fundamental right.

* * *

It seems that the decision of the Constitutional Court has put an end to the centuries-old debate on capital punishment in Hungary. The general public has to understand whether it wants to or not that capital punishment cannot be inflicted on the perpetrator of any offence, on murderers, on terrorists or on the perpetrator of a political offence.

The prohibition of capital punishment is absolute: it covers military justice just as well as the state of martial law, the danger of war, or any equivalent state of emergency.

Nevertheless, further legal developments are to be expected, at least in two respects. Several issues of the punishment replacing capital punishment (e.g. deprivation of liberty for life) have to be settled urgently through legislation. There is already an argument going on—even among lawyers—as to the meaning of "deprivation of liberty for life" in the new situation, serving 20 years as required by the present regulation—the legal condition of eligibility for conditional release—or serving a shorter or longer term than that. With regard to this, the statutory limitation period of offences punishable with deprivation of liberty for life also has to be regulated. In addition, preparations have to be made for the legal step, unavoidable by legislation, that the new comprehensive Constitution of Hungary will declare the prohibition of capital punishment. Although it

is hardly possible to name the time of enacting the new comprehensive Constitution, it is, however, certain that the constitutionality of criminal justice and the legality of the abolition of capital punishment demand that step.

Acta Juridica Hungarica
1991 33 N° 3–4, pp. 167–178

Akadémiai Kiadó,
Budapest

Csaba VARGA

Institutions as Systems

Notes on the Closed Sets, Open Vistas of Development, and Transcendency of Institutions and their Conceptual Representations[1]

I. A Logic of Systems

1. Both institutions and their components are conceptually represented as organized into some sorts of systems. This is the obvious outcome of the *classificatory* nature of the use of concepts and conceptual representations.

At the same time, human practice often abuses with conceptualization. Namely, it often overgeneralizes the reason of the choice taken in order to oversubstantiate the claim made. For reaching oversubstantiation, it puts the claims into a context more general than actually justified.

Systems in practical operation by and through which we live and practise our social practices are *contingent* and *casual* in their basic character. Of course, this is not to say that the selection of their elements and the way of their organization is a gratuitous

---

1 The draft version of the paper was presented as an invited commentary on Fabio Konder Comparato's working paper on "The Institution System of Liberalism and the New Function of the Modern State" at the Latin American Regional Institute of the American Council of Learned Societies' Comparative Constitutionalism Project, held at Punta del Este between October 31 and November 4, 1988. It is based upon earlier methodological papers by the author, including his "Quelques questions méthodologiques de la formation des concepts en sciences juridiques", Archives de Philosophie du Droit XVIII (Paris: Sirey 1973); "La séparation des pouvoirs: idéologie et utopie dans la pensée politique", Acta Juridica Academiae Scientiarum Hungaricae XXVII (1985); The Place of Law in Lukács' World Concept (Budapest: Akadémiai Kiadó 1985); [with József Szájer] "Presumption and Fiction: Means of Legal Technique", Archiv für Rechts- und Sozialphilosophie LXXVII (1980); "Law as History? in: Philosophy of Law in the History of Human Thought, ed. Stavros Panou et al., II (Stuttgart: Steiner 1988) [Archiv für Rechts- und Sozialphilosophie Supplementa 2].

action within an empty space, only to be filled by the wish and might of the day. For instance, there is some connection between their taking a shape, on the one hand, and the factors that have been instrumental in shaping them, on the other—although the presence of these factors, as well as their actual impact, may be quite incidental from the point of view of the existence, moreover, of the emergence of those systems as systems.

The constitutional system of liberalism as historically established is, for instance, *one* of the several possible materializations it could have had. It is one of the possible outcomes of human efforts through centuries to overcome contemporary misery by setting new framework for human action in its relationship to the law and the state.

At all steps, there is a close interconnection between the *shaping of ideas,* on the one hand, and the *available store of instruments and their reconsideration at any time,* on the other. Even the contents, directions and limits of human imagination are a function of such an interaction either. For in social total process, each step and contributing component has a variety of meanings, faces and links and developmental alternatives, and only later events and connections effectuated will decide which of them is to actualize. Or, the case is of a multi-faced and multi-directioned process with several competitive chances; something that could only be broken down by a finalist reductionism in order to be traced back to a single, straightforward line of development.

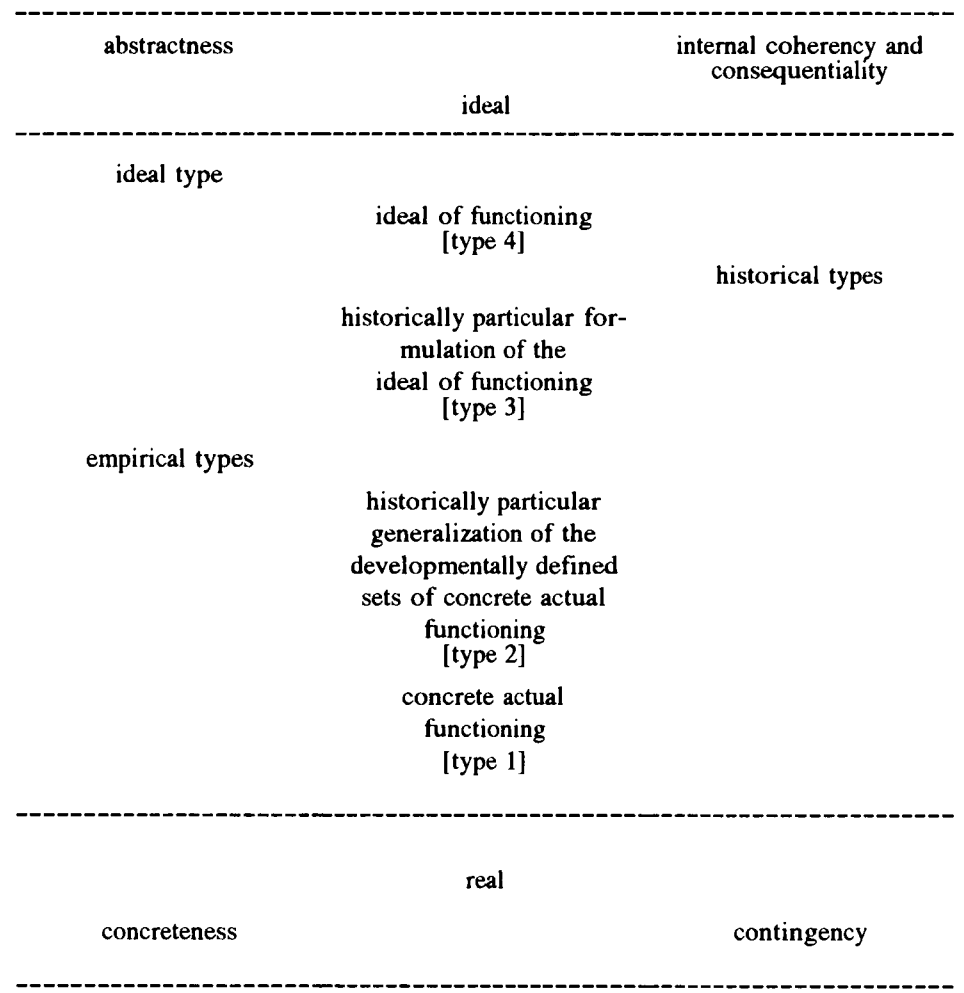
In any case, to state that there has been some necessity in the course of actions to take a shape and to reach at a conclusion made is by far not to state that there has been a preexisting universal idea that has to have materialized in that way. Even the ontological reconstruction of the factors in play in the social conditioning of the course of events is a reconstruction of the road run by, and the links bridging, the individual chains of that course of events, and not a statement about the universal idea as having been necessarily materialized in the historically concrete realization we have.

3. To be more precise: when we are speaking of systems of institutions and of their conceptual representations, we do have in mind at least four types, or levels, of those systems. Notably, *first,* the *actually existing concrete system,* which is a unit functioning as it is (e.g. the constitutional system of liberalism as practised in a given area in a given time, e.g. in the United States nowadays) (type 1); *second,* the *historically* developed, *concrete system* which is a unit functioning as it has been (e.g. the constitutional system of liberalism as practised in a given area in a given period, e.g. in the United States since the time it was developed) (type 2); *third,* the *generalization of the historically concrete systems as developed in our civilization* (e.g. the constitutional system of liberalism as known and practised in our civilization) (type 3); and *fourth,* the *core idea (1) of the functioning underlying to all kinds of generalization* (e.g. the abstract universal formulation of the last principles of operation of which the constitutional system of liberalism is but one of the theoretically possible forms of realization) (type 4). As to the origins of such an abstract-universal formulation, it may be either gained by theoretical reconstruction or formulated as a preconceived idea, in order to offer a basis to deduce therefrom justification for the historical realization(s).

As it can be seen, types 3 and 4 are not units functioning as they are or have been. Type 4 is an idea(l) in which "laws" (i.e. effects, interconnections) of functioning may

be observed in abstract generality on ideal conditions. Type 3 is one of the former's applications to, or materialization in, historically particular conditions.

4. All systems ideas and realizations form an endless continuum. Types 1 to 4 are nothing but meaningfully definable stages of this continuum, and by far not its limiting points. This is the reason why almost all of them may display almost all the properties that can at all characterize them.



Abstractness, internal coherency and consequentiality, as well as ideality are decreasingly, whilst concreteness and contingency, as well as reality, are increasingly all present in the line between the ideal and the actual functioning.

At the same time and to a decreasing degree, types 1, 2 and 3 are all historical ones; and types 1 and 2, at the same time also empirical ones. Obviously, it goes without saying that there would be no sense in projecting any ideal of functioning into a vacuum with no empirical background whatever. Consequently, at the same time, even empirical types may be used as ideal ones. And, obviously again, neither abstractness nor concreteness has end-point. For the question of whether I can define types more abstract or more concrete than they are is one of expediency in the determination of the levels of analysis.

5. Historically only types 1, 2 and 3 are existing, representing historically characteristic typical configurations. They are at the same time needed for theoretical description as they hold the name of what is to be conceptualized as existing. Ontologically, the existence of each and all of them can be established. Albeit type 4 claims to be over and beyond history, the social existence of the ideal representation it embodies can also be delimited historically.

6. Human action is teleological by definition. *Thelos* as a model is at all times working in it in order to direct it. However, it does not turn practice into mere implementation. The ideal remains ideal, the practical practical. Both the motive force and the criterium of practice are what is considered *practical.* Of course, consideration of what is practical may also set the implementation of something ideal as target. But motive force and criterium remain unchangedly the one what is considered practical. Attributes of ideal, no matter what kind and weigh they are, can only exert an influence as filtered through the consideration of what is practical.

II. Ideal Types and Historically Concrete Manifestations

7. A notional distinction among the *levels* of systems ideas and formulations is a methodological requirement. Since differing levels and corresponding concepts are often designated by the samé *name*, it is not exceptional that they are treated in an undifferentiatedly unifying way, which is a common cause of confusion.

For instance, as to the doctrine of the division of powers, the only realistic references are those historical manifestations which are commonly characterized as realizations more or less distorted or imperfect (type 1). Those imperfect realizations are seen as variations on a historical descriptive type (type 2) which, on its turn, is the implementation of a historical ideal type (type 3). In such a way, all practical measures taken in a historically concrete situation get in the final analysis traced back to a broad, well-defined sociohistorical context which, in this case, includes huge a many things, from the fight for constitutionalism in England, via the way in which Montesquieu was to overcome absolutism in France by (mis)interpreting English constitutionalism, to the achievement of the fathers founding the Constitution in the United States, including the

way in which they (mis)understood both England, Montesquieu and their own perspectives, and also including the (mis)understanding, by all historical actors, of the richness of the store of means available in principle. But is it really so that the idea(l) of functioning underlying to the doctrine of the division of powers gets reduced to it? Obviously, without universalizing what is actually particular, I cannot say "yes" to this question in theory. If I still do so, which occurs too often in practice, it involves that I have opted also for some methodological consequences. Let us see just three of them.

7.1. *Universalization* can only be done through assuming *notion dichotomies* between complementary concepts, *C* and non-*C*, which, albeit antagonistic to one another, are covering wholly the field. Thereby I erect an artificially rigid two-poled scheme to the exclusion of dialectics and historical sensitiveness.

For instance, it is a rather general pattern for contemporary political philosophies to regard the "Third Road" typed searches of a way out from continued crises in East Central Europe as by-products themselves of the same crises, fallen into irrationality. Well, this critique is an assumption of capitalism and socialism being, as historically developed, the only potentialities of capitalism/socialism and, thereby, also exclusive alternatives. Consequently, the universalistic assumption in work here excludes questions like "Is it this and only this that is capitalism/socialism?" "Is there indeed no choice in-between these poor kinds of representation?" "And no choice beyond them, either?"

7.2. As to the second consequence, my approach will be prejudiced from the very beginning if I can only count with the individual features of a *concrete historical manifestation* (type 1) as distortions of some underlying principle(s). If it is the case, it assumes the existence of something which they are nothing but the individual realization of. Well, this is also an assumption justifiable only by a finalist approach.

7.3. Finally, universalization of the particular dispenses with the search for identifying *last principles* (type 4). If there are no last principles, what remains is to reflect historical types one to another, which has very limited profit, not transcending even the level of historiography. In contrast to it, theory starts with reconstructing the basic function (type 4), which makes it already possible to approach to the historically particular formulation (type 3) as intermediary concretization.

For instance, the classical doctrine of the division of powers is not an empirical theory of development. Montesquieu did never say that power came at any place or time to being as divisioned in a tripartite way. He simply contrasted a positive utopia to the negative one he had already had. Notwithstanding, his positive utopia is usually treated as final formulation touching upon the topic. If it is so, no theory based on the concentration of powers should ever be reconcilable with his doctrine of the division of powers.

Well, the bolshevik theory of the state has as a matter of fact since long professed to be antagonistic to western democratic traditions. But ideological claims, e.g. for complete disrupt and discontinuity, are not to be taken as a substitute to theoretical analysis. In order to assess what is the whole dispute about, even a historical reference may be revealing. In fact, bolshevik theory was launched on as a revolutionary program of why and how to seize power, and bolshevik critique of Montesquieu theorized about

power at the time when it was at the threshold of actually seizing it. In response to that confrontation, it too misinterpreted Montesquieu, not to recognize anything from his teaching but an antirevolutionary program of resigning, once for all, of the seizure of power.

Or, in sum, it means that both disciples and critics have instrumentalized Montesquieu's positive utopia, by transforming his statements into ideology. Western tradition has developed universalized terms which are, however, valid in their proper context only, in contradistinction to the Russian revolutionaries who have narrowed them down only to mean the negation of their dreams.

The genuine problem is that, in fact, none of them has realized that what they actually did was to intermingle different levels of analysis, and that is the reason why they had to become mutually antagonistic. To be sure, none of them stated something different on the same subject, but differing statements on differing subjects.

At the same time, it is to be noted that a doctrine of a "division of labour" in power machinery was finally developed by the bolsheviks, pushed to offer (no matter how much imperfect, but, after all, a king of) an alternative to the western conception of the division of powers. Presumably, this principle of the unity of powers with only a mild and light "division of labour" within it will remain in force so long as the one-party's rule can impose itself upon society. On the other hand, even a system of "division of labour" in power machinery can develop working with some further—even if rather limited—potentialities.

As to the relationship of these conflicting approaches, mutual exculpation qualifies itself as bare ideology. Theoretically both are levelled at type 3.

III. Ideal Type as a Normative Ideology

8. All the systems, conceptual representations and operations we have surveyed by now are of a descriptive character and function, called into being as instruments to grasp conceptually what does institutionally exist. In short, they qualify as theoretical representations.

As is known, theoretical activity is a specific domain of homogenizing human activities, distinguished from both other domains of a homogenizing effect (e.g. custom, convention, such as speech, law, politics), on the one hand, and the huge field of the heterogeneity of everyday life, on the other. Still, it does not involve that the various forms of objectification of one area could not be made use of on other areas as well. Ontological investigation suggests that all kinds of ideal representation and objectification, no matter whether they are of a theoretical or practical character, can turn into *ideology*. All this can be done by putting them into another context and making their specific use.

That is to say that, 8.1, everything theoretical can be made a factor of practical action by putting it into a *practical* context; and, 8.2, everything in a *given homogeneous field* can be taken out from it and either lifted in *another homogeneous field* (e.g. the

linguistic, semantic, or rhetorical aspects of law, or the law's political use) or merged into the *heterogeneity of everyday life* (e.g. the uses of social convention, language, law, or politics in a way annihilating their particularities)—well, in both cases with prior determinations suspended in order to let them act as adapted to their new environment.

9. Being adapted to new environment is a change of memberships of the systems. In case of conceptual representations, a positive value-judgement and/or a deontic operator attached to them can effectuate this change. For a theoretical statement becoming a standard for practical action is already an ideological use. It involves its transformation into *normative ideology.*

10. Systems may be used as normative patterns in three situations: 10.1, in case of conflict with the systems idea in question, to *modify* the underlying system in the given direction; 10.2, in case of an internal contradiction within the underlying system, to *resolve* it in the given direction; and 10.3, with no external or internal conflict provided, to *prescribe* it the change as needed or to *define* the direction and substance of its further development when needed.

11. One of the fields for normative ideologies to provoke change by defining who is to act, when, on what, why, and how, is the so-called *filling of gaps.* As is known, "gap" is a normative concept, being the function of a normative framework a) to qualify any establishment within the system as a gap, in order b) to fill it, c) in a given way, d) with a substance taken from within the system by the effect that, e) at least ideologically, the filling of the gaps does not implement any genuine modification in the system, albeit it strengthens its individual position within, as a member of the system, as made to be more conform to the system.

Filling the gaps is one of the most important factors of the practicability of the systems, as it makes it possible to them to preserve their identity while to make them keep in pace with time. Or, there have ever been two basic means of sublated innovation in institutions: *transplantation* (i.e. injecting something not known in the system which is said to have been known within the underlying system), and *fiction* (i.e. claiming that what is in point of fact new in the system is nothing else but the implicit extension as made in the system).

(In the field of law, it seems to be a common place that, in addition to fiction proper as the earliest and most common and lasting instrument to provoke and, at the same time, veil change, almost nineteen twentieth of the four thousands years of legal history was dominated by innovative legislation, veiled as bare restitution of what the "old, good custom" of the country had been, in usage already in Hammurabi's Prologue to his Law Book and surviving till the enacting clauses by the last French king.)

And the reason for its success is easy to see: it has been a conveniently flexible means, suited to meet two basic requirements contradicting one another, i.e. to *effectuate change* as needed (i.e. to function as readapted to the changing needs) and to *preserve the system's identity* (i.e. to reproduce its basic continuity over all the series of actual discontinuities) within an apparent harmony.

12. In principle, each and every one of types 1 to 4 can be used as normative ideology if reflected to each and every other one of the same types. Even the conceptual

representation of the concrete actual functioning (type 1) can be made a normative ideology by reflecting it to the conceptual representation of its posterior functioning.

(Taking into consideration the *open texture of concepts* and the *inherent fuzziness of argumentation,* we have to realize that there is a large room for transcendency both among the concepts undifferentiated we use and among the systems undifferentiated we refer to. To avoid transcendency is a question of the formulation of premises, an operation that has nothing to do with reflection of one concept to another in their normative usage.)

13. The normative use of ideal systems and conceptual representations is the explanation of the fact way and how these systems and representations can be of use, or turn to be of use, or turn to be a *deciding factor* in social processes *even if* for long a period they only could at best be qualified as *empty classes.* For as they are normative, expectations towards them do not disqualify them even if not met with success. Or, what is more, even dead systems and representations can finally exert a decisive influence to overcome the inertia and to push forwards, or turn back, a process.

For instance in Hungary, the wish for implementing the Soviet-patterned Constitution of 1949 into practice seemed for long years an idea aborted from the very beginning. A decade ago, the ever growing gap between words and facts induced some constitutionalists to demand realism instead of illusionism, i.e. the adaptation of its wording to prevailing practice, to the hard fact of one-party rule. Happily enough, this proposal failed by the fear that thereby the only thing remained, the bare possibility of fighting for more or truer parliamentarism through referring to a text enacted by the communists, would also be lost.

IV. Objectivity and Contingency of Systems

14. For a given historical actor in a concrete situation, a huge amount of social objectivations, conventions, institutions, etc. are given. They form to him what we call *tradition.* All the components of tradition serve to him as an objectively given framework in respect to which he may have the only alternative of either contacting it or escaping from it, but in any case he will not be in a position to freely disposing with it.

Escaping from social bounds contradicts to the very notion of social activity; moreover, paradoxically, in modern society even the first attempt at escaping is itself only conceivable through conventionalized social practices. In short, *socialization,* i.e. a very specific learning process, is the only available pattern for the individual in his relationship to social totality in modern society.

At the same time, the individual is certainly not an isolation but a component part of social totality. What seems to be objectively given to him in individual situations has in fact no existence of its own, independently of the total set of individual social practices in the same totality. What a social tradition is, in the last analysis, a function of the total sum of social practices, reproducing the tradition through practising it. Consequently, reproduction of a tradition is a continued learning process, in which

taking its cognizance will amount to readapting it, and its interpretation to reinterpreting it, as part of social practices. In other words, each and every human act establishing what we call the *homogeneous* can only be performed within the boundaries (and upon the basis and for the sake) of (and, in the final resort, as subordinated to) what we call the *heterogeneous*. In the same way: each every human consideration to what we call *epistemic* can only take place within the boundaries (on the basis and for the sake) of (and, in the final resort, as subordinated to) what we call *ontic*.

15. In the light of an ontological description, the search for a practical solution is *volens, nolens* a *model patterned reaction* to a given situation—independently of the agent's subjective intention. At the same time, also independently of any intention, that what is to come objectively out of this will be something *more or less*, in any case *else*, than what the original intention was. It will necessarily be a *practical answer to a practical challenge* as it was sensed and interpreted by the agent acting. Thus, it will necessarily be an *imprint of all the moments*, which have been present in the situation; contingent from the point of view of the social totality.

There is a particular dialectics in play here. For the reaction, no matter to which extent and how intentionally it is model-patterned, will be the issue of *practical considerations in a practical context*. Even what is manifested as non-practical is made so by practical consideration. And this applies to everything. Anything claimed to be eternal is a function of practical interest to project it as fetishized. It is ideology that is in word both here and in cases of interests overgeneralized.

To qualify a statement as *ideology* is an ontological statement upon actual use, and not a judgement upon foundation or value. As is known, ideology is a form of consciousness called into being to influence practical human (re)action. As contrasted to it, *theory* is a form of consciousness called into being to reconstruct the interconnections of any process, including its ideology.

16. The theoretical reconstruction I have in mind can be nothing but *ontological*. For the result *epistemological* reconstruction can arrive at, may at most be a negative one, demonstrating, e.g. the false conclusion, reached by false inference, from false premises—i.e. its own incompetency for through reconstruction. It is only ontological reconstruction that can answer why the relevancy of epistemology is limited, why it is that forms of false consciousness can be instrumental, even sometimes socially needed.

It is ontological reconstruction that can only offer an explanation to the paradox of interpretation amounting to reinterpretation or misinterpretation, and of reproduction amounting to production or misproduction.

17. Systems are located in a *continuum* of a constant motion and change. It is a continuum for both their hierarchical structuralization and their self-reproduction in a continued process in social totality.

To be more precise, to exist as being placed in a continuum may have two senses. *Ontologically*, it is a form of existence through constant self-reproduction in an endless series of reinterpretation. (Reinterpretation here is an ontic sequence of purposeful

practical reactions, and not a critical attitude, which is epistemic.) *Epistemologically,* it denotes an ideal existence through having necessarily fuzzy conceptual boundaries.

These features are common to objects of social ontology. Nevertheless, I wish to emphasize to what considerable an extent the links are epistemologically loose among sequences in both the systems' lines of development and their hierarchic structures. The systems in question are historically developed sets in which all may have had alternatives to those actually established (albeit they do not). It is most plausible to realize it in limiting cases at both micro- (type 1) and macro- (type 4) level.

As, for instance, to the micro-level, each concrete, actually functioning system of constitutional liberalism bears the imprint of the place and time of its formation, i.e. characteristics that are only explainable in the context of their actual shaping. As to the macro-level, the connection of ideality and actuality is only explainable exclusively by their development. Let us assume that I should have to invent the constitutional system of liberalism now. As a matter of fact, I can by far not take it for granted that I would lay its foundations by the same philosophical, anthropological, etc. assumptions as it was done several centuries ago. And the same holds true vice versa too. I cannot be sure that any concrete system of constitutional liberalism that has ever existed could be inferred from or justified by the assumptions suggested by human inventiveness now. And I must to add that theoretical variations are, in contrast to actual occurrences, practically endless.

The same loose contracts can be characteristic of actually operating systems too. Theoretical reflection often groups together systems of autochthonous development (e.g. ones in England or in the United States), whose past may count more in centuries that others that, due to recent transplantation of imposition (e.g. in the Federal Republic of Germany or Japan), may count in decades.

It is due to these features precisely that they turn to be genuinely *historical* phenomena, both marking and made by history. For otherwise, if they were units unchangedly identical with themselves, their history could only be quasi-history at most, with mere alternation of blocks in a mechanical world, made up of discrete moves of discrete elements. To put it another way: the *continuum* the systems embody is the outcome of their dialectic character. Their dialectics is one of sublation, that is, of unceasing preservation and change.

18. It is also their existence as a continuum that makes it possible to understand why their historical nature is so important from the point of view of practical action as well. For their being a continuum in a constant motion and change is also a function of their *environment, in the interaction with which they are shaped.* Or, the way they transcend themselves and by which their reproduction through their continued reinterpretation is done is not only a function of them but of the general culture and field cultures (political, legal, etc. ones) as well, and it is so to such an extent that even the fight for them may have *alternative actions* to take. Namely, an action directed to them may aim at their shaping in a *direct* way (as, in the case of law, directed to its enacted text), as well as in an *indirect* way, through the cultural context in the interaction with which they

are shaped (as, in the case of law, with the mediation of legal policies and legal culture, made to be strong enough to be able to have genuine role to play).

V. Limits and Bonds, Consequentiality and Practicability of a System

19. The question of what are the properties, features and traits a system may develop or take over by transplantation from another system is quite open, having no restriction from the point of view of social totality. It is not even a system-related question; it can only be raised as a question of the limits of law, politics, etc. in a final resort by ontology: what can be practicable, i.e. fulfilling a genuine function, in a social system?

On the level of abstract generality, the answer is rather vague. For, in point of principle, there is no limit predetermining what can turn to be instrumental or practicable in a social context as everything whatsoever can.

It means that the possibility of *systems* coming into being as *mixed* is so to speak endless. One could even state that only mixed systems are practicable in practice, or that non-mixed systems are, without exception, issues of a theoretical reduction.

20. Is there any precondition for systems being identifiable as such just because they have some definite elements as organized into a system The question is directed to their own *determination from inside.* That is, is there any limit set up by the systems, defining their own identity by *minimum contents* as necessary and sufficient conditions for their existence? Or is there any self-imposing limit of the system which might of course be ignored, but only with the consequence of placing itself out of the system?

This is a topical issue, with enriching debates in the western hemisphere centering upon them. Only to mention but few: nationalization versus privatization; planning versus invisible hand; leftism versus rightism in the same system, etc. This is a key issue for the contemporary crises of actually existing socialisms as well. Only to name but few: economic reform and petrified Stalinist superstructure; bankruptcies of sham liberalization; wish of one-party self-legitimation with no offering for being legitimated, etc. The case of Hungary is a renewed proof of the hard bonds of a system. For economists claimed years ago that partial reform, softened and extended in time with no breakthrough in the political field was a planning for failure taking granted; and again, they were right. The dilemma now is hardened: is the tabooing of party-rule by one-party simply setting framework for a reform, or is it a touchstone of the left for aspiring even the cosmetic surgery, too much well-deserved?

21. To learn that, defying human imagination, systems human kind have established are only storehouses of contradictions and they still function well—this realization is shocking an experience for human mind to accept. But to expect systems with maximum *cohesion, consequentiality* and *freedom from contradictions* is a mere theoretical requirement, reflecting more of the subject than of the object, who, due to the *logical ideal of thinking,* is limited in imagination. And theory reflects, in addition to external world, its own homogenizing principles, too.

In fact, systems do function according to their *own homogeneities*, which are far off from the ideal of logic. As *practical* systems, they are to cope with practical problems resulting in *compromise solutions* to the detriment of the principles of cohesion, consequentiality and uncontradictoriness, that is, to the detriment of logic.

At the same time, *contradictoriness* with tensions in functioning is a basic fact of ontology. It stands not for temporariness and deficienciness of anything human after the first sin was committed and its authors ousted. It stands for a character everywhere and everywhen present, which may grow to be a burden but, in most cases of balanced development, serves rather as one of the most powerful *reserves for the internal renewal of the system.* Internal renewal is a way of making maximum optimum use of the systems's own potentialities, in order to make it possible for it to keep pace (through its continuous *readaptation* by continued *readjustments*) with overall development. This is the reason why systems process outer conflicts into inner ones by forwarding competitive arguments to solve them. This is the reason why systems develop conflicts through series of temporary solutions, with stillstand being just a name for the theoretical dividing line between situations of conflicts in succession of one another.

Acta Juridica Hungarica
1991 33 N° 3–4, pp. 179–215

Akadémiai Kiadó,
Budapest

András BRAGYOVA

Legality and *Ex Post Facto* Political Justice

Law is not sacrosanct—
more than that: it is rule
Frigyes Karinthy

I. The Problem

To begin with, let us consider the following imaginary cases:

One: in a country A (call it Armania), there is a government under legal system S1, under which there is no private property (with some exceptions) and substantial part of human rights is not respected, but the legal system is undoubtedly valid and effective. Citizens and foreigners, as well as foreign governments consider this legal system valid. They conclude treaties with this government even though they express their criticism against the constitutional order of that country, maybe using legal means, in particular international law, to do so. One day the constitutional order of that country changes, and consequently its legal system. Parliament adopts a statute, called "Law of Validity" which declares that every legal act done under the former system was illegal, since the former/prior legal system was a wicked legal system that is, invalid *ab initio.*

Two: let us suppose that following a change in constitutional order, or even without it, Armania unites with another state B, called Bermania, whose language and culture are similar, but if with which maintained not necessarily war-like, but certainly highly conflictual political relations, although undoubtedly on the basis of international law. Thus, Armania joins Bermania, in such a way that the legal system of Bermania will be in force from a given date on and with certain provisional exceptions in Armania. Then, the authorities of Bermania prosecute the head of the Armanian Intelligence Bureau, the chief spy of the country, for high treason, that is, committing a criminal act against Bermania by his former activity. In Armania, he had received the highest Armanian

order, the "Armanian Great Cross" for his patriotic services, which are, as a matter of fact, the same for which he is now prosecuted.

Three: Armania adopts a nationalisation law expropriating private proprietors; as the constitutional order changes, a new property law is passed declaring every acquisition of property under the nationalisation law null and void, obliging unlawful possessors (which are of course, proprietors under the prior legal system) to return immediately "unlawful" possessions to the "lawful" proprietors.

Four: The Parliament of Armania passes a law punishing for theft those MP's who voted for the Nationalisation Act.

Five: Armania, formerly a province of Bermania, declares its independence from Bermania. The Independence Act states that no legal relationship based on the laws of former Bermania will be recognised as operative in Armania, except explicit provisions of the Independence Act. It states further that "every event or fact taking place, happening, being committed or done" before the independence shall be deemed to be done under the laws of independent Armania.

Six: Armania is a state in which, under the constitution, the majority, or at any rate a substantial part of the population, on the ground of ethnic origin has restricted or no political rights, in particular the right to vote. Later on, political changes take place in Armania, and political rights are extended to the population as a whole. The new Legislative Assembly passes a law which declares that no official act (including any legal norm) performed under the former constitution, that derived its validity from that previous constitution, shall be considered valid in regard to any person who had no right to vote under that (i.e. the prior) constitution.

Seven: following a turn in the political system, the Armanian National Assembly adopts an "Act of Expiation and Justice", which orders the punishment of officials of the former regime who acted according to *certain laws* (as defined in the Act) of the former regime, now repealed but no doubt in force at the time when the official acts to be punished took place. The same act prescribes the punishment of ordinary citizens in certain cases who obeyed certain laws of the regime, such as the "Law on the Defence of Political Order" which required citizens to inform the authorities on anti-regime activities of fellow citizens.

These cases are indeed invented, but certainly not unfamiliar, since there is hardly a country in the world whose history would have failed to produce similar events. Even recently, many countries of the world, and not only European countries east of the Elbe, are facing similar problems. Politically they might be called the "post-revolutionary phase" of political change, provided one uses the concept "revolution" in a wholly neutral way. In other words, from a legal point of view, one could describe these events as consequences of the change in the *sovereignty* of the state. That is a change of the nature, or even the subject of the political authority behind the legal sovereign. This is provided, of course, that one is prepared accept sovereignty as a legal concept at all.[1]

1 See e.g. on this topic JENKS, W.—LARSSON, A. (eds.): Sovereignty within the Law. London, 1965.

This is an important and recurrent phenomenon of history certainly not restricted to modern Europe. I do hope that the examples describe the legal puzzle I wish to analyze in this essay, viz. the effect of a certain kind of abrupt change in the *political system* and consequent in change of the *political sovereignty* (which I hesitate to call revolution *tout court*) may have on the legal system and the particular problems created by it.

I think it is not entirely inappropriate to say that the cases above are in a sense paradigmatic for a certain type of legal change, which might be described as the change of the political superior or that of the legal sovereign in a legal system. In order to conceptualize our puzzle, I will, as a preliminary step, distinguish between change of a *legal order* and change of a *legal system.* I am quite aware of the fact that most legal theorists use, if they use them as a term of art at all, the words 'legal system' and 'legal order' interchangeably. I suggest to distinguish between the concepts of legal system change of legal order in the following way: I would call change of the legal *order* the change of the *primary* norms in a given legal system,[2] that is, the change of norms creating rights and duties, immunities and powers and all their possible modalities for the subjects of law; change of legal order means by and large the same as 'change of ordinary laws' of a legal system. Change of the legal *system* is by contrast, a change of the block of norms of a system which I will call in this essay "legality-norms", i.e. the systemic parts of the legal system, or a change of those elements of the legal system which renders a given set of norms a legal system. Needless to say, there is a good deal of difference between the two cases. Thus I shall use the expression 'legal system' to denote a (structured) set of norms[3] bound together and, second, the term 'legal order' will mean, if not stated otherwise, both legal order (that is, primary norms) and the systemic parts of law.

II. The Concept of Legality and the Problem of Ex Post Facto Political Justice

One form of the legal puzzles created by the change of sovereignty is the problem of "*ex post facto* political justice" of which the cases mentioned in the introduction were examples. In this paper I shall try to give a formal-legal, although I hope not formalistic, analysis of the *ex post facto*[4] political justice plans emerging recently after political

2 I use the terms 'primary norms' and 'secondary norms' in the Hartian sense; see his The Concept of Law, Oxford, 1961, Ch. V.

3 This is the most general and neutral meaning possible, see: e.g. KELSEN, H.: General Theory of Law and State (transl. A. Wedberg), Cambridge, 1946; RAZ, J.: The Concept of a Legal System, Oxford, 1970 etc. ALCHOURRÓN, C. E.—BULYGIN, E.: Normative Systems, New York, 1971.

4 It might be called alternatively "retroactive" justice; but I prefer the term ex post facto (or backward looking) because doing justice, in the sense of retributive justice is, by definition, always "retroactive" that is, a reaction to an injustice previously committed.

system changes in East-Central Europe.[5] Formal-legal analytic approach has in this context at least two different meanings: first, it means that I have no intention to analyze the moral, political or simply prudential aspects of the *ex post facto* justice problem; my argument has nothing to do with the substantial justice or any possible moral, political, or other justification of *ex post facto* justice projects. Second, I am not concerned with all legal problems involved in *ex post facto* political justice; rather, I am interested in a single, although I think decisive, aspect of "doing justice", i.e. in the question of their *legality*. What I propose is a contribution mainly to the theory of legal systems; in addition, I do hope it will prove that legal theory is an indispensable tool in dealing with really important practical legal issues. Moreover, this paper is an exercise in applied legal theory; since practical legal thinking is inherently theoretical in the sense that it is inextricably based on certain theoretical assumptions, although they remain implicit, unarticulated in normal legal reasoning simply because they are generally accepted and therefore rarely questioned at all. There are, however, "hard cases" (not necessarily in the Dworkinian sense[6]) lacking a crystallized normal (or standard) solution elaborated in court practice or in legal dogmatics[7] or both, and therefore, legal reasoning must go behind the theoretical level and assumptions of legal discourse. In such cases theoretical assumptions otherwise unquestioned become matters of dispute. This is just the kind of legal dispute in which applied legal theory has a role to play since in these cases theoretical argumentation, usually undisclosed in a routine case, makes up the core of the dispute. Or, perhaps more properly, cases are hard *because* there is no prima facie deductive solution based on accepted methods and premises of legal reasoning; therefore, in this type of legal dispute the fundamental assumptions (or "principles", if you will) themselves of law and legal reasoning are the rules of decision. In a normal case, on the contrary, the rule of decision is a secondary legal norm and solution of the dispute is derived from that norm by unchallenged methods of legal reasoning.

---

5 I have in mind of course mainly the Hungarian version, called *"Justitia Plan"* which was a comprehensive and systematic attempt of backward-looking political justice, although it applies to any similar legislative or judicial policy to do "justice after communism". Moreover, my aim is to go much further and my analysis, I hope, is applicable to any change of the political sovereignty of the legal system.

6 See e.g. DWORKIN, R.: Taking Rights Seriously, London, 1977, pp. 81 et seq. There is, however, an important similarity with the Dworkinian idea of 'hard cases', viz. that according to Dworkin in hard cases judges and legislators are inclined to 'political', as opposed to legal, decisions based on 'principles'.

7 By "legal dogmatics" I mean the language of legal discourse including standardised solutions to typical cases and the intellectual tool of legal argumentation, theoretical or practical. Legal dogmatics forms part of the legal system *sensu largo* since it is the meta-language of the norms of the legal system. On the other hand, legal dogmatics articulates theoretical assumptions on the nature of law, legal system and the directives on the use of norms of the system, definitions of legal concepts etc. Indeed no legal system can function without that meta-level of legal thinking. Thus legal dogmatics is in a sense similar to a paradigm of legalism in the well-known Kuhnian sense of the concept. See: AARNIO, A.: Rational as Reasonable, Dordrecht etc. 1986, pp. 10 et seq., 47 et seq.; and KUHN, T. S.: The Structure of Scientific Revolutions, 2nd ed. Chicago, 1970 (First ed.: 1962), see also HARENBURG, J.: Die Rechtsdogmatik zwischen Wissenschaft und Praxis, Stuttgart, 1986.

As a first step, I shall proceed to define the concept of *legality*, since my purpose is to analyze the idea and plans of *ex post facto* justice exclusively from the point of view of their legality. I propose to define legality *as the observance within the legal system of the norms regulating the legal system itself.* It seems to me that this definition by and large corresponds to the use of this concept in legal language and legal scholarship;[8] even if it were not so, I maintain that one should distinguish between the various undistinguished uses of this concept in legal language. Thus, legality is not the same as "lawfulness", not even the "observance of law", it is not the equivalent of the concept of "following a rule" and it does not correspond wholly to the concept of "lawful application of law", although most legal systems do contain expressly or by implication norms prescribing to their organs (courts of law, administration) the obligation to observe the primary norms of the system.[9] In this way the concept of legality includes the postulate of lawful administration of law as a norm relating to the system itself. But the core meaning of legality remains intact even here: the postulate of conformity with law is a postulate reaching *outside* the legal system (and it is therefore the precondition of the existence of the legal system and so that of legality too) while legality is a concept denoting normative relations *within* the legal system. Hence legality is a relationship between norms, belonging to the same legal system, i.e. the conformity of a legal norm with another; legality is the regulation of the functioning of the legal system by its own rules. Norms of legality do not prescribe what subjects of law are obliged to, i.e. legal rights, obligations etc., but rather they prescribe how the legal system should behave. For this reason, legality as a property of a legal system, and the relationship between the legal system and human conduct regulated by the primary norms of the legal system, are clearly distinguishable. Obviously enough, legality is a necessary property of any minimally sophisticated legal system, since at a certain level of complexity—and that level of complexity modern legal systems reached hundreds of years ago—a legal system cannot exist without regulating its own functioning in order to remain effective. It is also clear that the concept of legality presupposes that of the

8 I have found, however, only a few definitions similar to mine in legal writing. The one closest to mine I have been able to locate seems to be that of Georges Vedel: "La légalité d'un gouvernement est sa conformité au droit. Pour ceux qui distinguent la légalité et la légitimité, c'est plus précisément sa conformité *formelle* au droit." (Italics in the original.) See VEDEL, G.: Manuel élémentaire de droit constitutionel, Paris, 1949, p. 276. For a recent analysis of the concept of legality in modern French thought see: CHEVALIER, J.: 'La dimension symbolique du principe de légalité', 105 Revue du droit public, 1651 (1990).

9 The concept of "lawful application of law" might appear contradictory, or, if you please, redundant. But it is not so, for several reasons: first, if there were no rule of the legal system directing courts and other organs of the legal system to apply the norms of the system according to their content, i.e. "lawfully" or "faithfully", the system would loose its systemic character, since there would be no connection between norms and the organs applying them; second, in that case there would be no legal (normative) ground in the system to control the implementation of the primary norms of the system. This is in fact one of the postulates of Fuller in his formal natural law; see below.

legal system, since norms of legality are norms relating to a legal system or rather, regulating it.

The concept of legality is also closely connected to *constitutionality*, although there are substantial differences between the two. First, constitutionality is characteristically a *substantive* concept and applied to a legal system it is a substantive postulate: it denotes a certain ideal or wished for state of a legal system; constitutionality contains a lot of norms, not connected necessarily to the concept of legality, like separation of powers, human rights and the like. Second, however, in so far as the requirements of constitutionality become part of the legal system, constitutionality will be part of the legality of that legal system in the sense that unconstitutionality will also be a breach of legality, provided that constitutional requirements are conceived as norms defining the necessary content or limits of the norms the legal system. In that case any organ of the legal system[10] acting unconstitutionally will act necessarily against the legality, seen from the standpoint of the legal system. It is one of the characteristic *techniques* of modern constitutionalism that the norms of the constitution are incorporated into the legal system, so to speak, double faced. On the one hand, constitutional requirements are rules of legality; that is, they regulate the legal system internally. On the other hand, the same rules are also defined as norms creating rights for citizens bound to be protected by courts. Thus a breach of legality will also usually be a breach of an individual constitutional right creating a claim for individuals to attack it in the courts; in this way, one is tempted to say, legality itself becomes a postulate of legality. A well-known example of the judicial protection of legality is the French type of administrative jurisdiction, which is, in principle, nothing but the judicial protection of pure legality; the protection of individual rights is nothing but a salutary consequence of the judicial supervision of the legality of administrative acts.[11]

More closely related to legality is the concept of constitution in the "logical sense", as Kelsen (and generally the Vienna school)[12] calls it, "logical" in the (Neo-Kantian) sense, that certain rules are necessary, inevitable, and constitutive components of any legal system. These rules regulate the creation of norms within the system, the

10 An organ of a legal system is either an organ conceptually necessary for the existence of a legal system (e.g. norm producer) or an organ constituted by the legal system, so that it cannot exist without the legal system, such as a court of law.

11 French theory usually calls it "objective", in the sense that the protection given by administrative courts is destined to protect legal order, i.e. legality in the sense used here. See e.g. RIVERO, J.: Droit administratif, 11th ed. Paris, 1985, pp. 244 et seq., p. 248: '...le recours tend, non à la reconaissance d'un droit subjectif, mais á la sanction d'une règle de droit...'. Rivero calls *expressis verbis* the *recours pour excès de pouvoir* 'sanction du principe de légalité' (p. 244), although he admits of a certain shift into the direction of the protection of rights rather than norms.

12 See for example: KELSEN, H.: 'The Function of a Constitution' (transl. I. Stewart) in: TUR, R.—TWINING, W. (eds.): Essays on Kelsen, Oxford, 1986, pp. 109 et seq.; or, alternatively, his General Theory of Law and State (transl. A. Wedberg), op. cit., pp. 124 etc.

conditions of validity of norms belonging to the system (membership-rules), the hierarchy of norms, the sources of law, etc. Indeed, one cannot even imagine a legal *system* without systemic norms, which are, in my definition, norms whose breach amounts to the breach of legality of the system. No doubt, the constitution of a legal system in the "logical" sense is an inevitable part of the rules, the observance of which constitutes the legality of a legal system, provided that the rules of it are rules of positive law. But historically this has not always been the case; the fact is that the political claims of constitutional state, rule of law, *Rechtstaat* etc. were, at least in part, demands to codify explicitly in the form of written rules of positive law, the postulates of minimum formal legality, that is the constitution in the "logical" sense. The legal primacy of the constitution as the highest law is, from this point of view, nothing but the corollary of the fact that norms of legality are *meta-norms*, i.e. *norms relating to norms*. On the other hand, at a certain level of sophistication and complexity in the legal system, the explicit positivation of the norms of legality is also a technical necessity. Clearly, constitutionalism is much more than that; still it is true that legality is part of constitutionalism in any meaningful sense of the concept.

The main use of legality as defined in this essay will be what I would call tentatively the *immanent criticism of law*, or the self-criticism of the legal system. It is a double-edged criticism, since it serves in fact as a basis for two different kinds of *criticism of the law by itself*. For one thing, legality could mean a substantive control over the content of primary norms of the system (if, of course, the system does contain rules to assess within the system the content of its norms) and for another, legality means criticism of the law based exclusively on the systemic norms of the legal system. Using the terms introduced earlier in this paper one could say that the first is the legality of the legal order, and the second is the legality of the legal system. Accordingly, legality renders law "reflexive" in the *normative sense*[13] making possible a critically reflective attitude toward law without leaving the self-defined limits of the legal system and remaining within the confines of positive normativity. Aphoristically, one could say that the legality is the legal fairness of the system.

I trust it has became clear by this point that an examination of the legality of "*ex post facto* political justice" projects is also an analysis of their constitutionality. However, the analysis of the legality is another kind of analysis than that of substantive constitutionality: it is restricted to what I would call *formal constitutionality*. One should add that "formal" is by no means equivalent to something like "unsubstantive", but rather an independent standpoint of analysis in which one investigates the constitutional-legal issue exclusively in the light of the *formal correctness* of a solution, without examining the merits of the outcome in itself. In Hartian language one would say that the analysis of

13 So I do not intend to use the concept of "reflexive" in the sociological sense: this will distinguish my use from the Luhmannian school of thought, e.g. from Günther Teubner's ideas as exposed in his Recht als autopoietisches System, Frankfurt am Main, 1989, in particular p. 84; and see Luhmann's Rechtsoziologie, 2nd ed., Opladen, 1983, pp. 213 et seq.

legality is an analysis based exclusively on secondary norms within the legal system as applied to primary norms, but disregarding the content of primary norms; alternatively, using my conceptualisation, it is based on the systemic parts of the legal system. Thus, a formal analysis as proposed here is made on the basis of the secondary norms of the system, and it is formal in the sense that its result does not depend on the actual content of primary norms, but exclusively on systemic norms. In other words, a formal analysis does not concern directly the rights and duties (including their modalities) in force under the given legal system, but rather the norms of the system governing the process of creating, applying, terminating, etc. the norms upon which the individual rights, duties, etc. are based.

Perhaps the most important advantage of formal reasoning is that it is more exact, since formal criteria are, indeed they are supposed to be, more precise and semantically more unequivocal than substantive criteria. In short, formal reasoning is liable to produce a technically more perfect, more convincing solution to a legal problem, which must be accepted as correct, since it is deduced from unquestionable, evident as it were, premises by a formal and undoubted logical sequence. That is, "formality" is an abstract method which disregards the usually more controversial content-side of the legal issue and it bases the solution on neutral (or at least much more neutral) premises, moreover the formal process of reasoning itself is much more subject to rational control than the content based, substantive reasoning. Formal reasoning in this way avoids substantive, highly value-laden arguments which are by definition more controversial and less likely to gain reasonable, if not rational[14] acceptance. Arguments based on the claim of legality are by their nature formal: legality type arguments are essentially arguments from the consistency of the legal system; and consistency is not only an eminently "formal" kind of argument, but it is also, at least from certain views, the very basis of logical, or more broadly, rational reasoning.[15] Legality is an argument from consistency because it is based on the postulate that a legal system could not require lawfulness (that is conformity with law) if itself is unlawful. Unlawfulness is by definition an inconsistency of a human conduct with (at least one) primary norm of a legal system; an inconsistent legal system is, however, a different case: it is an inconsistency with the system's own norms, that is, with those (secondary) norms of the system, which give it—at least in the legal sense—the quality of being legal. Aphoristically speaking, one is tempted to say that a legal system cannot claim conformity with its norms if it does not conform with the norms created for itself. If it were so, and that is, not a technical or logical impossibility, the legal system would destroy the main general (and highly formal) value of any legal system, i.e. the idea of any normative order, namely that norms are made to induce conformity with them. Anyway, I do not argue that legal

14 I use here the distinction between rational and reasonable in the sense introduced by PERELMAN, Ch.: Justice et raison, Bruxelles, 1961, and AARNIO, A.: Rational as Reasonable, op. cit., in particular, pp. 77 et seq.

15 See STRAWSON, P.: Introduction to Logical Theory, London, 1951, pp. 1 et seq.

systems are in fact consistent, but rather that they ought to be, if they will conserve their legality as defined by law itself.

Here we achieved a point where the problem of *ex post facto* political justice and that of legality meets, since as I shall try to set it out, any backward looking justice attacks the core of legality and therefore it must fail if the legal system maintains its legality. This is so because *ex post facto* political justice is (as I shall argue later on) based inevitably on the assumption of the "illegality" of the former legal system: it must assume that the former legal system was at best a distorted non-law, a wicked legal system and *therefore* all the rights and generally every legal relationship created by that legal system could not be (or at least need not be) regarded in the new and of course lawful legal system as legally perfect, or fully valid. Thus, the new legal order may, unbounded in law, change, modify and, of course, terminate rights and legal positions created in the former legal order at its discretion, since they are—being "illegal"—not protected by the constitutional limits of state power. One is tempted to say that the new sovereign starts with a "clean slate" in relation to the former one[16] at least in law, if not in fact.

The most fundamental claim upon which all kinds of *ex post facto* political justice are by necessity based is, to formulate it in neutral language, the claim of *discontinuity* of the former and the subsequent legal systems. The point here is by no means that the proponents of *ex post facto* justice indeed argue more or less explicitly in this way (which may be true, although not necessarily) but that *ex post facto* justice could not be based on any other sound argument except the discontinuity thesis, provided, of course, that it wishes to remain within the bounds of legality. I conclude, therefore, that the only possible and plausible legal construction of *ex post facto* political justice is the withdrawal of the status of legality from the prior legal system in the subsequent one; that is to destroy, metaphorically speaking, the bridge between former and subsequent legal systems. If it is so than the legal criticism of *ex post facto* justice can be successful only if the following two theses are proved:

(1) There is a necessary connection between the legality of *ex post facto* justice on the one hand, and the discontinuity between the prior and subsequent legal systems on the other hand. That is, it must be proved that the former proposition logically depends on the latter: one cannot accept both without being inconsistent.

---

16 This problem is usually more thoroughly studied in international law than in constitutional law or legal theory, as the problem of "succession of states in international law" and the creation of states in international law. Indeed, in international law and relations it is vital to define, in cases of change of the political superior, the relationship between the former and the subsequent sovereign. In internal law, the problem of the identity and the continuity of states also causes equally great problems. But here, as it were, the sovereign must not face other sovereigns, so the real (in contrast to legal) possibilities are greater than in international law. See in particular: MAREK, K.: Identity and Continuity of States in International Law, Geneva, 1954, O'CONNELL, D. P.: State Succession in International and Municipal Law I-II, Cambridge, 1970 and CRAWFORD, J.: The Creation of States in International Law, Oxford, 1979.

(2) One must define what are the criteria of the continuity (and so that of discontinuity) of legal systems, and examine, how far these criteria were or were not satisfied in recent political changes or, generally, in any case of change of the legal sovereign.

These are, in my opinion, the fundamental jurisprudential issues involved in *ex post facto* political justice, susceptible to a neutral-formal legal analysis. As a matter of fact, this framing of the issue also rests on certain highly abstract and formal assumptions, which require no more than the acceptance of the idea that a legal system must be in conformity with itself. This assumption, although of course not immune from discussion too, still could claim a reasonably wide acceptance. But before I proceed to the core of the argument, it appears to be appropriate to set out in some detail the various versions of *ex post facto* political justice, as proposed actually in Hungary and elsewhere in the former "socialist" countries of Central Europe. Then I shall analyze the possible theoretical arguments *in favour* of the legality (or, generally, legal acceptability) of *ex post facto* justice plans. After having made this *detour* I shall return to the fundamental issue, and try to offer a solution to the legal puzzle. Therefore the reader interested exclusively in the theoretical argument of this essay might wish to pass over the next section immediately to Section IV.

III. Ex Post Facto Political Justice: Taxonomic Analysis

Fundamental changes of political system have historically almost always aroused a variety of attempts to change legal positions retrospectively and retroactively for political motives. The common ground of them, notwithstanding essential differences in method, means, scope and so forth, has been the ambition to treat legal order (in the sense introduced above) as a means to requalify *a posteriori* real events into what they in fact never were. Thus *ex post facto* justice always contains an element of reversal of legal qualification of acts and facts, or more properly speaking, depriving them from the legal quality they undoubtedly had when they were done, committed or happened, by redefinition of the law then in force. This is, in a sense, a particular form of legal fiction[17] ordering that norms of a legal order valid at a certain time and place ought to be regarded from a certain date on as not having been valid as they were; thus at least certain facts and acts will be retrospectively requalified. This is not, it must be emphasized, the problem of retroactive laws; rather, on the contrary, the problem of admissibility of retroactive laws is a smaller part of the topic discussed here.

This introduction will suffice to precede a detailed analysis of *ex post facto* justice as a politico-legal idea and its paradigmatic cases. Needless to say, *ex post facto* justice is a recurrent phenomenon of political and legal history, so that my sketch is intended

17 See FULLER, L. L.: Legal Fictions, Stanford, 1967 (originally published 1930-31).

to be applicable more broadly than in present day post-socialist Central and Eastern Europe. In the following I shall set out the main elements of *ex post facto* justice plans not pretending of course, that each element is to be found in every plan, not even that they are logically independent of each other. Of course, the various elements of *ex post facto* justice plans are closely related to each other, but their connection is, at least at the first sight, practical rather than logical: all of them share a common aim, viz. "doing justice". I wish to point out, however, that they are, in spite of the apparent differences, thoroughly connected by their common presuppositions. Admittedly, though they deduce somewhat different conclusions from mostly the same assumptions. Their common aim ("doing justice") is used here in quotation marks, since I do not want, being a lawyer, to analyze the distinctly moral aspects of the problem (which makes it clear, that I am a positivist); moreover, such kind of justice has little if anything to do with the moral or legal justice: it is, at its best, a sort of political justice, provided of course that political, i.e. *purely* political, justice is not a contradiction in terms. Accordingly, the quotation mark wishes to express my opinion that *ex post facto* justice is in its substance, a political idea, therefore, it could be justified, if it is possible at all, by political arguments. *Ex post facto* justice plans contain, in fact, a set of political measures to implement a certain policy. An important aspect of the analysis of *ex post facto* plans would have been the connection of law and politics, but I shall restrict myself here to a strictly legal analysis, or even more narrowly to a particular aspect of legal scrutiny, that of legality.

The first, and in many cases foremost, element of *ex post facto* justice plans concerns, of course, the extension of *criminal law* responsibility to certain political or politically motivated acts for which the normal legal conditions of criminal responsibility did not exist, or, if existed, do not exist anymore. It is of no theoretical importance (albeit, the practical difference could not be denied) that some would intend the punishment to be only symbolic; others would demand only the extension of statutory prescription of crimes or, in cases where it has already been completed, the reopening of the lapse of the time necessary for the prescription for certain crimes; still others would punish certain kinds of acts which were not unlawful, or were explicitly prescribed when committed. It is important to note that the criminal responsibility or punishment proposed is inevitably not normal criminal law (indeed it could not be by definition) but rather a set of criminal law rules valid only for a particular group of persons setting aside the general rules of criminal law which would remain in force for the rest of the society. There is some reason to contend that this first type is in fact the paradigmatic case of *ex post facto* justice since it contains its essence: the intention to "punish", in the sense of "moral-political" expiation rather than as a legal sanction, and the element of retrospectivity.

The second essential element of *"ex post facto justice"* proves this statement. It also contains a punitive element, since it wishes to oblige a certain group of persons defined by political criteria such as former political function in party, government or economy, to "compensate" the society through expropriation of their property, repayment of financial advantages received and so forth. Part of this kind of punishment would be not

only the substantial or symbolic reduction of pensions received by high functionaries, but also the withdrawal of decorations, medals, and honours conferred by the former regime (or what amounts to the same, the prohibition to wear them) including the repeal of the eventual privileges or advantages to which the holders of the honours had been entitled. These measures are destined, according to their proponents, to produce more social justice, through the takings from those "undeserved" thus reestablishing the social equilibrium by taking and compensation. The primary aim of this type of Justice is clearly the punishment of selected social groups. Undoubtedly, the means to this end are more social, political, or even "moral" than criminal. It still remains, however, punishment since the withdrawal of rights or privileges acquired as unrepealable rights under the legal system is nothing but "punishment" as punishment is, among other things the (temporary or final) repeal of otherwise intangible rights in a legal system. From this point of view it does not matter too much that some of these rights are merely symbolic and/or moral, and as such without direct or clear practical use. The other element of punishment is also present here: the lawgiver, in adopting this kind of laws, is not only taking vested or intangible rights but he is also critically reacting or responding to the conduct of a person. (A punishment for another's deeds would be absurd, because it is contrary to the idea of the punishment itself; responsibility for another's actions is of course well known in every modern legal order but not as punishment, i.e. responsibility, but as liability or *Haftung*.) Thus, if the lawmaker repeals certain rights as a general measure valid for every person without distinction, say a general reduction of pensions, it still could well be described as contrary to legality, but it would not be a punishment. The *ex post facto* character is abundantly clear if one considers that the conduct criticised by way of *ex post facto* legislation had been undoubtedly lawful as it is recognised by the measure itself.

The punitive element is also present in proposals suggesting to adopt prohibitive laws against former political activists, defined by various criteria, declaring them ineligible to obtain politically important posts in government, or eventually in society. No doubt, these are also punitive laws, both on account of the purpose and methods used, since they want to restrict otherwise generally available rights of a group of citizens because of the their conduct in the past; in addition, in most positive legal orders, such as in Hungary, limitation of political rights is actually a form of criminal punishment.

Fourth, *ex post facto* justice projects include—and included in history repeatedly—*indemnification* for personal injuries or financial losses caused by formerly lawful acts. Here it would be difficult to discover, at least at first sight, the elements of punition. But, even in this case, there are undoubtedly punitive moments, although not in its retributory side, but rather in the expiatory aim and purpose. What is lacking is the well-defined set of *persons punished*: rather, in case of indemnification or restitution, the society as a whole (that is, everything taken into account, those *not indemnified*) who are, if not punished in the strict

sense, but held liable to pay for the losses caused by the former sovereign.[18] No doubt, indemnification is inseparably part of the *ex post facto* justice ideas, as it is undoubtedly retrospective too; it is part of the bulk of legal measures aiming at the radical change of the formerly existing political and social system, and what is of paramount importance for me here, its legal system, guided by motives which might be described as the direct reaction or response to the legal norms of the former system now considered unjustifiable. The consequence of this is that legislation on "indemnification" changes the legal qualification of certain acts and states of affairs for the future so that lawful acts and states of affairs under the former legal system are now declared—at least in part—illegal and are, therefore, the basis for an indemnification. Thus indemnification is connected to patently lawful acts under the former legal system. Indemnification is the legislative approximation and expression of the idea of the *restoration* of the former legal order at least as far the law of property and related subjects are concerned. Total reprivatization would be the ideal fulfilment of this philosophy in post-"socialist" countries, as far as property rights are concerned. But even where the reprivatization is not pursued so radically and intransigently, if only for practical reasons, the starting point remains the given state of affairs at a certain moment(ary legal system) in the past which serves as a standard to which compensation is measured. The essence, here too, remains the retrospective change in legal order. These measures should, however, be clearly distinguished from correctional measures, such as compensation for (lawful or unlawful) imprisonment or other restrictions of personal freedom, in particular deportation, or compulsory domicile, etc. Those types of legal measures are obviously connected to certain prior acts of the state, but they are not guided by the idea of retrospectivity. In some cases this could be bound to the repeal of criminal sentences previously made either by courts or by general legislative acts, or both; if it were so, one should, at least in theory, distinguish between sentences lawful at the time they were announced, and sentences which were unlawful even under the law in force at the operative time, while both could be judged morally exactly in the same way. The consequence is only that originally unlawful sentences could have been declared invalid at any moment without legislative intervention, which does not apply to those lawful when made.

Therefore, the legal substance of the *ex post facto* political justice plans could be defined roughly as follows: any change in the legal system/order destined to change the political and social order which changes the legal order not exclusively

---

18 The most notable case of it in history was, to my knowledge, the indemnities and reparations payed by West Germany to certain groups of those who suffered injuries from Nazism, under the name of *"Entschädigung"* and *"Wiedergutmachung"*. See the series published by the *Bundesminister der Finanzen* under the general editorship of SCHWARZ, W.: Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland, Vols. I-VI. München, 1974-1985.

pro futuro and for acts and states of affairs in the future; rather it is a change in the legal order which in some way connects the present legal position of persons to legal acts and states of affairs existing prior to the moment the norm became operative; this is done it with the aim of redefying their legal qualification in the prior legal system. The essential element is, broadly speaking, the retrospective change in law; *ex post facto* justice plans are inseparably and inevitably backward looking in time; they have, then, a certain undeniable restorative flavour. In the rest of my essay I shall try to assess the legal possibilities and limits to such political measures.

IV. Legal Justification of Ex Post Facto Justice

In examining the crucial issue, the legal justification—and, as I have said, only that—of *ex post facto* justice plans, I shall proceed not on the basis of justificatory arguments actually propounded by supporters of such programmes in particular in Hungary; rather I intend to investigate any plausible justification for *ex post facto* justice plans whether actually proposed or not. More importantly, in doing so I wish to discover the essential, (in the sense of ineluctable) legal presuppositions of *ex post facto* justice plans; it will be the precondition to explore how far, if at all, *ex post facto* justice projects could be implemented without causing injury to the legality of a legal system. It should be noted that in this essay I treat the theories to be examined simply as the best possible, or eventually the typical, representatives of characteristic arguments; thus, the discussion that follows is not intended to be a full-fledged and fair criticism of the various theories on their own right.

Previously I made some efforts to point out that *ex post facto* justice programmes necessarily involve retrospective, i.e. backward-looking changes in legal order; in fact, *ex post facto* justice plans if pursued with the minimum consistency would amount to such a radical and fundamental disturbance of the legal system that it would inevitably question the legality of the legal system, that means, in last analysis, its existence as a legally ordered set of norms. To be sure, it would not question the mere factual existence, or, "being" of the legal order as such but simply (if it were simple), its legal quality or better even, its legal seriousness. In short, the *ex post facto* justice plans are not purely proposals to change radically the *legal order*, but also, at least in the sense defined above, they seek to change the *legal system*, which is a much different and much more difficult task. This circumstance, of course, did not escape the attention of those arguing for *ex post facto* justice; anybody arguing for legal measures of such a weight must be aware of the paramountcy of the intervention into the legal system they propose. If there is a single proposition accepted both by proponents and opponents of *ex post facto* justice projects, it is that they are *not* normal legislative operations. Such an intervention into the legal system requires, no doubt, serious legal justification; and the burden of proof therefore lies on the side of its proponents.

Now I shall proceed to examine the various theoretical arguments serving to justify *ex post facto* justice.

A. Substantive Natural Law

The argument from *natural law is*, of course, the most ancient and traditional (and the most philosophical) way of reasoning. I do not want here reargue the case *Natural Law v. Positive Law* with all the dissenting and concurring opinions in the context of my topic, since I do not think it will add anything to the long chain of arguments already put forward. What I want is to simply point out certain features of natural law theories which concern legality. Interpreting natural law as asserting merely the primacy of moral rules (or, better, norms of a certain well-defined morality) over rules of any legal system, at least under certain conditions, would not be very interesting, still less dangerous, for legality, not even in a stronger (and I would maintain this is the authentic one) version contends that these moral, or morally justified norms are in some legal sense "stronger" than other rules of law, such as the well-known "*übergesetzliches Recht*" ("Law above the laws" in free translation) of Gustav Radbruch.

A natural law containing criteria of just law—Hart remarks very pertinently that justice is the most legal of the virtues[19]—would be natural *law* only if it would be able to destroy *legally* the specific legal quality, that is, the validity, of any positive law contrary to natural law. A weaker version, say in which natural law is only a means to discover, which law is unjust,[20] would not be relevant here, since it would not even contend that a legal norm contrary to natural law would be deprived of its legality. The point is that if natural law makes an unjust norm invalid only *pro foro interno* then it has still nothing to say about its legality. That kind of natural law reasoning is useful as a legal argument—but in that case for the positive law—after the previous legal order had passed away, but not before it. The argument from natural law served in most cases to justify the *ex post facto* non-recognition of the legality of certain legal norms or laws (the distinction between the two is now not in question) in the legal order following the one in which it was unquestionably of full legality. Remember that the judgements cited in Radbruch's well-known article on "unlawful laws"[21] were made after the fall of the nazi regime; the same applies to the judgements of the International Military Tribunal and the judgements pronounced by the American Military Tribunals in Germany after the World War II. As Kirchheimer convincingly pointed it out,[22] the IMT was careful enough to base its judgement as far as possible on legal norms having the least possible dubious

---

19 HART, H.L.A.: The Concept of Law, op. cit., p. 163.

20 Like that of FINNIS, J.: Natural Law and Natural Rights, Oxford, 1980.

21 RADBRUCH, G.: 'Gesetzliches Unrecht und übergesetzliches Recht' (1945), reprinted in his Rechtsphilosophie (ed. WOLF, E.), Stuttgart, 1950, pp. 347 et seq.

22 KIRCHHEIMER, O.: Political Justice, Princeton, 1961, pp. 326-327.

legality (in the terminology used here). One is inclined to say that the natural law arguments of the type cited above, quite independently of their moral value and convincing force, are in fact, from the point of view of bare legality simply rules of the legality of the system consecutive to the system in which they were fully valid (which is of course a question *par excellence* of legality). In sum, my thesis is that arguments based on (that is deriving their force from) substantive natural law are unable to affect the legality of legal norms as long as they are legal according to the rules of an existing legal system;[23] they could surely be interpreted as norms identifying the laws of the legal order which *should be obeyed by citizens*, in some other sense than its legality (or "legal force") or even which do not have to be obeyed. This does not solve, however, the question of legality. Namely, how far, if at all, a consecutive legal order may in a legal sense (although undoubtedly *can*) enact rules to punish citizens or officials (say, judges) because they obeyed or enforced or even (provided they were legally entitled to do so) created manifestly unjust laws. It is perhaps not entirely missing the point to say that natural law rules in these cases serve as norms of positive law of the posterior/consecutive legal system ordering punishment for *obeying* certain norms of the previous legal system because they were (morally or under natural law) gravely unjust. Thus, in that case, the binding force of a moral precept is regarded as a good ground for regarding positive law norms as defective *ex post facto*. Obviously, the *moral (as distinct from legal)* acceptability of such an enforcement of positivated natural law will always depend at least on two factors: first, on the moral weight of the norm violated in the previous legal order (a good example of this is the Nazi law in breach of elementary norms of humanity, i.e. violating really the lowest minimum standard of generally accepted morality) and second, on the independent moral value of law: the value attributed by the *positive morality* of a society or a group of people to pure legality. Note that the latter factor is moral, not legal: it is the moral value of law *irrespective of its content*.

A variant of the substantive natural law justification is the contention that certain legal orders (but not *legal systems*) were "invalid" because they were contrary to the human rights norms of international law. This reasoning would use international law as a substitute for, or a kind of, natural law. This argument is based on highly unrealistic assumptions, most eminently on the doctrine of unity of international and domestic law; if this assumption is not accepted, human rights cannot be reasonably said to be based on international law. I have tried to prove this thesis elsewhere[24] so that I shall not pursue this matter further here.

---

23 Of course, the existence of a legal system as a system, as distinguished from single norms, or groups of them belonging to it, could also be a matter of discussion. It would lead too far to discuss this problem here. At any rate, I suppose for the purpose of the present argument, that the existence of the legal system remains undisputed throughout.

24 BRAGYOVA, A.: 'Is It Possible to Base Human Rights on International Law?', in: MAIHOFER, W.—SPRENGER, G. (eds.): Revolution and Human Rights, ARSP, BH. 41 (1990), pp. 141 et seq.

B. Formal Natural Law

There is however, a second, and in a sense a more pertinent, version of natural law argumentation, which is that of Fuller.[25] The Fullerian *formal* natural law seems to be more pertinent to the subject of legality for the simple reason that it is in fact, nothing else but the codification of the precepts of legality couched in natural law terms.

Thus, at least in one formulation it is possible to say that in Fuller's thought legality and justice are closely bound together: in fact, he writes of "[the] deep affinity between legality and justice".[26] This contention is not concerned with the substantial aim of law, Fuller says, but it is clear that a just law must respect the standards of the inner morality of the law, because a law (or better, the legal system to which it belongs) even if it is just in its substantial aims, still cannot be just *law*, since it fails to possess legality. This view is bound to a type of moral-ethical rationalism, as it was referred to before, binding inextricably together moral validity and rational action in an apparently questionable way.

The main difficulty with the Fullerian natural law of legality as it might be called, is, however, that it neither proves the falsehood, nor causes the invalidation of the rule of law violating the Fuller-criteria in any meaningful legal sense of the word. Of course, for Fuller, a law contrary to the precepts of legality ("inner morality of law") is not law at all; but this formulation, much debated[27], does not, it seems to me, resolve the problem. Leaving aside conceptual problems ("is there such thing as a *critical definition* of a concept?"), it is not clear what happens, at the operative time, with the law defying the norms of legality. The only consequence of it would be that Fullerians will not regard it as a law but rather as a mere *fiat* or simply a phenomenon purporting to be law without corresponding to the definition of law adopted by those who follow Fuller's ideas. The problem still remains, even in that case, the same: what happens to the validity of the norm (or law) contrary to the inner morality of law.[28] The solution Fuller offers, viz. that it is not law and therefore could not possess the quality of validity (or "binding force") by and large in the same sense as it would be, at best,

---

25 FULLER, L. L.: The Morality of Law, New Haven, 1964.

26 FULLER, L.L.: op. cit. p. 157.

27 I mean of course the well-known Hart-Fuller debate. See, in addition to Fuller's 'Morality' quoted above, HART, H.L.A.: 'Fuller, L. L.: The Morality of Law' and 'Positivism and the Separation of Law and Morals' now both in his Essays in Jurisprudence and Philosophy, Oxford, 1983, pp. 43 et seq. and 343 et seq. For Fuller's reply see 71 Harvard Law Review, 630 (1958). See also BOUKEMA, H. J. M.: The Hart-Fuller Debate, 14 Rechtstheorie 29 et seq. (1983).

28 I leave here aside a possible purely sociological interpretation of this argument which would argue that a society consisting, at least in vast majority, of Fullerians would not, probably, obey norms contrary to legality criteria. Provided this were so, that would only be a sociological argument, since it would assert a causal, but not a normative, relationship between the legal immorality of law and its chances to be obeyed. But the point here is the normative effect of the legal immorality of law and not the social effects of legally bad laws.

meaningless to say that a whale walks on the street (except, perhaps, in poetical works); thus it could not be obeyed, not because it is not valid, but rather it is not valid because it is not law, so it cannot be valid at all (since validity is a quality reserved exclusively for rules of law). This is a rather absurd kind of reasoning; its absurdity will be clear at once if one considers that it is exactly of the same type as the argument which one meets quite often in aesthetic debates: it is the same structure as arguing that the sound a piece by Alban Berg or Pierre Boulez makes is "not music" at all, and not simply "bad (or disliked)" music.[29]

This argument, I would maintain, is contradictory, for the following reason: it asserts in fact that a given *definition of law* (or music in the example) must be *obligatory* in the sense that everybody (every subject bound to obey the laws of a legal order) should accept it. If it is so then Fuller's theory is—as I think most natural law theories indeed are[30]—a theory of obedience to law, i.e. that of political (or moral) obligation and should be most properly judged as such. But, if one will disobey an unjust law, it is undoubtedly presupposed that the law in question is *valid* in the sense that it *exists* in a positive legal order. If it were not so, one had nothing to disobey, and in fact the whole problem would be meaningless and obsolete, as it would be obsolete or moot at the very moment the legislator repeals the unjust law or changes its practice contrary to the morality of law. Thus, I submit, the Fullerian natural law, in fact, splits the concept of law in two parts: first, it proposes an evaluative-critical concept of law, corresponding to the criteria of inner morality of law, and second, it contains a value-neutral concept of positive, existing law. Indeed any natural lawyer must assume (by definition) the duality of positive and natural law; therefore the crucial question is, at least from the present essay's point of view, whether it could be proved that natural law would deprive positive law of its validity in the sense of its legal existence. I find the conclusion inescapable that whatever the merits of natural law reasoning may be for other purposes, it fails to produce meritorious effects in an existing legal system, so long as the legal order survives.

Another question is whether natural law reasoning, as I tried to point it out, and the same applies to the Fullerian version, may be used in a subsequent legal order as an argument to justify the denial of legal quality from norms which were no doubt valid as positive law in some previous legal order (or are valid in another legal order considered to be defective). For this purpose a Fullerian line of reasoning would be excellent. In

---

29 One cannot fail to remark that the debate on the question whether international law is 'law properly so called' or not shows similar traits, as far as the conceptual, methodological side of the problem is concerned. In addition, it is usually thought—on both sides, I believe—that the qualification as not 'law' would be downgrading for international law, although nobody would deny (not even Austin) the *existence* of the set of norms called (properly or improperly) 'international law'. Cf. AUSTIN, J.: Lectures on Jurisprudence, London, 1873, lectures I and V, VI, Vol. I, pp. 81, 88-171; and see GLANVILLE, W.: The Controversy concerning the Word "Law", 22 British Yearbook of International Law, 1945, pp. 146 et seq.

30 In fact, SAINT THOMAS AQUINAS formulated, at least in one instance, the fundamental question of natural law in the same way. See: 'Summa Theologicae' I-II. quest. 96, a 4-6.

fact, this type of argumentation seems to be recurrent in the treatment given in Germany to the norms of the former GDR legal system, which became part of the legal system of the Federal Republic of Germany (i.e. the unified German state) as of 3 October, 1990. The main argument is, roughly, that the GDR legal system was defective by the standards of the *Rechtstaat* (rule of law), i.e. legality, and therefore it could be treated by (post GDR) German courts as if it had not been of the same legal quality or validity (for the past) as West German law is. No doubt this argument is conceived in a broadly Fullerian vein, although it does not pretend explicitly that the GDR legal order (or system) had been invalid; but it treats it as a legal order lacking the inner morality of law, hence not law "properly so-called". But, it should be repeated, this argumentation could not deprive the GDR law or, *a fortiori* any prior legal order (the norms belonging to that legal order) from legal existence retrospectively; it could not only justify the retrospective denial of its legal quality in *the subsequent legal order.*

C. "Revolutionary Legality"

The argument from *"revolutionary legality"* serves in the last analysis the same purpose. Revolutions are aimed at destroying the legality of the existing legal system; their peculiarity is just that: revolution, in that analytic sense,[31] is a method of changing the legal *order* through changing the legal *system*. Thus, a revolutionary change in law could be distinguished from other types of change by its method of breaking the rules of the legal system in order achieve changes in the legal order; this implies, of course, that revolutionary change does not involve necessarily the use of force. A revolution destroys, or pushes away, the existing legality; therefore, apparently, this concept of revolution is not dependent on the political content of the change but it tries to define it only from the legal point of view. Thus, I would maintain that the concept of revolution—of course, in a strictly legal optics—concerns the very existence of the legal system, as opposed to the existence ("validity") of its norms *ut singuli*. That means that a revolutionary change of the legal system is a *change of the basis of validity of the legal order as such.*[32] The concept of revolution, then, is reserved for a particular case of change in the legal system: that is, for cases in which the legal order changes through the change of the norms of the system relating to itself. This use of the concept of revolution allows to make a clear difference between a *coup d'État* or a *pronunciamento* and a revolution: a coup is unlawful only insofar as the rules of the legal order governing changes in the highest public offices are concerned; but the basis of the validity of

31 Cf. WRÓBLEWSKI, J.: 'The Analytic Concept of Revolution' in: MACCORMICK, N.—BANKOWSKI, Z. (eds.): Enlightenment, Rights and Revolution, Aberdeen, 1989, pp. 364 et seq.

32 In this definition the secession of a territory from a state to which it belonged in certain cases would also be a 'revolution'.

the legal order[33] remains intact. Moreover, this definition of revolution makes possible a further distinction between what I would call a "radical law reform" and revolution in the legal sense. In a radical law reform the whole legal order may change and still it will not be a revolution, since the basis of the validity of the legal order does not change.

The concept of revolution is, then, inextricably related to the concept of legality as I use it here; the revolution attacks just the legality side of the legal order/system as such, and not simply certain norms of legality in the legal system but rather the legality as a whole (though, of course, it happens to break not necessarily each norm in the legality bloc of the system). "Revolutionary legality" is, by definition, a legality based on the denial of the legality of prior legal system. It is the very aim of a revolution to do so, as we have seen abundantly. In other words, a revolution in the correct sense creates a new legal order and at the same time it suppresses another one; it is new not in the sense that the content of its norms is entirely new—although most probably there will many new norms in it—but new on the ground of its validity, i.e. not based on the legality-norms of the prior, superseded legal system. Therefore the relationship between the prior and the subsequent legal order is an essential feature of a revolutionary legal system: a revolutionary legal system does not recognize as 'legal' the norms of the prior legal order; it should treat them as legally non-existent, which would not exclude their, as it were, *de facto* recognition. From the point of view of a revolutionary legality, every norm of the prior legal order had lost its validity by virtue of the revolutionary act destroying the legal system. More precisely, one is inclined to say that the prior legal order had not *lost* its legality, but rather, it is regarded in the revolutionary legality as if it had never existed as a legal order. In a milder version, it is not regarded as having an legality equivalent to the subsequent legal order. Obviously, in practice it is impossible (and from its own point of view not even necessary) for the revolutionary legal order to change all norms of the prior legal system (and order). Albeit the Russian Bolshevik revolution in and after 1917 succeeded in getting as close as possible to it. The same applies to the French Revolution, according to Burke:

> "No acts of the old government of the Kings of France are held valid in the National Assembly, except its pecuniary engagements; acts of all others [are] of the most ambiguous legality. The rest of the acts of that royal government are

33 The concept of revolution will, then, depend on the explanation given by a legal theorist of the existence of the legal order. Thus, a Kelsenite would say that the change of the *Grundnorm* is a revolutionary change, a Hartian would link it to the change of the rule of recognition etc. For an interesting discussion of this problem from jurisprudential and practical point of view see: EEKELAAR, J.: 'Principles of Revolutionary Legality' in: SIMPSON, A. W. B. (ed.): Oxford Essays in Jurisprudence, 2nd Series, Oxford, 1973, pp. 22 et seq, and HARRIS, J. W.: 'When and Why Does the Grundnorm Change?' 29 Cambridge Law Journal, pp. 103 et seq. (1971)

considered so odious a light, that to have a claim under its authority is looked on as a sort of crime."[34]

The point is, clearly, not the *quantum* of the change in the legal order; it is, more importantly, that the new legality may treat freely (according to its own norms) the norms of the prior legal system in selecting which one it would recognise as existing and which one it would not.

Thus, the argument from revolutionary legality is, in essence, not too far from the natural law reasoning. The only difference is that the revolutionary argumentation is, in a sense, more radical or, perhaps, less circumstantial in its arguments. There is, however, a very important common point: both natural law and revolutionary legality might justify the non-recognition (or, better, *ex post facto* repeal) of the norms of the prior legal order in the subsequent one. From this particular point of view it is not material at all that this kind of "reversal" of the prior legal order happens (and for practical or prudential reasons must happen) quite rarely. In most historical cases, it had remained usually restricted to certain well-defined—and eminently political—classes of laws and legal situations created by them. Even if the new legal order in practice treats most norms of the prior legal order as valid in the new system, it still remains true that it is based on its own criteria and norms; thus, the revolutionary legal order remains unbound to the prior one through at least the ties of legality.

The same applies to a particular type of revolutionary legal system, the counter-revolutionary (or perhaps more properly, "restorative") legal order which is, under the definition given above, not less revolutionary than the one it replaces. The difference is simply that the new legal order created by the counter-revolutionary (restorative) legal order is purported to be the same as the legal order in force before it was overturned. Thus, the "new" norms of the revolutionary legal order happen to be the norms of a former legal order. (By the way, annexation or inclusion of a legal order into another preexisting legal system is a half way house between revolution and counter-revolution. It is a half revolution since the prior legal order is changed in a revolutionary way, i.e. by changing the legal system and its basis of validity, but the new legal order is taken from a legal order already in force.) In restorative legal orders (or in restorative situations) it might even happen that the revolutionary legal order is flatly declared invalid. A good example of this kind of restorative revolutionary legality is the Hungarian "Act on the Restoration of Constitutional Order and the Exercise of Supreme Power", adopted by the counter-revolutionary National Assembly in March 1920, after a revolutionary period from October 1918 till August 1919), which provided in its Article 9 the following:

"[A]ll the acts, orders or other legal provisions whatever their name, issued by the organs of the so-called People's Republic and Soviet Republic shall be

34 BURKE, E.: Reflections on the Revolution in France (ed. O'BRIEN, C. C.), 1969, p. 208.

invalid. Similarly, every act and resolution of the so-called National Councils are invalid. The People's Acts and the People's Resolution shall be deleted from the Official Collection of Laws."[35]

Thus, the revolutionary legal order was regarded as legally non-existent *ab initio* and without any legal effect at all, with very limited exceptions; in addition, the pre-revolutionary legal order was regarded as valid even during the revolutionary period. And this was not only a theoretical position: the courts held that in principle every act committed during the revolutionary period was to be treated as if the prior—and later on restored—legal order were in fact in force at the moment it had been committed. In this way a lawful act under the former legal order, for example the nationalisation of private property, was considered by virtue of this principle as robbery (as it was on the basis of the restored legal order) or a lawful action of the police or court martial was regarded as a murder and so forth.

D. Unlimited Sovereignty

A crude version of legal positivism may also serve as argument in favour of the justification of *ex post facto* political justice. This is a very simple, perhaps the simplest possible, reasoning based on the simple and attractive assumption (or contention) that sovereignty is by its nature unlimited and legally illimitable. Of course, the question of limitability of sovereignty (or that of a personified sovereign) is a highly complicated problem of legal theory: this is, in a sense one of the key problems of legal positivism. I do not think that legal positivism, by its very assumptions, must necessarily recognise the legal illimitability of the sovereign or that of the legal order as such; still, it is true that many leading positivists (at least from Bentham to Kelsen[36]) recognised, albeit in various forms and not without certain reservations, that in the last analysis, positive law cannot be limited by (positive) law, and I think there are many positivists (and many natural lawyers too) who would endorse this view.

The argument based on legal illimitability of the sovereign is best expressed in a classical statement of Austin: "Supreme power limited by positive law is a flat contra-

35 It was possible under the Act that certain laws adopted by the revolutionary authorities and certain official acts (e.g. marriages celebrated etc.) remain in force provisionally until the new legal order replaces them by its own new norms or decisions.

36 See e.g. BENTHAM, J.: Of Laws in General (ed. HART, H. L. A.), London, 1970. Idem.: Principles of Morals and Legislation (ed. BURNS, J. H. and HART, H. L. A.) London, 1982; KELSEN, H.: Das Problem der Souverenität und die Theorie des Völkerrechts, Tübingen, 1920, idem.: General Theory of Law and State, Cambridge, Mass., 1946, pp. 197 et seq. And see: BURNS, J. H.: 'Bentham on Sovereignty: An Exploration' 24 Northern Ireland Law Quarterly, 399 (1973) and in particular: HART, H. L. A.: 'Sovereignty and Legally Limited Government' reprinted in his Essays on Bentham, Oxford, 1982, pp. 220 et seq.

diction in terms".[37] It is not an easy task to define legal sovereignty, i.e. sovereignty, as a legal concept as opposed to sovereignty as a concept of political philosophy and theory, or as a practical political phenomenon. I will resist the temptation to discuss this question here and restrict myself to point out the connection between the phenomenon of legality and the argumentation on the Austinian line, contending essentially that there is necessarily, in every legal system, a single, unlimited law-maker capable to determine the content, validity and binding force of every norm of the system without any legal limitation. A paradigm case of this type of legal order is, of course, the British constitutional order (which was the model of the Austinian theory) with the legally omnipotent Queen in Parliament on its top.[38] But the same applies to a legal order making strict distinction between constitution maker and ordinary law-maker (such as Germany or France or even the United States among many others): the only difference is that in those legal systems it is the constitution-maker which is, in last analysis, *legally* unlimited.[39] The latter case may be (and frequently is) different in practice from the Westminster system, but theoretically—regarding the legal order as a whole—it is no less true that those systems do have a legally unlimited law-maker (the constitutional legislator), too.[40]

There could be little doubt that there is a great deal of empirical truth in the reasoning roughly reproduced here. Nevertheless, the theories which contend that the sovereign law-maker is unlimited in the legal sense are in fact ignoring the phenomenon of legality. This is the reason why arguments referring to the sovereign "will" (of the state or eventually to that of the "people" in political discourse as an answer to political arguments in favour of rule of law) work so well for the purpose of arguing for setting aside the systemic norms of legal system, i.e. legality. Indeed, crude versions of legal positivism, such as that of Austin (and at least in part Somló[41]) ignore the analysis of the systemic quality of law as they regard law as a legal 'order', i.e. a set of homogeneous norms, and not as a legal 'system', that is, a structured set of norms.

---

37 AUSTIN, J.: Lectures on Jurisprudence, op. cit., p. 270.

38 The obligatory reference on this topic is DICEY, A. V.: Introduction to the Study of the Law of the Constitution, 8th ed. London, 1913, pp. 37 et seq. See also JENNINGS, I.: The Law and the Constitution, London, 1959, pp. 120 et seq.; and see MARSHALL, G.: Constitutional Theory, Oxford, 1970.

39 I disregard here the famous puzzle (paradox) of legally unchangeable constitutional laws discussed by Alf Ross and later by Hart as the problem of 'self-referring laws', because it is concerned with the *logical possibility* of the limitation of the constitutional (or generally the last resort) law-maker. See: HART, H.L.A.: 'Self-referring Laws' in HART, H. L. A.: Essays... op. cit., pp. 107 et seq. and ROSS, A.: 'On Self-reference as a Puzzle in Constitutional law' 78 Mind 1 (1969) for a different view.

40 Certain constitutions, like the German Grundgesetz in its Art. 79, contain, in fact, limitations on the constitution-making power of the constitutional law-giver. Without willing to discuss here the logical possibility and legal value of this kind of limitation, it is doubtlessly true that an absolute constitutional limitation is bound to the very existence of the legal order, of which the constitution is the highest norm. See on this problem BACHOF, O.: Verfassungswidrige Verfassungsnormen? Tübingen, 1951.

41 Cf. SOMLÓ, F.: Juristische Grundlehre, 2nd ed. Leipzig, 1927, pp. 191 et seq., 453 et seq., who speaks of 'promising laws'.

Once the legal system is regarded as a legal order, a collection of norms of behaviour for citizens issued by the sovereign law-maker and nothing else, there is no sufficient theoretical argument against any type of *ex post facto* political justice. Indeed, as Joseph Raz has pointed out in the case of Austin,[42] sovereignty as a criterion of identity of legal systems is inapt to explain how a legal order could be the same in the course of time; in other words, as Raz points out,[43] in that way the legal system is nothing but a series of momentary legal orders without any connection among the various states of the system. Now, this is the reason why an Austinian view of the legal order is so well suited to an argument for the discontinuity of the legal system: by its premises it conceives of the legal system as a series of discontinuous sets of norms. One is inclined to say that, for this theory, every legal system is constantly discontinuous. Thus, strictly speaking, the problem of discontinuity cannot even exist for this line of thought, since discontinuity is, so to speak, the natural condition of the legal order. As such it does not need justification at all. Alternatively, in a bit of paradoxical language, one could say that an Austinian legal order (which is, it should be remembered, not a system in the proper sense) is always in revolutionary change. Therefore, the problem which I call here 'legality' is practically nonexistent for an Austinian and for that matter, more or less to any post-Austinian[44] theory of law.

* * *

The conclusion which could be drawn from the foregoing is that every possible justification of the *ex post facto* justice plans has one element in common: the contention of the discontinuity between a prior and a subsequent state of the legal system with certain extraordinary events between the two. Thus, the connection between the thesis of discontinuity of the legal order and the contention of the legality of *ex post facto* political justice plans (or for that matter, that of the irrelevance of legality) turns out to be the decisive point in every possible justification of *ex post facto* justice plans. In fact, I hope I succeeded to prove in examining the possible justifications of *ex post facto* justice plans that every plausible justification is bound to the discontinuity thesis. It appears to be, therefore, inevitable to examine in somewhat more detail this problem before reaching a conclusion.

---

42 RAZ, J.: The Concept of a Legal System, Oxford, 1970, pp. 5 et seq.

43 Ibid., pp. 34-35.

44 I mean for instance HOLLAND, T. E.: Jurisprudence, 13rd ed., Oxford, 1924, Salmond, Jurisprudence, ed.: FITZGERALD, A. J., London 1966, MARKBY, W.: Elements of Law, 5th ed., Oxford, 1886, or WILLOUGHBY, W.W.: The Fundamental Concepts of Public Law, New York, 1924. It should be remarked that the continental legal positivism, in particular the German, French, and the Italian is very similar in this respect to Austin. See e.g. LABAND, P.: Das Staatsrecht des deutschen Reiches, Vols I-III. Tübingen, 1876-1882.

V. Identity, Continuity and Legality of the Legal System

I shall start my discussion with a few preliminary remarks on the relationship between validity and change in the legal system.

It is undoubtedly one of the most fundamental characteristics of the legal system that the norms composing it are *equally valid.* This is probably a truism, but still a very important statement. Within the set of primary norms belonging to the same legal system (within a 'legal order') no distinction among the norms in respect to their validity is possible: there could be no Orwellian norms "more valid than others". This phenomenon is expressed, at least in part, in our usual way of speaking of the "unity of the law", where 'law' might well be read to mean legal order; other theorists with different philosophical backgrounds would speak of the "homogeneity of legal objectivation";[45] both, I presume, denote the same characteristics of the legal system. The (primary) norms of the legal system are equally valid. That is, there are no norms of the system "more legal", or legally more valuable than others; in other words, the legal force of all norms is the same within the legal system.

One important consequence of this property of the legal system is that the 'legality' of the norms is their most important feature: the time, conditions, form or similar circumstances of the formation of the norm do not matter from the point of view of its validity. Nor has the hierarchy of the sources of law immediate influence on the validity of norms belonging to the same legal system: the hierarchy of the sources of law is *not* the hierarchy of their validity. It is, so to speak, the hierarchy of the *sources* of the norms, but not that of the norms themselves; an act of Parliament is not more valid than an order of a local council. The expression 'source of law' is, of course, a metaphor describing the particular procedures of the legal system of making valid norms, or, alternatively, the conditions of making valid norms within the system. In this context 'validity' means basically systemic validity,[46] and therefore, is denoting the property of the norm that it belongs to the system (corresponds to the "membership rules"). Thus the norms of the hierarchy of sources law belong to the norms of legality, the violation of which amounts to the violation of legality of the system; the violation of the hierarchy of sources may occasionally render the norm invalid, but even then none of the norms will be more valid than any other norm of the system.

The hierarchy of the "sources of law", on the other hand, is intrinsicly connected to the rules of change of norms within the system. In this respect the rules of hierarchy of sources do have a function of guaranteeing the validity of norms: the higher the source of the norm stands in the hierarchy of sources within the system, the higher is its resistance to change. If a norm N_1 is changed to norm N_2 then there are two different kinds of changes possible: first, the change of the content of the norm (to which I shall

45 See first of all PESCHKA, V.: Theorie der Rechtsnormen, Budapest, 1982, pp. 42 et seq.; idem., Die Eigenart des Rechts, Budapest, 1989, pp. 153 et seq.

46 RAZ, J.: 'Legal Validity' as reprinted in RAZ: The Authority of Law, Oxford, 1982, pp. 146 et seq.

revert soon), and second, the change of its guarantee against change. The latter case happens when the norm of the same content is raised from an act of Parliament to the constitutional level; now the "normative content" of the norm has remained untouched, but it became more resistant to change, because a higher norm (in this case the highest, at least in positive law) may be changed only if more complicated procedures are used: the higher a norm, the better it is entrenched. On the other hand, of course, the position in the hierarchy determines the subset of norms of the system capable to be changed by other norms of the system: the higher the position of the norm the greater is the subset which may be changed by the norm in question. In other words: an act of Parliament could be changed--except, of course, changing it by the same procedure it was made—only by changing the constitution.[47] In this sense, the constitutional entrenchment of a norm means the highest possible guarantee of remaining valid (that is, guarantee against change) within the legal system. Thus, the norms of hierarchy of the sources of law are the norms regulating the change of norms within the system; this regulation is not restricted to the formal rules of change (that is, roughly, the procedures of change). But also, as we have seen, the higher norms at the same time limit the change of the normative content of the norms, since the field defined by the higher sources is a substantial limit as well to the change of the contents of the norms of the system. Still, it is true that the rules of hierarchy by their nature operate essentially formally, in the sense that they are applicable independently of the content of the norms.

Another concept closely related to the change of the legal order is that of the *momentary legal system.*[48] A momentary legal system is the set of norms belonging to the same legal system in a time span between two changes. Thus, a legal system remains the same momentary legal system as long as no new norm is added to the system or subtracted from it. My definition of the momentary legal system differs from that of Raz in one respect: I suggest to define the momentary legal system by the change of the composition of the norms of the system, while Raz relates it to a certain moment in time. The two definitions are, in fact, not contrary to each other since any change (addition, substraction or modification of the validity conditions of a norm) in the composition of the legal system happens, of course, at a certain time. Therefore every new momentary legal system created by change corresponds to a momentary legal system as defined by a certain moment of time. The advantage of my definition is, I think, that it connects the concept of change in the legal system and that of the momentary legal system, since it defines the second in terms of the first.

This connection, more explicit in the definition given above, makes it easier to define the concept of continuity—and for that matter, the discontinuity—of the legal system. I wish to approach this question—crucial, I believe, for the whole argument of this essay—from various points of view. First, I will define continuity and its criteria, then I

---

47 The example, of course, is not applicable except in legal orders which possess a constitution higher than the ordinary act of Parliament.

48 See RAZ, J.: The Concept of a Legal System, pp. 34-35, 187 et seq.

would like to distinguish the concepts of identity and continuity of legal systems. All this reasoning will throw, I hope, some light on the connection between legality and the limits of change of legal systems.

A. Identity and Continuity

I think it is necessary to distinguish clearly the criteria of identity and that of continuity of the legal system. It is sometimes thought that only the question of *identity* may be answered by methods of jurisprudential inquiry; this is the view expressed in the seminal essay by Joseph Raz devoted to this problem. He writes:

> "The legal system is only part of the norms constituting the political system; most political systems include numerous non-legal norms... It follows that since the continuity of a legal system is tied to the continuity of the political system, the former is affected by the fate of the non-legal norms that happen to form part of the political system concerned... The substance of my contention is [he writes] that whatever form one's ultimate account of continuity takes, it must, in view of the relation of law and state, be based on the following two points: first, that continuity depends on the interaction of legal and non-legal norms, and the extent and manner of their change; and secondly, that among the legal norms concerned some are more relevant than others. Constitutional and administrative laws are therefore more relevant than, for example, the law of contract or torts."[49]

Contrary to this view, I think that it is possible to distinguish between identity and continuity of the legal system, using exclusively legal criteria. This is not to deny that the problem of continuity has inevitably a political flavour; simply, I shall argue, the two aspects could be meaningfully distinguished. Raz seems to believe, as the text quoted above shows, that a political system change is in every case and by necessity a break in the continuity of a legal system; but, it is submitted, one can distinguish between at least two different ways of change in a legal system/order: first a political system change (or as Raz would say, change of "political norms") with continuity and second, a political system change which causes discontinuity of the legal system. The question I will try to answer is, of course, how one could distinguish the two cases.

To start with, it should be recognized that the subproblem of continuity and identity is closely related to the concept of the momentary legal system; indeed, identity and continuity (or discontinuity) is a relationship between at least two momentary legal

---

49 RAZ, J.: 'The Identity of Legal Systems' in RAZ: The Authority of Law, cit. pp 78 et seq., p. 100. (Footnote omitted.) See also RAZ: The Concept of a Legal System, cit., Ch. VIII. And see: FINNIS, J.: 'Revolutions and the Continuity of Law' in SIMPSON, A. W. B. (ed.): Oxford Essays in Jurisprudence, Second Series, pp. 44 et seq.

systems. Thus, when one discusses the identity and/or continuity of legal systems, it is a discussion of the relationship between a momentary legal system, MS_1, and another momentary legal system, MS_2; the crux of the problem lies in the nature of the relationship between MS_1 and MS_2, or perhaps better, in the rules or norms, if any, governing this relationship. Putting the question that way, it requires that one consciously neglects several other aspects of the problem, since, obviously, the present discussion is reduced to the normative aspects of the identity/continuity question; no doubt the relationship between the two momentary systems may be seen from various and completely different points of view.

Two momentary legal systems could be said to be *identical* (or identical in part) on the ground of the relationship between the primary norms composing them: that is, this criterion is concerned with, or relates to, the substantive side of the legal order. According to this definition, two momentary legal systems are wholly identical only if they are composed of exactly the same norms. That is, if their content is exactly the same. Since I defined earlier the momentary legal system as a legal system of the same composition (i.e. by the change of the norms of the system), it is clear that only the same momentary legal system could be wholly or entirely identical with itself. Thus, the concept of total identity (or identity in general) presupposes the concept of membership of the legal system, that is, the systemic validity. If at least one norm is changed in the system, then the system is identical with the earlier in every primary norm except the one which had been changed. This definition of the identity, it is submitted, is essentially the concept we usually use in legal discourse when we are faced with similar questions, like, for instance this one: "is the tax law of Hungary identical with that of Iceland?". Such questions, if put in a *bona fide* manner, inquire into the *differences* between two legal orders; questions of identity (or, in practice, that of the scope of the identity) between legal systems are normal everyday practical problems in every sophisticated legal system. This is of particular importance if we conceive of this question as one relating to the *norms* composing the system, and not as one relating to the *laws*, since a frequent practical question in the case of new laws (say, a new labour code or criminal code) is how many new norms they really contain—i.e. to what extent are they identical with the previous code. Thus, identity is, contrary to continuity, a matter of *degree*.

The question of identity, as the examples above show, is not concerned with the legality of the norms examined; indeed it is a legal inquiry which does not even presuppose the validity (or existence in some other sense, for instance "socially") that the group of norms whose extent or degree of identity is looked for: it is fully allowed to ask for the degree of identity between two groups or bulks of norms and still not assert that they exist, or at least setting aside the problem of their existence.[50] More-

50 No doubt, practical interest is aroused normally by questions which concern existing legal orders; I contend only that this is not conceptually necessary. Anyway, it is standard legal inquiry if one investigates the relationship of a given legal order, e.g. Hungarian or Scottish to the Roman law, that was for a lot of centuries a non-existent legal order.

over, the latter could be said to be the typical case as lawyers quite often are looking for the changes of a given legal system within a defined period, e.g. in one year. Thus, the search of the degree of identity of two bulks of legal norms is a comparison between two legal *orders*, rather than legal *systems*, as defined above.

Continuity of the legal system is, on the other hand, a concept describing the particular relationship between two (or more) momentary legal systems from the point of view of the norms/rules governing the very process of change of the momentary legal systems. In other words, the concept (and the phenomenon) of continuity of legal systems is intrinsicly related to the legality of the system concerned. As we have seen before (and know it very well from elsewhere), every legal system contains norms regulating the procedure and conditions of addition and subtraction of norms to the momentary legal systems; every operation of that kind changes the momentary legal system MS_1 into another momentary legal system MS_2. Investigating the continuity of legal systems means, therefore, an inquiry into the norms constituting this connection. The relationship of continuity between two momentary legal systems is granted if (and only if) the change of MS_1 has been made in conformity with the norms governing the conditions and procedure of change of norms valid (applicable) for MS_1; in that case it could be said that MS_2 is in the relation of continuity to MS_1. The inverse of this statement does obviously not hold: legality according to the norms of MS_2 would be a clear case of discontinuity.

One would describe this state of affairs by saying that the *legality of the change* (i.e. the conformity with the norms relating to the system itself, as we know) renders the various states of the legal system continuous. Thus, in deciding whether two (or more) momentary legal systems are in the relationship of continuity or not, it is only the legality, the legal regularity of the change, which decides. In short, the subsequent legal system is related to the prior one through its conformity with certain ("legality") norms of the prior system. As a consequence, if there is a continuity between the two (and every subsequent pair of) momentary legal systems, then the prior momentary legal system normatively predetermines the subsequent momentary legal system. Hence, in investigating the nature of continuity between two momentary legal systems MS_1 and MS_2 we are interested in the nature of the *link* between the two ($MS_1 \succ MS_2$); we are searching for what the symbol of the link '$\succ$' denotes. The link between the prior and subsequent momentary legal systems is the normative determination of the change of MS_1 into MS_2 by the systemic norms of MS_1. The normative determination of the subsequent momentary legal system by the prior one is, of course, not a full determination, still less a *pre*determination; it means simply that the legal process of change of the composition of the legal system is made in conformity with, and to that extent is determined by, the norms governing the formal and substantive conditions of change of the norms in the system. Formulated in other words, the new norms should be valid according to the norms (i.e. they should possess the legality of) of the prior momentary legal system. In this sense, it is not unfounded to say that the subsequent momentary legal system normatively follows from the prior one; an alternative formulation would

be to say that the prior and the subsequent momentary legal systems are bound to each other in the legal sense through the normative link between them.

Two remarks are, I think, necessary at this point. First, the concept of continuity exposed above presupposes that the momentary legal systems, bound together by the normative bridge of continuity, as it were, should not be fully identical; that follows analytically from the definition of identity and continuity respectively, since the two identical momentary legal systems could not be in relationship of continuity as this relationship is possible only between two partly non identical momentary legal systems. The second, and perhaps more important, remark is that, contrary to identity, continuity has no degrees: while it is quite normal to say that a momentary legal system is partly identical with another one, it is meaningless to say that they are partly continuous and partly discontinuous (except of course if one uses the word 'continuity' in the sense of 'identity' which is not allowed by the terminology adopted here). Two momentary legal systems are either continuous or not while they are necessarily not identical.

Thus, continuity of the legal system is a sequence of momentary legal systems bound together by systemic links; therefore, legality is a (or, perhaps, the sole) constitutive factor in cementing together a given series of momentary legal systems into a continuously existing legal system. It is only this normative link within any consecutive pair of momentary legal systems MS_1 and MS_2, that makes a sequence of momentary legal systems subsets of a legal system.[51] It follows from the foregoing that the validity of a norm in the system could be defined unequivocally by two parameters: first, the formal and substantive validity criteria, and second, the subsequent momentary legal systems which include (or included) the norm in question. One must add that legality is a concept that involves the requirement of the existence of norms (together with the claim of conformity) relating to change in the legal system; since the application of the norms of the legal system to itself (as I have defined legality) necessarily includes the "dynamic aspect"[52] of the functioning of a legal system.

In conclusion, the concept (and the phenomenon) of continuity is based exclusively on the systemic properties of the legal system; unlike identity, it is not a concept bound to the idea of legal order. A very important consequence of this state of affairs is that legal systems may be continuous without containing one primary norm in common, that is, without being even lightly identical. This observation is corroborated by practical experience: a legal system remains continuous even though after some time there will be no norm identical with its own previous state. Paradigm cases are the United States or Britain: the legal system of these states has been no doubt continuous, in the sense I use it, for centuries; and still one could hardly find but a few norms of common law

---

51 See RAZ, J.: The Concept of a Legal System, op. cit. And see WRÓBLEWSKI, J.: 'Systems of Norms and Legal Systems', 49 Rivista internazionale di filosofia del diritto, 224 (1972).

52 The use of this concept here is, of course, the sign of my indebtedness to KELSEN. See his Reine Rechtslehre, 2nd ed. Vienna, 1960, pp. 196 et seq.; see also his General Theory of Law and State, op. cit. pp. 113 et seq.

which remained intact to change during the continuous existence of the legal system of these countries. This example shows that the concept of continuity has nothing to do (at least not directly) with the social content or function of the legal system or the norms composing it: a sociologist, an historian, or a political scientist would not necessarily agree with this statement from his or her own point of view.

B. Legality and Continuity

At this point we still do not possess the solution to the problem in which we are interested. Even though it was said that continuity is a property of a legal system which depends on the legality of the passage from MS_1 to MS_2 and from MS_2 to MS_3 and so forth, we have not yet resolved the original problem. Up to this point I have tacitly assumed that the norms constituting the "block of legality" within the system have remained the same. The norms belonging to the block of legality, or the core of them which ultimately creates and/or maintains the continuity of the legal system have been described and explained, as it is well known, by important legal philosophers in various ways; I have in mind, as particularly relevant, Kelsen's *Grundnorm* and Hart's rule of recognition. Their influence had been not purely theoretical, because in certain countries where courts of law had to decide on the legality of a post-revolutionary legal system ('revolution' is intended here to mean simply a political system change, not the legal concept) they in fact applied—and referred to—these jurisprudential statements.[53] The question in which we are now interested is, however, a bit different: it intends to ask what happens if the *norms within the block of legality* change; that is, the problem of the *legality of the change in legality.*

In trying to answer this question at least approximately a reminder is perhaps necessary: legality is the *legal self-regulation* of the legal system necessary for the existence of the legal system, as a distinct system. The norms forming the "block of legality" have, at least, a double character: first they are general postulates necessary for the correct legal functioning of the legal system (one could assume that they are by and large the same as the Fullerian criteria of the "inner morality of law" discussed above); and second—despite their different function and behaviour within the legal system—they form part of that legal system, like the other norms of which it is composed. The latter means that they are usually expressed in the same form as any other norm of the system; therefore, they could be changed, under certain conditions as if they were "ordinary" norms of the system. Needless to say, any important change in the "norms of the political system", that is, political system change, simply cannot happen without important changes in the norms of legality. Reasonably typical examples of such transformations are the

53 In several countries of the world, such as in South-Africa, Rhodesia (as it then was), Pakistan etc. See EEKELAAR, J.: Principles of Revolutionary Legality, op. cit.; HARRIS, J.: When and Why Does the Grundnorm Change? op. cit.

change in the procedures for creation of norms of the legal system, change in the legal competence of the organs of the state possessing legal power to issue norms, change in the procedure of the composition of the (highest) law-making organs or the change of these organs themselves, and the like. Many of these changes, or at least the political events leading to them, would be, I think properly, described by most political observers as 'revolutionary', since the changes are great enough to embrace not only the whole political process of transformation from an authoritarian rule to democracy, but its inverse too. It is important to note that these changes might well include the change of the highest legislator, that is, the *legal sovereign* of the system. However, from a legal point of view, they are not necessarily entitled to the same qualification, because it is not at all impossible that a legal system changes the norms regulating its own functioning (i.e. belonging to the "block of legality") exactly in the same way as any other norm belonging to the system. If the norms relating to the production of norms within the system are changed according to the prior rules of production, the change could be truly revolutionary in the political sense (say from the rule that the Tzar solely entitled to make laws to the rule that laws are adopted by the National Assembly which is freely elected) but it will not produce any break in the continuity of the legal system. The substantial condition of this continuity is the full recognition (by compliance with the pertinent norms of production) of the legality of the prior momentary system. In a case with this kind of change, it is a necessary condition that the change of the systemic norms be gradual. That is, in every subsequent phase of change, there should be always at least two common systemic norms in the prior and the subsequent momentary legal systems.[54] This kind of change of the legal system is of course fully compatible with any subsequent fundamental change of the norms composing the legal system (i.e. that of the "legal order") to the extent that the new norms of the system allow it, without it amounting to the discontinuity of the legal system.

There is another very important connection between continuity and legality: the limits set by legality in the case of continuity to the modification of the legal system. Essentially I contend that the main consequence of the continuity of the legal system is that it may not deny, legally, the legality of the previous momentary legal systems linked to it by the chain of continuity. It follows, then, that at the moment when the norms of legality were modified, observing the norms of legality within the system, the momentary legal system thus created included every norm which composed the prior momentary legal system. In consequence, the new norms relating to the addition, subtraction etc. of norms in the legal system are applicable to the norms "inherited" from the prior momentary legal system; however, due to the link of continuity, the fact that, the subsequent momentary legal systems are, in a way, successors of the prior ones, indicates that they are legally no less valid than any other norm belonging to the system. It is a general property of the momentary legal systems that the norms

54 Expressed in different language, it is necessary that MS_1 and MS_2 contain at least one common systemic norm. This is, by the way, the minimal definition of continuity.

composing them as we have abundantly seen above, are equally valid, notwithstanding their origin, "rank" and so forth.

It happens quite often that the modification of legality norms, if preceded or followed by radical political changes, continues with no fewer radical changes in the substantive norms of the legal system. This is in itself an unchallengeable procedure and compatible with legality, provided that it does not deny the legality of the previous states in the same system. And this is the point where legality hinders overly radical changes of the legal order. The most acute problem in this respect is certainly the problem of *ex post facto*, i.e. retrospective change or modification of the norms composing the legal system. One must clearly distinguish the case of an ordinary repeal of a norm from that extraordinary one. The former is a relatively simple thing (at least from the present point of view): a norm ceases to exist in the next momentary legal system; while the latter is an equivalent of the modification of a momentary legal system which legally could not be modified since it has been superseded by the subsequent chain of momentary legal systems, normatively linked together through the regular sequence of consequent momentary legal systems. The retrospective modification of a superseded momentary legal system would amount to the denial of the normative link binding together the subsequent phases of the same legal system. Therefore it would be, in fact, an indirect claim of discontinuity within the legal system. Now, we have already seen that there is no partial discontinuity in the legal system: a legal system is either continuous or discontinuous (and in that case there are two entirely different legal systems); in short, there is no half way house between the two, exactly in the same way that there is no partial legality in a legal system. Since the full denial of the continuity must, by necessity, lead to the self-denial of the legal system as such, it is in the legal sense nearly as dangerous an act as a revolution would be.

There is another important aspect here. Retroactive legislation, i.e. a norm applicable to facts or states of affairs prior to its entry into force (which for our purposes may be taken to be the same as the moment in which the norm had been added to the legal system), is always of doubtful legality. Surely not on simple logical grounds: it is quite clear that a norm (or principle) like *nullum crimen sine lege previa* does not follow "logically" from the concept of the legal system. On the other hand, it is also true that a legal order composed of exclusively or overwhelmingly retroactive norms would not be a legal order at all, since to quote the classical statement of Hobbes:

> "No Law, made after a Fact done, can make it crime [...] and a positive Law cannot be taken notice of, before it be made; and therefore cannot be Obligatory".[55]

But, all that being true (or perhaps even a truism), most legal systems usually allow in their practice laws applicable to states of affairs, conducts, facts etc. prior to their

55 *Leviathan*, Ch. 27. The edition used is that of edited by C. B. Macpherson, London, 1968, p. 339.

creation.[56] It must be said that even the principle of *nullum crimen sine lege* just quoted, requires the retroactive application of the criminal law norms *advantageous* to the defendant. However, it would be mistaken to cite these cases as argument for unlimited retrospective modification of norms within the legal system, since there is a fundamental difference between norms which modify or change only the legal consequences of facts prior to the entry into force of the norm, *without withdrawing the legal quality* of the norms previously regulating the states of affairs and facts.

Expressed in other terms, the main limit inherent in the legality of a legal system is that it may not reverse the *fundamental legal qualification* once given within the system (that is in an unbroken sequence of momentary legal systems) to a conduct or state of affairs reaching back to the momentary legal systems in which it was valid. That is, simply it may not declare prohibited retroactively what was legally permitted in a given moment in a given momentary legal system and so forth. A legal system doing so would reject its own systemic quality since it would legally qualify the same conduct and the same state of affairs within the same momentary legal system in a contradictory way. This would be in itself not a sheer impossibility—contrary to Kelsen[57] and in accordance with mainstream view—I do not believe that there could no contradiction in a legal order but this would be a contradiction of a very particular type. First of all, it would be a contradiction consciously introduced, in a sense just *in order to create a contradiction* between the norms of the system; second, it would create a contradiction between norms which is possible only if one rejects the legality, i.e. in this case, the legal validity of the system's own previous states; that is, the previous momentary legal systems would be regarded as if they had not been part of the same legal system of which the retroactive norms are supposed to be.

The rationale of my view is the following: as we have seen above, a norm is usually a member in a series of consecutive momentary legal systems as long as it remains valid; it could be modified only in switching from MS_1, containing the norm, into MS_2 which does not contain it. Now, a retrospective repeal of a norm (including a repeal by a contrary norm) would, as it were, reel back the whole series of consecutive momentary legal systems to the one containing the norm to be repealed. But, it must be stressed again, this could be done only by destroying the legality of the legal system for at least two reasons: first, as we know, every change in the composition of the legal system creates a new momentary legal system. Therefore a retrospective repeal would, in fact, "decreate", so to speak, each momentary legal system that existed between the repealing

---

56 See in general KISKER, G.: Die Rückwirkung von Gesetzen, Tubingen, 1963; and AFFOLTER, F.: Das intertemporale Recht I-II, Leipzig, 1902-1903. Cf. MUNZER, S. R.: 'A Theory of Retroactive Legislation' 61 Texas Law Review, 425 (1982).

57 See his Reine Rechtslehre, op. cit. pp. 209 et seq.; and see on this topic HARRIS, J. W.: 'Kelsen on Normative Consistency' in TUR, R.—TWINING, W. (eds.): Essays on Kelsen, op. cit., pp. 201 et seq. Of course, Kelsen later changed his view on the subject, see: 'Derogation', NEWMAN, R. A. (ed.): Essays in Honor of Roscoe Pound, Indianapolis, 1962, pp. 339 et seq.

and repealed norm; second, a retrospective repeal would be contrary to the homogeneity of the validity of the norms composing the system, since that homogeneity makes impossible any selection between valid norms within the system. They could perish only together with the system as a whole but not alone, as no selection among valid norms within the momentary legal system is permitted.

It is essential to note that the same applies, *mutatis mutandis*, if one investigates the same problem, not in the case of norms, but for *legally perfect legal positions* created within and under the legal order, such as those which are (or became) under the operating rules unchangeable in law; a classic and simple example of such situations created by the legal order is the acquisition of property after the lapse of time required by law by virtue of prescription (statutory limitation), or the prescription of crimes. In these cases, rights, and similar other legal positions, should be treated as if they were norms, if the rights or legal positions had been created immediately by the norms or guaranteed directly by them, and provided of course that the legal order declared those situations, under certain conditions, irrevocable in law.[58]

VI. Conclusion

My conclusions to this essay will be relatively brief. The essential point has been that the phenomenon I ventured to call "legality" is a fundamental quality of any self-regulating legal system. The legality of the system remains unaffected as long as the norms of the system relating to itself are complied with; a particular aspect of the legality, or legal existence of the system is the question of its legal continuity which could be determined only by examining whether the legality of the system had been uninterrupted. The continuity of the legal system—unlike and independent from the identity of the legal order—could be maintained even in the case of fundamental change in the rules governing the working of the legal system, including the structure of the legal sovereign, which is equivalent to a political revolution. The only condition is that the legal regularity of the change within the system (its legality) must be maintained. This regularity may be identified, at least in part, with the *"existence" of the legal system in the legal sense* which is not necessarily identical with the non-legal (social, political etc.) criteria of existence (nor with the continuity) of the legal system. After all, it is quite reasonable to speak of the history of French or Hungarian law, although, rather obviously, there were several discontinuities in the legal sense in the history of these legal orders; still, it is meaningful to treat the history of French law as a historical continuity, as distinct from the legal one. From this point of view continuity, a crucial concept within legality, is a necessary, if not in itself sufficient, component of the highly complex phenomenon we call 'existence of a legal system' as distinct from, although not contrary to, the existence of norms of conduct *ut singuli*; a legal system which is not

58 See the fine analysis of these problems in JÈZE, G.: Cours de droit public, La téchnique juridique du droit public français, Paris, 1924, pp. 1-105.

continuous does not—indeed cannot—exist in the legal sense *as a system*. This is, of course, not to say that continuity and existence of a legal system are the same, but simply that continuity is a crucial concept in explaining why and how different bulks of norms form a unity in time and may be reasonably referred to as a legal system distinct from others.

An important aspect which should be mentioned with emphasis is that continuity (or discontinuity) does not affect directly the existence (in the sense of non-systemic validity) of the single norm components of the system. A "new" legal system created after a break in the continuous legality would certainly contain a lot of norms (most probably the majority) which were valid and continue to be valid in the "new" system built up after the rupture. Discontinuity would not have necessarily more import on the substantive components of the legal system (that which I called earlier 'legal order') than it would be possible in case of continuity; the difference is rather in the methods and procedures available to change the composition of the legal system. As I have tried to explain in the case of continuity, legality sets serious limits to retrospective change of the legal order; in general continuity implies that even if the legal sovereign has changed, it is bound by the bonds of legality to the prior normative acts of its predecessor.

The last question I shall attempt to answer concerns a crucial aspect of the problem discussed: what is the consequence of the violation of "legality"? What happens if the legislator infringes on the norms constituting legality, for instance those set out earlier? The answer can only be manyfold: on the one hand, this event could not be excluded, still less prevented by the norms of the system. But this is not all one can say on this topic, since an infringement of legality could nevertheless produce dangerous side effects for the violator. The grounds of these counter-productive effects could be discovered essentially in the circumstance that a law-maker or any other organ of the legal system, which infringes upon legality, contributes to the destruction of the system itself, thus indirectly to its own destruction, simply because the law-maker as an organ of the legal system is linked to it inseparably. A legal system regularly violating legality will be in last analysis a series of minor revolutions; one is tempted to say that a legislator making laws contrary to the principles of legality becomes, whatever his or her intention is, by virtue of its violation of legality a revolutionary legislator with all the consequences, legal political and social, of a revolution. One should be reminded that the position of the revolutionary law-maker is at best ambiguous: as we have seen the revolutionary legislator denies the legality of the prior legal system and at the same time claims full legality for the subsequent one. The revolutionary legislator is, therefore, inevitably a transitory phenomenon: for, either it becomes an ordinary legislator with legal authority (stemming from legality, and ultimately from the legal system) and than looses its revolutionary character; or, it remains revolutionary *against its own system*. But in that case, revolutionary legislation must end in the disruption of the legal system and in the

last analysis in the self-destruction of its own legislative authority.[59] In sum, a legislator as the highest organ of the legal system, cannot command authority and obedience to the system (as distinguished from the norms composing it, since they could be accepted on independent grounds) if it constantly disobeys, and thus denies the validity of, its norms. A legal system cannot be composed of a series of minor revolutions without risking total decomposition.

One must conclude, therefore, that *ex post facto* political justice, which by necessity presupposes, as I endeavoured to prove above, the discontinuity of the prior and subsequent states of the legal system, could not be implemented, not even according to their proponents, without accepting the discontinuity thesis. The least one can say is that it is necessary to examine most carefully whether the preconditions of discontinuity exist before adopting measures inconsistent with the continuity (and for that matter, legality) of the legal system. The problems raised in (and after) the process of transition from "socialism" to constitutional democracy in Hungary and elsewhere in East and Central Europe are a good case for the reasonableness of this statement. Of course, the continuity of the legal system does not bar even the deepest possible transformation of the legal order, but it is equally true that it limits the methods available to do it; in particular it limits—not absolutely, nevertheless substantially—the retrospectivity of the changes introduced to the legal order. This may hurt perhaps, and in certain cases quite acceptably, the sense of moral justice of many; but this is the price a society must pay for the advantages of the relatively smooth functioning of the legal system or, occasionally, simply for its mere existence.

59 Perhaps the best possible example of this '*paradox of revolutionary legislator*', if one is allowed to call it so, is to be found probably in the Russian Revolution under the Bolsheviks: they wanted to legislate in order to destroy the legal order but found no better method to do so than to build up their own legal system, in part similar to the one they wanted to destroy. The theoretical problems are exposed e.g. by SCHLESINGER, R.: Soviet Legal Theory: Its Social Background and Development, London, 1946, pp. 17 et seq., 36 et seq.

Acta Juridica Hungarica
1991 33 N° 3–4, pp. 217–234

Akadémiai Kiadó,
Budapest

Albert TAKÁCS

Dilemmas of Constitutionalism in the Decisions of the Hungarian Constitutional Court

The *primacy of the Constitution* is a basic postulate of a law-governed State meeting the intrinsic and extrinsic criteria of constitutionality. The Constitution represents the legal underpinnings of the exercise of power, a concrete order which, established in democratic processes and through consensus, is recognized by society as constituting the condition and framework for the functioning of its political unity. The Constitution is legal category, a statutory enactment deriving its specific quality, its peculiarity, from the distinctive primordial character it is invested with, in contrast to all other statutory enactments. All legal mechanism, all legal processes must be in conformity with the Constitution. However, this primacy of the Constitution is not some inner specific of the regulative procedure asserting itself automatically on the strength of the declaration it embodies, but a requirement calling for institutionalized *guarantees* for the implementation of the Constitution and for a form of organization protective of the Constitution and capable of controlling the course and nature of its implementation. In point of fact, the political and state processes taking place by virtue of the Constitution do not lose, despite the fundamental norms governing them, their natural expression of interests, consensus and compromise, so they can be seen more as original decisions than as deductive applications of the Constitution without any formal proceedings. In order for the intrinsic and extrinsic aspects of constitutionality, of the implementation of the Constitution, or for the positive and negative requirements thereof to come into play, it is necessary to have an organization which, destined for the protection of the Constitution, will ensure a harmony between the Constitution and additional related (derivative) enactments, with the primacy of the Constitution upheld.

Assurance of the primacy of the Constitution in all legal acts is a task of extreme complexity, mainly because of the need for the legal mechanisms linked up with the

Constitution to observe the limitations placed by the Constitution on the exercise of power by the State (negative aspect) and to allow scope for manifestations of the State which the Constitution has envisaged in furtherance of some significant goals (positive aspect). This is combined with the fact that the negative and positive aspects of the Constitution are enforced on different levels of legal acts and state actions, on different tiers of hierarchy, so, as regards the nature of their linkages with the Constitution, they embody a wide variety of direct and indirect features. Another problem lies in that the Constitution, despite its primacy in the legal system, is nothing more or nothing else than a statutory enactment formulating a concrete order deemed to be fundamental (or to be attainable as such) and that, precisely for this reason, it cannot be regarded as an inexhaustible source of legal tenets and as an open-ended system of points of reference.[1] Like every statutory enactment, the Constitution contains legal tenets which carry their meanings, not in themselves, but in the way they are interpreted by their implementers or advocates. Hence the implementation of the Constitution is a logical and a value laden procedure varying with the interests in giving it effect and/or getting acquainted with it. It is this basic nature of interpretation with which it is necessary to reconcile the requirement, more or less contradictory at all times, that the Constitution should also be an objectivation existing in other than interpretation. Therefore the precept and postulate of the Constitution's primacy apply in respect to both the subject and the object of interpretation.

In light of the foregoing it can be seen that the tasks of implementing and protecting the Constitution imply real responsibilities and promise real results only in a State with a power structure that is based on the separation of powers and thereby of the interests involved in enforcing the Constitution. As was shown by the failure of the mechanism established by the amendment of the Constitution in 1983 for protecting constitutionality, moderate arrangements for the separation of powers are incapable of expressing the pluralism of intents and interests relating to the implementation of the Constitution, which in turn is, in view of the diversity of constitutional requirements, an indispensable condition for enforcing the constitutional provisions in the entire system of state organizations with different interests in taking action. Implementation or protection of the Constitution cannot be the prerogative of a single state organ (or of some of them), for it has no chance of success except when the organic structure of the State is such that each of its components or units has its own functions and responsibilities to perform in respect to the implementation of the Constitution. Nothing but the state organization as a whole is capable of implementing the Constitution on a full scale. Precisely this recognition is reflected in the doctrine of the separation of powers which maintains, even in relation to sovereignty, that the creation and maintenance of the particular legal order prescribed by the Constitution is a task of every constitutional organ within, of course, its competence. This does not, naturally, rule out (but rather presupposes) differences in the nature and weight of functions performed by the various organizations in operating a

1 BETHGE, H. Aktuelle Probleme der Grundrechtsdogmatik, Der Staat, 1985, No. 3, p. 355.

concrete order, yet it does exclude the possibility for any state organ to carry out its constitutional mandate by restricting or impeding similar activities of other organizations. The role of the Constitutional Court, which was set up by the Constitution as amended in 1989 and regulated in detail by Act XXXII of 1989, as well as the modes and avenues of its functioning should also be interpreted against this background of relationships between constitutionalism and the protection of the Constitution.

The preamble to Act XXXII of 1989 determined, inter alia,the chief function of the Constitutional Court to be that of protecting the constitutional order and the fundamental rights recognized by the Constitution and, keeping in view the theory of separation of powers, proclaimed the Constitutional Court to be the highest organ destined to protect the Constitution. For the purpose of enabling the Constitutional Court to perform these functions the Act vested it with wide powers even by international comparison. Accordingly the Court's powers[2] include *ex ante* (*a priori*) control over the constitutionality of Acts of Parliament and international treaties, *ex post* (*a posteriori*) norm control, investigation of eventual conflicts of statutory provisions and other legal acts of State with international treaties, consideration of constitutional complaints against violations of fundamental rights embodied in the Constitution, elimination of unconstitutionality manifest in omissions, termination of specified conflicts between spheres of competence, interpretation of constitutional provisions, and proceeding in any matters referred to it by law.[3]

A recurrent and still pending issue in foreign literature on constitutional jurisdiction concerns the nature of the constitutional courts.[4] Related analyses proceed from the powers, established *de jure*, of constitutional courts and compare the conclusions drawn with *de facto* actions thereof. This line of inquiries is all the more justified since the scope of action open to constitutional judicatures by virtue of law and the actual activities thereof may be stated to be out of step in almost all cases. The actual activities of the overwhelming majority of constitutional courts do not exhaust all legally established avenues (chiefly because the courts exercise self-restraint), but a smaller number of constitutional courts can be observed to exceed their legally established powers essentially by operation of customary law. As regards the functioning of the Hungarian Constitutional Court in this respect, there is as yet no sufficient experience capable of generalization to allow a reliable comparison. It is nevertheless necessary to discuss a few dilemmas in the light of legislation, because they are not irrelevant to possible future directions of the Court's activity in the protection of the Constitution.

---

2 Art. 1 of Act XXXII of 1989.

3 A case in point is the power vested in the Constitutional Court by Art. 31/A (5) of the Constitution, under which the responsibility of the President of the Republic for violations of the Constitution or other legal enactments during his performance of office shall be judged by the Constitutional Court.

4 TRIBE, L. H.: American Constitutional Law, Mineola, 1978, pp. 9 et seq.; WEBER, A.: Verfassungsgerichtsbarkeit in Westeuropa, in: STARCK, Chr.—WEBER, A. (Hrsg.): Verfassungsgerichtsbarkeit in Westeuropa. I. Baden-Baden, 1986, pp. 60 et seq.

The Act on the Constitutional Court fails to give a legal definition of the nature of the Court. Yet, by reason of the term "court", what appears to be the acceptable view is that the Constitutional Court should be seen as a law-administering organ, one that applies specifically the Constitution. This interpretation is supported both by the logic of the division of powers and by the requirement of democratic legislation (that is public, based on consensus and open to control). If the Constitutional Court is conceived of as a law-administering organ, one may by all means raise some preliminary objections to its powers as established by law. The first relates *ex ante* (*a priori*) norm control, which is much discussed in foreign literature as well. Preliminary control over the constitutionality of legal enactments may be objected to by reason of the fact that this function restricts in effect those of the organs vested with legislative power. If the Constitutional Court may declare a legal enactment to be unconstitutional before it is validly passed, thereby preventing its adoption, the Court is virtually involved as a participant (vested with the right of veto) in performing the function of an organ with legislative power. The Constitutional Court tentatively shares the decision-making competence of the organ affected by such control, so this line of its activity is much closer to legislation than to its proper function, that is the application of law. Giving concrete substance to constitutional provisions, implementing or enforcing them, is primarily a task for the legislator, with its constitutional mandate and responsibility also consisting in this activity. Under the Hungarian regulation, *ex ante* (*a priori*) norm control is basically control over laws, which turns the Constitutional Court into an organ giving concrete substance to the Constitution and, owing to its special right of veto, makes it no longer an adjunct to the legislative organ (which, for that matter, would clearly follow from the principle of primacy of the Constitution and its protection), but actually superordinate to it. The Court's function to interpret the Constitution, which is inadequately specified, may likewise be criticized for similar considerations. The problem lies in the mandatory nature of interpretation. If the Constitutional Court is viewed as a law-administering organ, its interpretational activity may equally concern interpretation of law enforcement, which, under the general rules of interpretation, may only relate to concrete cases, with no effect *erga omnes*. In fact, mandatory and general interpretation of the Constitution implies *quasi* legislation, at least in a negative sense, for the result of its interpretation of the Constitution thereby determines in advance (and may even be said to substitute for) the will of the legislature. The function of giving concrete substance to the Constitution in advance is inconsistent with the function of enforcing the law, particularly so in cases where such activity aims at adding to the content of the Constitution, for it amounts to a typical and constantly criticized form of *tentative modification of the Constitution* extremely disquieting from the point of view of constitutionalism.[5] Considering that the function of protecting the Constitution is assigned to more organs than one, even if there is a highest organ established specifically for that purpose, it is inadvisable to invest a single organ with too wide powers to watch over the constitu-

5 BETHGE: supra 1, fn 367.

tionality of the legal system. Depending on whether direct or indirect elements are predominant in the linkages of the legal system with the Constitution, we can speak of constitutional or legality control. The current state organization continues to include organs called upon to terminate such conflicts and contradictions in the lower echelons of the legal system as may be said to be disquieting from the point of view of constitutionality. In this context, requirement of implementing the Constitution implies a protective function so indirect as to make it more appropriate to assign norm control to organs whose essentially similar functions are confined to lower levels of legislation. A problem directly affecting the law-administering nature of the Constitutional Court concerns the scope of discretionary powers, as it may be stated in general that even a certain extent of discretion tends to make law enforcement closely akin to (*quasi*) legislation. This aspect holds particularly true of the possibility for the *applicability of legal enactments* to be established on grounds of expediency. In this respect one may take objection to the provision of the Act on the Constitutional Court under which the Court may, by invoking a particularly important interest of legal certainty or of the applicant, disregard the date for annulment *ex nunc* of legal enactments and fix another date previous or subsequent thereto.[6] What is involved here is not the procedure, otherwise copiously criticized or championed in foreign literature, under which establishment of unconstitutionality is virtually tantamount to a legal enactment being declared *null and void* in an appropriate legal ceremony, which clearly implies *ex tunc* but rather a problem concerning the discretionary powers of the Constitutional Court to determine whether or not a legal enactment shall lose effect, and, indeed, discretionary consideration of a particularly important interest of legal certainty or of an applicant *points beyond* the scope of law enforcement, let alone the fact that, precisely under a system for the protection of the Constitution, it would be difficult to argue for the existence of an interest supporting the acceptability of shortening or lengthening the period for which a case of unconstitutionality may be allowed to subsist.

Any criticism that may be addressed, under the adopted legal (legislative) arrangements, to the protection of the Constitution and to the highest organ established for that purpose implies nothing but possible anomalies in the functioning of the Constitutional Court, first and foremost the fact that the too wide-ranging activity of the Court may even come to recast the basis for legitimating the constitutional order and thereby that order itself. No matter how important the function of the highest organ protecting the Constitution may be, it must not lead to "totalitarianism" in the protection of the Constitution in a state based on the rule of law and governed by the doctrine of the division of powers. Tilting the balance cannot, of course, be imputed solely to legislative regulation too loose and hence amenable to widening in scope, because it is coupled with the additional question of how the Constitutional Court uses the powers conferred on it by law. It should be seen, however, that the practice of self-restraint is itself based on discretion, or presupposes a discretionary power that transcends, in a large part of cases,

6 Arts. 42 (1) and 43 (4) of Act XXXII of 1989.

the scope of protecting the Constitution, that is applying the law, meaning that is goes beyond the limit within which the primacy of the Constitution as a legal norm clearly prevails over all state organs.

Today we may feel fortunate to say that constitutionalism or the protection of the Constitution are no mere theoretical questions. At the beginning of 1990 the Constitutional Court started to function on the basis of a constitutional mandate and a legislative regulation. In the first few months of its work, which were most probably decisive to the development of its judicative practice and style, the Constitutional Court handed down over 20 published decisions.[7] By interpretations of the Constitution and law, several of them contributed greatly to forming a judgement on the set of problems concerning constitutionality and on the prospects of future development. A breakdown of the decisions by the legally defined functions of the Constitutional Court does not allow, owing to the short period of time since the Court started its work, any far-reaching conclusions to be drawn, but is nonetheless worthwhile to cite a few relevant figures. Out of the 22 decisions published up to 16 October 1990, four were concerned with interpreting the Constitution, two may be said to have dealt with constitutional complaints, and the rest (16 in total) related to *ex post* (*a posteriori*) norm control. A small number of constitutional complaints and a great number of decisions on *ex post* (*a posteriori*) norm control leap to the eye in light of international experience (with emphasis laid again on the short period of time available for a comparison). In countries serving as a model for developing the practice of the Constitutional Court, the judgements of constitutional courts deal with constitutional complaints for the most part[8] and those relating to *ex post* (*a posteriori*) norm control are rare exceptions. This is most probably associated with the fact that constitutional jurisdiction in Western Europe is increasingly developing into one concerned with the so-called fundamental rights,[9] related decisions being based precisely on constitutional complaints. However, the Hungarian Constitutional Court cannot also escape the pressure of heightened expectations about the effect of fundamental rights in creating a constitutional order. This explains largely why the Constitutional Court has made its most important statements affecting fundamental rights precisely in its rulings on norm control. For that matter, the relatively high ratio of proceedings involving *ex post* (*a posteriori*) norm control can

7 By the time this study was completed the Constitutional Court had passed its decision, of great importance to the evolution of the concept of fundamental rights, declaring capital punishment to be unconstitutional. (In his dissenting opinion attached to the decision, judge SCHMIDT made noteworthy statements concerning the Court's powers as well.)

8 The Federal Constitutional Court of the FRG, for instance, considers some 3,000 constitutional complaints a year, whereas the total number of norm control proceedings between 1951 and 1985 remained below this figure. Cf. BENDA, E.: Die Verfassungsgerichtsbarkeit der Bundesrepublik Deutschland, I.; STARCK—WEBER (Hrsg.): supra 4, pp. 131, 133, 135.

9 POKOL, B.: Alapjogok és alkotmánybíráskodás—jogelméleti szempontból (Fundamental Rights and Constitutional Jurisdiction—from the Point of View of Legal Theory), Jogtudományi Közlöny, No. 5 of 1990, pp. 144 et seq.

similarly be explained by the temporary situation in which the contradictions and tensions appearing within the law and hence resolvable within the framework of norm control tend to increase during the period of transformation of the legal system, a fact which understandably shifts the focus of the Court's activity to these aspects. In like manner, the peculiarity that the Constitutional Court has established cases of unconstitutionality, with their consequences enforced, in a relatively large number of its published decisions is illuminated by the contradictions accompanying the transformation of the legal system. The Court rejected only two motions for annulment, while, in the remaining 16 cases of relevance, the aforesaid four motions for interpretations of the Constitution should clearly be left out of consideration, although the Court decided full or partial annulments. In the West European practice of constitutional jurisdiction based on a more stable legal order, the number of rejected motions is much higher than that of motions upheld by the constitutional courts.[10] Of the decisions of the Constitutional Court establishing nullity, seven fixed a date *subsequent* to that of their publication in the official gazette. In the cases of unconstitutionality established, the annulments with subsequent dates and objected to in principle as indicated above are justified by the Constitutional Court mainly on grounds of avoiding *gaps in law* arising in consequence of annulment. This was also stated in Decision No. 10/1990 (IV. 27) establishing the unconstitutionality of regulation on widow's pension, the Court adding that the time-limit set was intended to allow time for the legislative, in that case the Parliament, to adopt an appropriate legal enactment in conformity with the Constitution. Also, there are cases in which the establishment of unconstitutionality is based on the inner contradiction of the legal system created by an omission of the legislative organ. The same reasoning is to be found in Decision No. 16/1990 (VII. 11) of the Constitutional Court. If the establishment of unconstitutionality within the framework of norm control proceedings were based solely on the ground that the contradiction of the legal system would be the concomitant of an omission alone, summons with a time-limit fixed would be a suitable, and practically the only, means of terminating a case of unconstitutionality. But in the event that a case of unconstitutionality involves a violation of the Constitution by both act and omission, as was the case with the last-mentioned decision, the concerns to be expressed in connection with cases of annulment at subsequent dates relate also to cases of violation of the Constitution purely by acts. For that matter, the intervening time-limits fixed by decisions of the Constitutional Court establishing "deferred nullity vary between eight and two and a half months [as exemplified by Decisions No. 10/1990 (IV. 27) and No. 22/1990 (X.16), respectively].

In its judicative activity so far, the Constitutional Court has passed seven decisions annulling legal enactments with *ex nunc* effect on grounds of unconstitutionality, its reasoning being in all cases that it has found no interest deserving special consideration and justifying departure from *ex nunc* effect, which is stated by law to be the general

10 In Austria, for example, the ratio of favourable and unfavourable decisions is 1 to 10. Cf. KORINEK, L.: Die Verfassungsgerichtsbarkeit in Österreich, STARCK—WEBER (Hrsg.): supra 4, p. 174.

rule. Although the dilemma of annulment with *ex nunc* or *ex tunc* effect continues to be much discussed in foreign literature, and examples can be given of both rules within the decision-making competence of constitutional courts;[11] *ex nunc* annulment is consistent, if not with the dogmatic specifics of unconstitutional statutory enactments (i.e. invalid, or null and void *ab initio*, at least with the nature of protection of the Constitution. If, however, the *ex nunc* principle means nothing more than one recommended for the Constitutional Court to follow in exercise of its discretionary powers regarding expediency, the first breach is made for the Court to work its way from the status of *upholder* of the Constitution to that of *active shaper* or developer *of law*. This tendency may be detected in Court Decision No. 5/1990 (IV. 9) on the so-called tax on interest. The Constitutional Court annulled the contested Act and the related decree of the Council of Ministers with *ex nunc* effect, but judge Géza Kilényi, in his dissenting opinion attached to the Decision, argued in favour of *ex tunc* annulment by referring to the need for the Court to play a role in shaping the law and to take the lead in developing legal culture. In this respect the decisions of the Constitutional Court should be responsive to the "population's sense of justice" and meet the requirement "to restore confidence in constitutionality". This view is apt to bring extra-constitutional aspects into the mechanism for the protection of the Constitution, thereby leaving scope for an active involvement of the Constitutional Court in developing the law, which at this point ceases to be consistent with the postulate of the primacy of the Constitution as a legal unity. However, in addition to the contested argument, Géza Kilényi's dissenting opinion contained an idea in support of *ex tunc* annulment which went right to the heart of the problem of constitutionality presenting itself in this respect. He pointed out that the category of void and redressable acts is unknown to public law, as it is to civil law, and that the criterion of nullity lies precisely in such acts being gravely defective at the very moment of their adoption. In the course of implementing provisions of public law it is not for anyone to invoke grave defects, namely the nullity, thereof, because such legislative acts carry, as a rule, an obligation to enforce them, but it is possible for them to be declared null and void by an organ (the Constitutional Court in our case) empowered thereto. It is such a declaration that operates to incur and enforce the legal consequences of a grave defect which made the statutory enactment in question *a priori* unsuitable to attain the legal effect intended. This concept of nullity serves as a guide in the question of whether a decision of nullity has an *ex tunc* or *ex nunc* effect. Violation of the law-making procedure and the hierarchy of legal sources in the course of adopting a legislative act results in so grave a defect as to provide a basis for enforcing the consequences of nullity with retroactive effect. Bearing in mind the aspects of constitutionality, one should agree with this line of reasoning, but one thing to be added is that the very concept of nullity as set out in the dissenting opinion concurrently rules out the Constitutional Court's discretionary power and choice of options in respect to dates for annulment.

---

11 RÁCZ, A: A jogszabályok törvényességének utólagos ellenőrzése (Ex Post Control of Legality of Statutory Laws), Állam- és Jogtudomány, No. 3 of 1982, p. 456.

The decisions relating to *ex post* (*a posteriori*) norm control include none of *ex tunc* annulment by the Constitutional Court, but Decision No. 20/1990 (X. 4) establishing the unconstitutionality of the act on property returns invokes the desideratum of legal certainty in substantiating its *ex tunc* effect. If the Constitutional Court has a legally established right (and uses it) to invoke the same legal principle, i.e. legal certainty, also at a later date in motivating *ex nunc* and *ex tunc* annulments alike, we have the case of so wide a scope of discretionary powers as can hardly be reconciled with the logic of protecting the Constitution on the basic of its primacy.

In exercising its function in respect to *ex post* (*a posteriori*) norm control the Constitutional Court has examined the conformity of various levels of legal enactments (law, law-decree, government decree, ministerial decree, council ordinance) with the Constitution. Given the diversity and interrelationships of the regulations subjected to control, the decisions of the Constitutional Court show a rather wide-ranging pattern in the interpretation of legal enactments and in the style of stating the reasons on which they are based. It may be stated in general that the Constitutional Court has relied on different decision-making techniques for arriving at a decision. Nevertheless, there emerge two basic types, markedly prevalent, of decisions, with allowance made for their diversity following from the nature of things. The Court's decisions relating to *ex post* (*a posteriori*) norm control can be classed as belonging to either type depending as the Court sees the cause of unconstitutional conflicts of the legal system in cases of (more or less formal) conflicting competence susceptible to interpretation by the traditional analytical technique of legal dogmatics or subjects the fundamental rights as the core and substance of law-making competence to its investigations on constitutionality. This distinction is known in foreign literature as well, and thus the modes of characterization are those of decision-making based either on legal positivism (for the first type) or on social sciences (for the second type).

The type of decisions more interesting and more significant in both theory and practice is represented by implementation of the Constitution on the basis of *fundamental rights*. In exercising its function relating to *ex post* (*a posteriori*) norm control the Constitutional Court has handed down five decisions, which are profoundly influenced by its conception of fundamental rights. In Decision No. 2/1990 (II. 18) the Court's conclusion that the contested provision of the Electoral Act on the election of MPs was not contrary to the Constitution resulted from an interpretation of the right to privacy and protection of personal data. In his dissenting opinion László Sólyom, then Vice-President of the Constitutional Court, ascribed greater *intrinsic value* to the two fundamental rights involved and thereby stated them to have a wider ambit of operation. On this ground, in his dissenting opinion important and peculiar to a dogmatics of fundamental rights to be developed by the Constitutional Court, he held that the contested source of law was inconsistent with the Constitution. In its Decision No. 8/1990 (IV. 23) the Constitutional Court was guided by the right of disposal conceived of as a *"general personality right"* in considering certain provisions of the Labour Code to be inconsistent with the Constitution. The substance of the principle of *equality* was central in Decision No. 9/1990 (IV. 25), which rejected the application for nullity submitted against certain provisions

of the Act on the Income Tax of Private Persons. Also, in its Decision No. 10/1990 (IV. 27), the Constitutional Court invoked equality in declining to hold the regulations on widow's pension contrary to the Constitution. In Decision No. 13/1990 (VI. 18) the establishment of the unconstitutionality of the Law-Decree on savings deposits was founded on the *freedom of contract*, which the Constitutional Court regarded as a separate constitutional right. The fundamental right to *privacy and protection of personal data* was the guiding principle in Decision No. 20/1990 (X. 4), which declared to be unconstitutional an article of the Act requiring leaders in certain state and party posts to file property returns.

A *dualistic conception* of fundamental rights is clearly palpable in the decisions of the Constitutional Court mentioned above. On the one hand, as they are guaranteed by the Constitution, these rights mean protection from and operate as a bar to interference by the State as a public power, that is to say, perform a protective function, and, on the other, they embody such *objective values* of the legal system as have their effect irradiating on all legal enactments even if the latter make no special mention of a particular fundamental right. In this sense, fundamental rights imply objective (and general) *value-judgements*. This dual view of fundamental rights reveals a certain contradiction inasmuch as they, construed as performing a protective function, are neither unrestricted nor insusceptible of restriction, but are, in the first place, subject to the legislature will. Having regard for the concrete set of conditions prevailing, the legislature may place more or less restrictions on them without the fundamentally protective nature of these rights ceasing to exist. With a view to maintaining such a protective function, restrictions by the legislature are limited by the fact that the core and substance of similar fundamental rights are not susceptible to additional restrictions. By contrast, the concept of fundamental rights as objective values is based on their expression of values which must be implemented as general principles and hence no restriction of them whatever can, as a matter of course, be imagined without eliminating their very nature as fundamental rights. The fundamental rights conceived of as objective values are of necessity part and parcel of a constitutional order materializing the ideal of a constitutional state, whereas this cannot be said in definite terms of the fundamental rights performing a protective function.

In its Decision No. 2/1990 (II. 18) the Constitutional Court, considering the constitutional aspects of the use of identity numbers, held that protection of privacy and personal data "is not [an] absolute or unlimited [right], just as the rest of fundamental rights set forth in the Constitution are not". This thesis can be construed to mean that under specified conditions the State has powers to restrict, through legislation, all fundamental rights contained in the Constitution (naturally without prejudice to their substance), because, on the strength of these rights, their subjects are entitled to demand non-interference by the State only within the scope unlimited by the State. Accordingly the Court's decision accentuated, under a moderately positivist approach, the protective function of fundamental rights. This feature is enhanced by the statement in Decision No. 3/1990 (III. 4) that "a fundamental right shall not be subject to any restriction except as provided for in a law of constitutional force". This thesis suggests only that the form of

restriction may be one of legislation emphatically based on consensus, but once such legislation has been adopted, restriction of a fundamental right is admissible and legitimate. Again, the concept of fundamental rights as ones performing a protective function is reflected in Decision No. 13/1990 (VI. 18) of the Constitutional Court, which declares the freedom of contract to be a separate constitutional right, while recognizing the admissibility of its restriction under specified conditions such as "the competitive position of financial institutions" or "a significant rate of inflation". By referring to other conditions and circumstances (security of the State, protection of the internal order, public morals, etc.) Decision No. 20/1990 (X. 4) confirms the restrictability of fundamental rights (though its dictum is confined to some of them). For that matter, the Court's concept of its self-restraining role in the protection of the Constitution should also follow from its concept of fundamental rights as allowing protection against the State and disallowing interference by the State, for the real scope of fundamental rights thus interpreted rests, not directly on provisions or rather declarations of the Constitution, but on the concreteness with which the legislature invests particular fundamental rights. This means that such fundamental rights are for the legislature to decide. In this case the Constitutional Court has no other choice but to control the constitutionality of the legislature decision. Such an "attitude" of the Constitutional Court is excellently exemplified by Decision No. 5/1990 (IV. 9) (on the so-called "interest tax"), in which the formal aspect is the decisive element, namely the two-thirds majority required for the adoption of a law of constitutional force, even though that aspect is regarded by the Constitutional Court as a substantive one at the same time, for, in point of fact, the law-making process as determined by the Constitution represents by itself the value and guarantee which manifest themselves in broad consensus, yet the constitutionality of consensus reached with the required formalities may then be judged by no further criteria. This is also expressed by the part of the motivation in the Decision on "interest tax" which sees a danger to principles like equality of rights, equality of opportunity, legal certainty, social security, or predictability in the absence of a two-thirds consensus rather than in the specific inner value of the act of decision-making. In other words, the Constitutional Court would have recognized the Act on Interest Tax as constitutional had the latter satisfied the formal requirements, regardless of whether or not it conformed to a value or a legal principle (extraneous by comparison to the substance of the act of will). Since the doctrine of the illimitability of the substance of fundamental rights was unknown to the Constitution in force at the time the Court passed its judgement on "interest tax", the Constitutional Court had a right and found it easy to take the approach of viewing fundamental rights in their protective function, according to which, however, it should also come/should also have come to the conclusion that the fundamental rights involved are/were subject to the will of the appropriate legislator.

Nevertheless, the practice of the Constitutional Court shows of a concept, too, under which fundamental rights are viewed as embodying objective (legal) value-judgements. A characteristic expression of this is to be found in President Sólyom's dissenting opinion attached to Court Decision No. 2/1990 (II. 18). In connection with the fundamental right to protection of privacy and personal data, he pointed out that a

fundamental right was subject to restriction by the State only if and when restriction was necessary for the enjoyment of the fundamental rights and freedoms of others, provided that restriction was the *ultimate recourse*, and "it may be of an extent absolutely necessary for that purpose". As can be seen, the primary function of a fundamental right is to uphold a value which can be expressed in its subject's right of disposal rather than to afford protection from interference by the State. As is specifically stated by President Sólyom, "the substance of this right (i.e. the right to protection of personal data—A. T.) is in everyone's right to dispose of disclosing and using his personal data". This concept of fundamental rights focuses on their nature as objective values and therefore admits restrictions of them only in cases where such value would otherwise come into conflict with an other similar objective value. On the other hand, *conflicts of values* thus emerging cannot be resolved except by reliance on additional values grasped through interpretation, because there is no normative rule establishing the order in which and the extent to which conflicting values shall be upheld, precisely in view of the *sui generis* nature thereof.

Another typical example of a value-based concept of fundamental rights is found in Decision No. 8/1990 (IV. 23), in which the Constitutional Court held to be unconstitutional the trade right of representation without authorization, as laid down in the Labour Code, by claiming it to impair workers' (citizens') right of disposal, which was part and parcel of the fundamental right to *human dignity* as set forth in the Constitution. In fact, both rights are expressions of one and the same value, that of human autonomy. A fundamental right derives its substance not from the constitutional declaration on human dignity, as this gives rise to no normative requirement,[12] but from the *value* (autonomy) which may manifest itself in the most diverse categories, irrespective of whether or not it is embodied in a constitutional precept. For that matter, this concept can be founded on Art. 54 (1) of the Constitution, which declares human dignity to be an inherent right of everyone. Recognition of human dignity as an absolute right would ensue from such a qualification as its basis, and the substance of the legislative provision is constituted by an objective value. In reality, the subsequent article of the Constitution is likewise in conflict with this interpretation when it prohibits arbitrary deprivation of human dignity, because, in a consistent interpretation, no one may be deprived, arbitrarily or not, of an inherent right. When deprivation or any kind of restriction is admissible, the essential point is not the objective value content of a declared right, but the protective function thereof, which in turn is not a distinctive feature of inherent rights, for, on the basis of values recognized as objectively existing, any restriction of fundamental rights is inconsistent with the substance thereof and hence, when their appropriate value is declared by the Constitution, this is even unconstitutional. This explanation stems from the context that the mutual relevancy of fundamental rights with a value content comes into play, not in the normative structure of law, but in the linkages of values manifest in a legal

12 SAJÓ, A.: Az "emberi jogok" haszontalanságairól és lehetetlenségeiről (On Abuses and Absurdities of "Human Rights"), Világosság, No. 8-9 of 1990, p. 575.

instrument. A value-based concept of fundamental rights allows even formally fundamental rights to take on a new meaning with the spread of values, whether reformulated or originally defined, that are made the concern of law. Of course, the Constitutional Court has a decisive role to play in such interpretation or reinterpretation. This is well illustrated by that part of the motivation to Decision No. 8/1990 (IV. 23) in which the Constitutional Court explains that the right to human dignity shall be deemed as one of the definitions of the "general personality right". In the approach to the Constitution as a rule of positive law it is quite obvious that what we have here is a *generalization* of a value present in the substance of the different fundamental rights, a definition of that value as a new one, since a general personality right is unknown to the positive Constitution of Hungary. The general personality right is a non-legal (ultimately a philosophical or a moral) value which may, precisely in the absence of legal normativity, constitute the substance of the most diverse legal provisions. Viewing such values as constituting the substance of legal provisions necessarily raises the problem of those values having a *radiating effect,* a phenomenon in which a fundamental right with a value content ceases to be a normative rule and serves as a generally valid *model of interpretation.* Since, given the interrelationships of the value content of fundamental rights, combinations of the modalities of upholding values are in theory unlimited, the discussed concept of fundamental rights is the main reason and basis for the so-called open interpretation of the Constitution. Nevertheless, undoubtedly elegant and attractive as it is, an open interpretation always carries the danger of dissolving the frameworks within which the normative unity of the Constitution is enclosed. Such danger is very real in the Decision of the Constitutional Court just cited, as the Court declared the general personality right as an "ancestor right" or a "subsidiary fundamental right", which may be invoked in defence of the individual's autonomy "whenever none of the concrete, or nominate fundamental rights are applicable". The postulate of a general irradiating effect was stated by the Constitutional Court to apply, not to a fundamental right specified by the Constitution (which does not know the type of fundamental right in question), but virtually to a fundamental value, the nature of which is consequently determined by a *value-judgement* rather than by positive law.

Indisputably, there may be various concepts of fundamental rights and the battle between the different trends is still in the balance. Yet, on this score, I should like to refer to the criticism which terms the kind of practice of constitutional jurisdiction showing signs even in the practice of the Hungarian Constitutional Court as "constitutional totalitarianism", or "fundamental rights dictatorship". The concept of fundamental rights as objective value-judgements, a few typical features of which have been indicated earlier, overstrains both the very category of fundamental rights and the law itself, as it even imparts a direct fundamental right relevancy to each legal provision, precisely on the strength of the irradiating effect of fundamental rights. Therefore, in point of fact, the other elements of the legal system become *relativized* in the light of fundamental rights. Again, an added problem lies in the fact that the value-based doctrine of fundamental rights implies not simply a certain value background to each legal provision, a broader and weightier one in the case of fundamental rights and a lesser and less

significant one in the case of other rights, the real problem being posed by the fact that the values, when appearing as the *substance* of fundamental or other rights, prevail as the substance of a legal norm, because, in a consistent legal interpretation, the political decisions of the legislator are displaced—and increasingly so—as the orbit of fundamental rights widens and the interrelationships of their value contents become more intensive—by the value-judgements of the philosopher. However, the universal value-content of fundamental rights is incapable of localizing, identifying or ranking the conflicts affected by legal provisions, because the set of social relations as the scene of conflicts tends to generate as well as to restrict values. The function of law resides, not in recognizing the reciprocity of social relations acting in this capacity, but in a special legal *redistribution* which neither the said set of relations nor the values operating therein are capable of accomplishing. Since, however, that scope of action of the law tends to be reduced by the "crude" values appearing in it, too wide an extension of the orbit (operation) of fundamental rights equally tends to weaken the efficiency of the legal mechanism itself. This does not naturally mean that the efficiency of a legal order functioning with a reduced quantity of fundamental rights is likely to lead to a wider use of legal means. Nevertheless I believe that the value-based concept of fundamental rights makes it more difficult to define the scope of applicability of law, so it does not but encourage the idealism of excessive expectations.

The problem indicated above of implementing value-based fundamental rights consists in the impossibility of *devices* for resolving real conflicts to be deduced from conflicts of values. So there is also an indispensable need for a special "principle of distributive justice", otherwise equally based on a supposed value, to establish the rank-order of values to be upheld in each particular case. The Constitutional Court was likewise unable to avoid this situation. In its Decision No. 9/1990 (IV. 25), which was concerned with a complaint against a provision of law allowing a deduction from the taxable income of parents with three or more children, it resolved the conflict between non-discrimination and equality by considering that *positive discrimination* based on equal dignity was admissible. If a social goal can be attained or a fundamental right recognized by the Constitution can be implemented only through failure to achieve a smaller measure of (quantitatively identical) equality of rights, positive discrimination cannot be deemed to be unconstitutional. In a conflict between the value of equality and the principle of non-discrimination, the rank-order of values depends on the consequences which the realization of conflicting values entails for the realization of the value of fundamental rights concerned or of relevance to the case. Thus, in resolving conflicting values, the Constitutional Court practically chose to apply the consequential approach to establishing a rank-order and thereby constitutionality. Although the motivation of the decision makes no special reference to it, such consequentialism can hardly mean anything else than maintaining a balance of emphasis between the proportions in which the values involved are realized.[13] Such consideration of values,

13 Cf. ALEXY, R.: Theorie der Grundrechte. Baden-Baden, 1985, p. 272.

on the other hand, never follows from the weight of values *per se*, but from a comparison thereof *inter se* and with the real set of conditions. The postulate of proportionality as an idea central to distributive justice cannot be deduced from the relations between the values of fundamental rights alone. Its deduction also needs consideration of proportions as shifting between real sets of conditions as a consequence of interference with fundamental rights. This type of proportionality is stressed by the motivation to Decision No. 20/1990 (X. 4), arguing that the (legal) requirement for certain state and party functionaries to file property returns is a means unsuitable and unnecessary for preserving the purity of public life and hence fails to satisfy the desideratum of proportionality.

The contradiction between positive discrimination and the principle of equality was resolved in Decision No. 21/1990 (X. 4) of the Constitutional Court, which was quick to come to the fore, by reliance on the criterion of proportionality for a consideration of values and interests. That Decision (which was concerned with interpreting the Constitution rather than with norm control, but, given its relevance for fundamental rights, deserves mention at this juncture) pointed out that exclusive privatization of land or other objects of property qualified as positive discrimination and that it did not violate the principle of *equality* as narrowly understood and was not contrary to the Constitution only if the principle of non-discrimination was ignored "on a sufficiently strong constitutional ground". In the question of admissibility of positive discrimination the Constitutional Court referred primarily to the value of a fundamental right. In effect, it espoused the principle of equality by stressing the need for the parties to be treated on an equal footing in property sharing and "for the points of view of each to be considered with equal attention and equity". However, the Constitutional Court was certainly likewise aware that there was little chance of establishing the exact values of fundamental rights on the basis of equality and therefore, in its statement judging those values, it emphasized the need for a consideration of *economic interests* as well, for equality of rights and eventual socially required positive discrimination cannot be safely reconciled except when the consequence of reconciliation is "a *sine qua non* for social equality of fuller perfection and serves to lay the ground for the equality of private owners as actors of a market economy to be created". Although the reasoning proceeded from a fundamental right with a value content, the appropriate final conclusion can be drawn from the more favourable "aggregate social result" rather than from the substantive implication of values. Against this background it is perhaps no exaggeration to say that the fundamental right as interpreted in the Decision of the Constitutional Court did not but serve as a criterion for *delimitating* the problem and the content of the Decision was determined by a consideration of social interests regardless of the value of fundamental rights. It appears that fundamental rights with a value content cannot be conceived of as a normative guide, but that their role in the decision-making procedure lies rather in creating a form of integration and a formula of rationalization for the consideration of various values and interests. But once the integrative and rationalizing integument is removed from the fundamental rights invoked and interpreted in the practice of the Constitutional Court, one meets with a multitude of situations and *conflicts* to be

subjected to primary (i.e. political) consideration and insusceptible of being decided on a normative basis. The approach to a decision focusing on the concept of fundamental rights as values may easily overextend the capacity of the Constitution and come to replace the Constitution's basic political and legal order, which is necessarily limited in scope, by a relative order of values or, in a case of lesser gravity, to juxtapose the latter to the former, an order which is not within the grasp of political decision-makers. Yet, "objective legal value-judgements" thus formulated will fall outside the domain of the principle of "contestable democracy", a principle not negligible from a constitutional point of view.[14]

Parallel to its judicative practice developing fundamental rights by principles of open interpretation, the Constitutional Court has handed down decisions construing the Constitution as a *unity* of strictly *positive legal provisions*. This group of decisions may be said to include those based on norms of the Constitution relating to organization and competence or on norms other than governing fundamental rights. This other line of the "style" protective of the Constitution, clearly distinguishable from decisions on fundamental rights, focuses attention on the problem of constitutional dogmatics, still disputed and unclarified, that fundamental rights and the so-called organizational rights, which are deemed today to be two different components of the Constitution, are extremely difficult to regulate in conjunction, in their relevancy to each other, regarding the unity of the Constitution. This duality may be a source of problems particularly in the case of a constitution like the Hungarian which has undergone a large number of progressive modifications, for such modifications are apt to reveal a strong trend of de-emphasis on the requirement that the functions of implementing and protecting the Constitution should not be blurred and that implementation of the Constitution and investing it with concreteness, including determination of the essential substance of fundamental rights, are a prerogative of the legislature in the first place.

Observance of the *positive* procedures involving the legislative aspects of organization, competence and courses of action is a constitutional question of prime importance. Regulation by the Constitution, or laws directly associated with it, of the forms and subject-matters of legislation, with allocation and determination of spheres of decision-making competence, expresses the socio-political *significance* of the legislative body and even of the set of daily relations to be governed. Under a differentiated legislative system, the forms of enactments imply different possibilities for discretion and compromise, so keeping them within their respective framework constitutes a basic postulate of a *democratic* exercise of power in addition to the *stability* of the legal system. Particular importance is therefore attached to the decisions of the Constitutional Court concerned with *ex post* (*a posteriori*) norm control, which come out first and foremost for the full maintenance of the legislative order as determined by the Constitution. Court Decision No. 3/1990 (III. 4) annulled a provision of the Electoral Act because, under the statutory

14 Cf. SATTLER, A.: Die rechtliche Bedeutung der Entscheidung für die streitbare Demokratie. Baden-Baden, 1982, pp. 11 et seq.

provisions on legislation in force at the time, it limited the scope of franchise in the form of ordinary law, although a positive rule of the Constitution reserved that power for laws of constitutional force. The Decree of the Minister of the Interior on the public use of identity numbers and on stamp marks of firms was found unconstitutional by Decisions No. 11/1990 (V. 1) and No. 18/1990 (VIII. 1) of the Constitutional Court, because it had restricted a fundamental right, namely, that to protection of personal data, although such a restriction shall not be ordered by ministerial decrees. Departure from legal enactments on a higher hierarchical level is subject to an *enabling provision of law, concrete and explicit.* However, multiple subdelegation of powers is not admissible in such cases either. Decision No. 12/1990 (V. 23) of the Constitutional Court annulled a section of the Land Act and the related Decree of the Council of Ministers on the acquisition of immovable property by foreigners on account of inadequate legislative powers.

In like manner, Decision No. 14/1990 (IV. 27) of the Constitutional Court stated the unconstitutionality of a decree of the Metropolitan Council on account of inconsistency with the intended goal and concrete provisions of a high-level enactment. Decree No. 15/1990 (VII. 11) annulled certain provisions of the General Sales Tax Act on the ground that they left the regulation of matters subject exclusively to regulation by a law to the records of the Central Statistical Office being a state decision not deemed to be a legal provision and thereby committed a grave violation of the Constitution. As the Decree of the Council of Ministers enforcing the Social Insurance Act had no power to depart from the provisions of the Act, Decision No. 17/1990 (VII. 31) of the Constitutional Court found it to be a legal provision adopted in exercise of inadequate powers and declared it unconstitutional by reason of violating the established order of legislation. According to Decision No. 22/1990 (X. 16), the Council of Ministers was found to have failed in its duty to exercise legislative powers in the question of compensation for prisoners of war, thereby committing a violation of the Constitution by omission. Omission manifest in non-exercise of powers means non-compliance with a mandate under positive law and therefore prejudices the constitutional requirement to preserve the integrity of the legislative order, just as does an active trespass beyond the scope of legislative powers.

The decisions founded on a positivist concept of the Constitution may be said to include most decisions of the Constitutional Court *interpretative of the Constitution.* Decision No. 1/1990 (II. 1) gave a reply to the question put in connection with a referendum on the date to be fixed the election of the President of the Republic and, the Court, by comparing the powers of the National Assembly with the relevant constitutional provisions, relied on a sound legal argument for concluding that the Parliament was free to decide the manner of electing the Head of State. Decision No. 4/1990 (III. 4), which was "outdated" by a subsequent amendment of the Constitution, interpreted the Constitution in connection with the modification of the Act on Family Law, stating that adoption of rules governing fundamental rights are reserved, regardless of the nature of regulation, only for laws of constitutional force. Considering that the category of law of constitutional force is since unknown in the present constitution, the

Decision had no effect on later decisions. This same fate is shared by Decision No. 7/1990 (IV. 23), which interpreted the constitutional rules on the powers of the President of the Republic. The only exception so far in the practice of positivist interpretation of the Constitution is Decision No. 21/1990 (X. 4) cited earlier, which relied on an open interpretation of fundamental rights for arriving at the conclusion that the mode of land privatization, as planned at the time of handing down the Decision, was inconsistent with the purpose, as established by the Constitutional Court, of the article of the Constitution declarative of equality and prohibitive of discrimination. The second part of that same Decision interpreting the Constitution stated that the property of cooperative farms was within the protection of the Constitution. Although this part of the Decision interpretating the Constitution similarly refers to non-discrimination, it does not relate it to the value-content of *any fundamental right*, but points out that the constitutional distinction between forms of property shall not be a source either of advantage or of disadvantage. In its interpretation of the Constitution the Court was probably led by inapplication of the fundamental rights approach to follow, in the second part of the Decision, a purely *positivistic concept* of law different from that in the first part.

Both of the following Decisions of the Constitutional Court constitutional complaints are based on a positivistic interpretation of law. It should be noted on this score, too, that since neither constitutional complainant sought termination of a violation of a fundamental right, the Constitutional Court was practically not in a position to apply the technique of open interpretation of law. Decision No. 6/1990 (IV. 12) stated a violation of law on the ground that the owners and co-owners of holiday homes in the village of Balatonszepezd could not participate in the local referendum for lack of notification thereof, but, considering that the contested procedure had not influenced the outcome of the referendum to any significant degree, it did not annul the results of the referendum. Decree No. 19/1990 (IX. 19) was likewise concerned with the irregular conduct of a local referendum and in that case it established so grave a violation of law as to warrant the annulment of the administrative decisions which, contested in the constitutional complaint, ordered and approved, respectively, a merger of villages.

Acta Juridica Hungarica
1991 33 N° 3–4, pp. 235–258

Akadémiai Kiadó,
Budapest

BOOK REVIEW

Thomas DONALDSON: **The Ethics of International Business**, Oxford University Press, New York-Oxford 1989, 196 pp.

"Pecunia non olet" said once Vespasian. Today, when the daily news is full of reports of dubious business transactions, from environmental pollution to insider trading we ought to observe strictly and objectively, what belongs to the worlds of business and ethics, how the things are related to each other and how they should be related for the sake of effectiveness integration.

In 1987 the Peter B. and the Adeline W. Ruffin Foundations established a separate foundation within the framework of the Danden School at the University of Virginia in order to produce a series of lectures by outstanding sholars on business ethics. This volume by Thomas Donaldson is the first book-size publication dealing with the nature and morality of the international business community from the aspect how it should contribute to the morality and to the understanding of the current business climate, with the help of innovative and practical ideas in this field. The volume sets a comprehensive normative framework within which ethics can be interpreted in the global market. Moreover it proposes an "ethical algorithm" for international managers to consider while conducting their public affairs, solving those controversies which necessarily appear between their own country and a host country. Of course the author of this volume recognizes that philosophers, business theoreticians, political scientists, economists and theologians survey his book, but at the same time he expresses his anxiety over the fact that precious few practical economic managers require such education. He emphasizes that a normative framework is gravely missing and produces a list of how the representatives of the various sciences have avoided, until now the moral analysis of economic processes with it the consequent analysis of

their regulation as well. This has somewhat hanged let's say, from the end of the sixties to the beginning of the seventies. Scientists realized the links between society and business, the unification of the points of ethical theory and analysis—and not only on the domestic scene, but in the various scenes of international economic life as well. The looming interdisciplinary revolution, while presenting several unknown aspects of facts and values, has not yet reached the international markets. And while such political theoreticians as Beitz, Fishkin and Shue have attained remarkable results indeed, their work is almost exclusively limited to a survey of the actions of some countries, neglecting international firms. Therefore their actions were more or less political actions instead of a legal, economic and business character. In the same way the philosophers have dealt with business ethical cases very intensively within a given country, but at the same time did not care about international business transactions. Even if these transactions were considered in the research, they were only in a very "case-specific" way, such as the Bhopal tragedy or the fate of South African investments. The scientists produced several empirical studies about multinational firms, and have entered in to board scale research in the field of the structure of global markets and international market strategies. Meanwhile hardly an essay was written about the moral viewpoints involved in the complex decision-marking between process countries. Not everyone agrees with the initial approach offered by Donaldson for those who intend to claim some success in this field of sciences; at the time of the writing of this book. The favourable change in international power relations and the positive elimination of a large segment of armament have promoted the fact that South Africa is once again accepted by the community of nations: in the Boer-Anglo country, slowly, but surely, progressive thinking prevails.

In August, 1987 in Geneva in the countries of the world under the aegis of UNCTAD accepted a surprising agreement, whose preparation had taken four years. The developing countries agreed that free trade and private enterprises are more and more important for their economies, the industrial nations have reached the point to reduce somewhat the tragic weight of debt. The critics of this agreement say that the accepting parties do not take very seriously the agreement, but rather at a theoretical level they have taken it, stressing the recent trends in the global economy today; the move from central planning to deconcentrated initiatives, from the capital-intensive economies to labour-intensive production, from industrial programs to agricultural programs etc. Beside the changing process of economic opinions we can find the closely connected series of normative and non-empirical questions, which cannot be transformed and simplified into numerical data evaluated statistically or in to maximally successful strategies. These are related rather to the basic questions of fairness and decency, e.g. what kind of rights of a multinational firm can be realized in a developing country, that beyond the legal duties what kind of extra efforts should be taken by the enterprises to help their employees to enjoy their rights. Naturally these debates are more or less without solution, because the cultural heritage and the industrial and economic traditions of these countries are very much dissimilar to each other, and so cannot be compared. Any non-empirical quest to analyze the

global business dealings can be taken as completely out of the question, therefore some researchers ended to underestimate their surveys which were empirical indeed. However, the opinions of other researchers agree on this point: moral concepts can and should help international economic activities. According to Donaldson both the realism of Hobbes and the cosmopolitan moral idealists are wrong, because they consider their transnational moral obligations from the most various aspects and in this way will never be really effective. The opinions differ in the multitude of the rather simple questions; it is necessary all of them are able to explain their own ideas.

The book deals with the relations of enterprise and morality from a moral viewpoint while stressing the widening responsibility of a large and effective organisation as it is required by a developing technology. This is the "contract" which exists between any grade and form of production and property, in the future it will matter more and more. The legal opinions concerning this chapter differ from each other, but agree on one point; they strive to increase the effectiveness of the enterprise, and better the lives of the employees. The next chapter taken a look at basic human rights, without which international business would not be able to exist and function at all. One of the most significant conclusions of this chapter is that the obligations of international enterprises relating to the observance of these rights differ somewhat from the duties of a nation-state or individuals. In the following chapter the author presents the practical sides of these rights, how the cultural differences and national integrity can be observed together. In this chapter the ethical algorithm can be found, which "according to Donaldson" may serve as a first-rate tool for the synthesis of differing expectations and hopes. In the further chapters the author surveys those modes, then in the concluding chapter he surveys the possibilities of disinvestment. He does not really go into the evaluation of fundamental political and economic questions dealt with by other popular and scientific works, but there is no need to survey these problems because the ethical and successful investments and their philosophy requires the estimation of several further aspects, so he deals rather with them, instead. In this century multinational enterprises have contributed in a lot of positive and negative ways to the development of the world economy. For example, in 1910 the United Fruit Company with the help of a soldier of fortune, "Machine Gun" Malony, organized a coup d'état in Honduras in order to get the exclusive concession of the banana plantations in the country. Today perhaps there is no necessity to do such actions, the successor of the United Fruit Company has achieved significant successes in the "green revolution" specially in areas such as seeds which require few fertilizers but bring about high-protein produce. In order to decide whether the multinational firms are exploiters, saviours or just neutral participants in economic life, we have to clarify those principles which are the basis to survey them and judge them, day by day, year by year. But does it make any sense? The experts dealing with the connection of morality and business, and the reasons for economic legislation can use this volume with considerable gain. A list of literature to each chapter and an index supplements the volume.

Miklós UDVAROS

Herbert B. ASHER: **Presidential Elections and American Politics** (Voters, Candidates, and Campaigns since 1952), The Dorsey Press, Chicago 1988, 397 pp.

Herbert Asher is a Professor of Political Sciences at the Ohio State University and also serves as special assistant for governmental relations to the university president.

The volume analyses the presidential elections in the United States from 1952 to the present from two perspectives: on one hand from the aspects of the citizen, who has to choose from the contestants, on the other hand from the viewpoint of the candidate, who hopes for election (or reelection) from the electorate. The volume is divided into two main parts: in the first part the author dwells on those factors which heavily influence the strategic selection of candidates. The volume is abundantly illustrated by various tables and statistics in order to support the argumentation.

The first chapter gives a glimpse of the process which selects the candidate. This process begins years before the actual campaign and is influenced by important or less important issues. The comparison of the different candidates, or would be candidates, the overview of their previous records employ not only the television journalists and the newsmen generally, but, to a certain extent, the man on the street also contemplates the comparable advantages and expected moves of these persons.

As the aim of this volume is to make the dynamics of the presidential election understandable, it stresses the fact that the successive, four yearly presidential campaigns should be examined by a more general approach, from the dramatic, issue-ridden fifties till the more optimistic and almost nostalgic Reagan-years. It is an undeniable fact that the pre-war New Deal and the Fair Deal of the Truman-era, and their issues, gradually lost their importance in the seventies and eighties, new problems appeared, as raging inflation, high interest rates and the periodical returning recession occupied the minds of citizens both in the course of the campaign and on the very day they cast their votes, to decide who would be the lord of the White House for the forthcoming four years (or even for eight years).

The ten presidential election campaigns between 1952 and 1988 show a very changing picture from the aspect that there were such campaigns which emphasized the personality of the candidates, such campaigns which stressed issues such as civil rights and racial problems, and it happened when the economic situation decided favourably or unfavourably on the person of the future president. It is obvious that the emergence of television in the fifties forever changed the style of the campaign or events contents to a certain extent. The usage of television requires an experienced media; the candidates "must sell" by all means. Since 1976 the candidates have received support from public funds as well. The electorate has also profoundly changed in the last 40 years. Specially the number of Southern coloured voters has increased significantly. Since 1972 18 year-olds also may vote, that means an extra 11 million voters. It is also undoubtedly true that the recent voters incomparable more informed, educated, and therefore more choosy than his ancestors were 40 years ago. Respect for governmental activities also drastically changed in times due to such issues as the

Watergate scandal or the struggles for civil rights. In the mid-seventies the respect of the President decreased, respect for Congress, however, has increased. From the eighties, due to the dynamic personality of Ronald Reagan, respect of the presidency has also increased among the citizens. In the last decades the ratio between the two big parties also changed—the American electorate became somewhat more conservative than it was in the middle of this century, the traditional New Deal-coalition has ceased to exist. There is a dispute going on in the literature: some of the experts doubt that the Republican Party can be a national majority party for a prolonged period of time, others emphasize the fact that, with the exception of Jimmy Carter, the Democrats were unable to send their candidate to the White House in the last 30 years.

The author deals with the issue of citizens and election in the next chapter. He explains the uncountable factors which influence the voters' behaviour, among other the relative ranking of issues, the expectations of the possible candidates. These factors are in such close interrelation with each other that they hardly can be separated at all. According to the research of Herbert F. Weisberg and Jerrold G. Rusk, delegates participating at the Conventions evaluate the possible candidates both upon their personal characteristics and party politics. The possibility of the candidacy of this or that person has been accumulated as the specific mutual effect of the direct and indirect factors. If we consider the difficulties of the candidates, then we see the fact that the American presidential candidates are very much related to their campaigns in a system where the political parties actually exist only in the period of elections. It is interesting too that the results of primaries can differ significantly from the results of the November presidential election.

The next chapter informs us about the financing of campaigns. For several citizens the previous methods of financing the campaigns seemed to be so unsavoury, that in the seventies the majority strongly favoured the limitation of campaign funds. The costs of electing a president significantly increased as one study shows: in 1932 each presidential candidate spent about two million dollars on their campaign: in 1984 the bigger campaign costs have reached 70 million dollars. The mentioned "public funding" may convince campaign managers in the future to put the expenditures under a reasonable limit. An extra chapter talks about the struggle for the presidency. It emphasizes that the campaign should be viewed from several different perspectives. From the viewpoint of the citizen it is such a process which may inform him on the current issues and the available alternatives. The candidates—through the examination of their successes or failures can see their own chances in the further struggle, where the ultimate phase is the November election.

Some elements cannot be left out of the campaign, e.g. the primaries cannot be ignored. Rockefeller tried it in 1968, consequently he lost the possibility to participate seriously in the November election. Some experts raise the question what factors influence decisively the campaign: whether the more or less closely related factors influence the outcome of the election. According to the statistics relatively few citizen change their views during the campaign, but even this precious few may decisively alter the outcome of the election,

while we see the fact that hardly half of the eligible voters attend to vote. Altogether 2-6% of the voters make up their mind on the day of the election, 70% of them decided long before. By all means the success or failure of the primaries influence quite a lot of citizens who may vote in November.

In the last chapter the author thinks about the perspectives of the future. He raises the question whether the voters of Southern states went over to the Republicans.

The volume is supplemented by an extensive list of constitutional regulations on elections, a list of literature and an index. The volume by Professor Asker is an exceptionally valuable contribution to American political literature to make the points of the American election campaigns more understandable for the European reader.

Miklós UDVAROS

PETRUCCI, A.: **Mensam exercere.** Studi sull'impresa finanziaria romana (II secolo a. C. metà del III secolo d. C.), Jovene Editore, Napoli, 1991, XI+418 pp.

The author of the book to be reviewed here, due to his comprehensive study about the Roman and Latin colonies in the early Republic [*Petrucci, A.*: Colonie romane e latine nel V e IV sec. a. C. Napoli, 1989, 188 pp. (Estratto da 'Legge e società nella repubblica romana II, a cura di *F. Serrao*)], is not unknown to scholars of Roman law. In the present book the young Italian romanist deals with another no less interesting subject, the activity of the Roman "bankers". [Aiming at simplicity, I use the modern term "banker" for the ancient forerunners of this profession, although I agree with the author who makes a clear distinction between the ancient Roman mensae and present-day banks.] In recent years, four valuable monographs have been published on this topic [First of all, see *Andreau, J.*, La vie financière dans le monde romain. Rome, 1987, see also *Maselli, G.*, Argentaria. Banche e banchieri nella Roma repubblicana. Bari, 1986, *Bürge, A.*, Fiktion und Wirklichkeit: Soziale und rechtliche Strukturen des römischen Bankwesens. SZ 104 (1987), *Balbi de Caro*, S.Z., La banca a Roma, 1989], and also the earlier literature is relatively rich [Petrucci gives in the notes a more or less complete bibliography. The earliest monographs, *Kraut*, De argentariis et nummulariis commentatio. Gottingae, 1826, is quoted. Since the seventies of the 19th century, in every decade more books and articles have been dedicated to the Roman bankers.] Under these circumstances it has not been easy to write an original book about the *argentarii*. As far as the originality is concerned, the intentions laid down in the introductory part of the book (pp. 16 et seq.) show significant and modern aspects of the old problem, which have been more or less neglected in the earlier literature. Petrucci's aim is, on the one hand, to analyze the economic and legal organization of *mensa* interpreted as a particular type of financial undertaking. His aim is, on the other hand, to reveal the actual place of the bankers' activity in the Roman economy and in the Roman law. The clear

explanation of these aspects is characteristic or the whole book having a well arranged structure and written in a lucid style. This *clartè*, which is unfortunately so rare in the modern literature, is one of the significant values of this book.

The author elaborates on a number of juristic and non-juristic (historical, literary and epigraphic) sources covering almost the entire material of Greek and Latin sources on the subject. It was a difficult undertaking to read the more than two hundred books and articles which are not only quoted in the more than one thousand notes but often also reviewed and critically evaluated. It would have been, however, useful to enclose also an authors' index (similar to the *Index of Sources*, pp. 403-418), because it is sometimes difficult to find the first citation of a given work (with the bibliographical data).

In Chapter I, entitled *"The Roman Bank System In The Light Of Modern Views"* (pp. 1-17), the author gives a general survey of the views in the modern literature concerning the *'sistema bancario'* of ancient Rome and sketches the goals of his own research. As far as the dispute on the public or private character of Roman bankers is concerned, Petrucci states, in accordance with the prevailing view in the modern literature, that *argentarii*, as well as the majority of the *nummularii*, were private bankers. [I think this plausible view is not contested by *Maselli*, op. cit., p. 152, stressing the significance of strict public control over the bankers.]

It is an important observation of the author that the investigation of Roman banks as *organizations*, as well as the structure of *mensae*, the questions of the bankers' liability, the activity of managers like *filii*, *liberti*, *servi* and the *societas* of bankers are in general neglected by modern researchers including Andreau. As main fields of research, the examination of *mensa* as an economic and juristic organization, and the "collocation" of this kind of enterprise in the Roman economy are mentioned. The establishment of whether there were specific regulations on bankers in Rome as a social stratum is regarded by the author as an important task.

In Chapter II, entitled *"The Concept of Mensa as Enterprise Activity"* (pp. 19-62), the author deals with the appearance of bankers in Rome and the emergence of the notion of *mensa*. In his opinion, supported also by a number of epigraphic sources, the *edictum de edendo* was created between the end of the 3rd and the first decades of the 2nd century B. C. At that time, the concept of *mensa* already had a specific, well-defined meaning, namely referring exclusively to the enterprises of *argentarii*. Petrucci thinks that the edictum in question also meant a legal acknowledgement of the *mensa argentaria*. Accordingly, the *argentarii* were the first bankers in Rome, while the other types of bankers (*nummularii*, *coactores argentarii*) did not appear until the end of the 2nd century B. C. The *mensa nummularia* itself, however, according to the author's plausible opinion, emerged later, probably at he beginning of the 1st century B. C.

The author emphasizes that the activity of the *argentarii* can be well distinguished from similar activities in the light of the existing sources. Notwithstanding

this he states that there was also a general notion of *mensa* as a kind of *negotiatio* also attested by a general term on those having a mensa (*mensularius*). This term was namely related to the *nummularii*.

It is a relevant statement of the author that *mensae* in the imperial age could also be enterprises connected with public administration.

The author's interesting explanations are always supported by a number of juristic and other sources including epigraphic ones. Also the views in the modern literature are quoted and critically evaluated. However, some questions appear to have been neglected only treated *per tangentem*. The author did not search for the causes of denomination of *argentarii* and did not analyze the meaning of the synonymous Greek expression *trapezita* in Roman usage. It would have been interesting to analyze the historical and semantical relationship between these terms. The author seemingly identifies the meanings of these terms (see p. 68).

Chapter III entitled "*Historical Development of Activities Characterizing the Mensa Argentaria*" (pp. 63-251) is the most comprehensive part of the work amounting to almost half of the total volume. Firstly, a general, but at the same time thorough, survey is given on the basis of literary and epigraphic sources of the republican age. In this part, special attention is paid to the comedies of Plautus and to the *Corpus Ciceronianum* including the *Rhetorica ad Herennium*.

Thereafter, the *edictum de edendo* is discussed. The author states that a considerable part of our knowledge concerning the economic and juristic features of *mensa argentaria* in addition to the *mensa nummularia* results from the commentaries of the *edictum de edendo*. Surprisingly, this is largely neglected by Modern Scholars.

The author analyses the relationship between the *editio actionis* and *instrumentorum* on one hand and the *edictum de edendo* on the other. In conclusion, he propounds the hypothesis that there was an independent *rubrica* in the Edictum Perpetuum about the *editio rationum* of *argentarii* in contrast to Lenel's reconstruction having a comprehensive title *De edendo*.

Subsequently, the reconstruction of the original text of the edictum in question is treated with special regard to Fernandez Barreiro's criticism against Lenel's reconstruction. [See *Fernandez Barreiro*, La previa información de adversario en el proceso privado romano. Pamplona, 1969, pp. 229 et seq. The author also deals with the character of the *actio in factum adversus argentarios* and convincingly proves that this was a penal action having the function of pecuniary compensation. As demonstrated by the author, the liability of the *argentarii* was based exclusively upon *dolus*. [Cf. also *Kübler, B.*, Die Haftung für Verschulden bei kontraktsähnlichen und deliktsähnlichen Schuldverhältnissen. SZ 39 (1918), pp. 207 et seq.]

It is interesting to read the comparison of praetorian regulation concerning the *argentarii* and on *nautae caupones stabularii* respectively. According to the author, it is surprising that the former were privileged while upon the latter strict liability was imposed. It can be added that the edictum on *publicani* was relatively mild. [See *Brósz R.*, Nem teljes jogú polgárok a római jogforrásokban (Citizens without full legal capacity in the sources of Roman law). Budapest, 1964, pp. 166 et seq.]

Thereafter, a comprehensive analysis of the passage D. 2, 13, 6, 3 (Ulpian) is

given. In this fragment the great jurist, quoting Labeo's opinion, enumerated activities belonging to *argentaria* and some activities *extra rationem*. As a conclusion, Petrucci delimits the circle of bankers' activities as follows: deposit and credit on the basis of *ratio*, open and closed deposit of sums of money, loans for interest and for financing commercial activities, payment by the client's order in favour of third persons, *permutationes* (transfer of money to another locality), *nomina transscripticia*, participation at *auctiones* in order to give credit, and the examination and change of coins. The author acknowledges that the acceptance of pawn and mandates could occur with in the activity of an *argentarius* but these were peripheral and not typical transactions being excluded from the *ratio*.

In addition some problems of the *receptum argentarii* are dealt with in this part of the book (this legal institution is treated from another point of view in Chapter V) as well. The author criticizes many points of Bürge's conception. Petrucci contests that among other things, Bürge's hypothesis on the formal character of *receptum*. It can be remarked that recently Nörr has proposed further arguments in favour of the originally formal character of the *receptum*. [*Nörr, D.*, Aspekte des römischen Völkerrechts. München, 1989, pp. 30 et seq. It seems, however, that Petrucci does not exclude the possibility that *receptum* was originally concluded by *sollemnia verba* (see namely pp. 379 et seq.).]

After the survey concerning the republican age, the single types of bankers' activities are thoroughly analyzed on the basis of sources relating to the first two centuries of the imperial age. In this part the author also applies an exegetic method of first analysing the juristic sources and the non-juristic sources. It is to be stressed that in this respect Petrucci extends the circle of his investigations to a large number of historical, literary and epigraphic sources. Given the limited size of a book review I can only make some remarks on this valuable part of the book.

Firstly, author deals with the deposit. There are interesting and profound analyses concerning the problems of open and closed deposits and the privileges in the case of bankruptcy. It is an original statement when Petrucci distinguishes three kinds of money deposits from an economic point of view. Regarding the fragment of Papinian in D. 16, 3, 8, it would be interesting to consider the meaning of the expression *fraudator* in connection with a passage of Ulpian in D. 42, 5, 24, 2 referring to the damaged clients' "*fidem publicam secuti*". [The expression "*fides publica*" is worth paying attention to in contrast to the expression "*eorum fidem*" concerning the *nautae* (see D. 4, 9, 1, 1) and makes the concept the *argentarii* as namely private bankers a bit doubtful.]

Petrucci makes the distinction between the *mutuum* and *depositum irregulare* quite clear when stating that the judge was entitled to determine the interest in the case of delay even in the lack of a special stipulation on *usurae* as attested by a genuine passage of Papinian (D. 16, 3, 24). Subsequently, the author treats the credit given by the *argentarii* with special regard to that given at *auctiones*. Although the problem of auctions in Rome seems to be elaborated sufficiently by the literature. [See e.g. *Talamanca, M.*, Contributi allo studio delle vendite all'asta nel mondo classico. Roma, 1954, *Thielmann*, Die römische

Privatauktion. Berlin, 1961, *Ankum, H.*, Quelques problèmes concernant les ventes aux enchères. Studi Scherillo I, Milano, 1972] the author propounds some new hypotheses concerning the contractual relationship between the *argentarius* and the *procurator*. Beyond the thorough analysis of the sources, the author also evaluates modern literature in this part and he criticizes the views of Mitteis, Andreau etc.

In conclusion Petrucci states, among other things, that the activities of the *mensa* and those *extra mensam* can be clearly distinguished, and the bankers' activities are characterized by the central role of the *ratio*.

After surveying the juristic sources, the author examines the historical, literary and epigraphic ones (e.g. the *lex metalli Vipascensis*). [As for the lex metalli Vipascensis, see also *Demelius, G.*, Zur Erklärung der lex metalli Vipascensis. SZ 4 (1883), p. 39 and *Schönbauer, E.*, with the same title, SZ 45 (1925), p. 357 and SZ 46 (1926), p. 184.]

As a general conclusion to Chapter III, the author states that the range of activities of the *mensae argentariae* was already shaped in the first half of the 2nd century B. C. In the subsequent period, an extension of the range of these activities can be observed on the basis of the sources. The typical activities show, however, a constant uniformity. There were also constant connections between the banks and the commerce in a broad sense. It is a relevant conclusion of the author that there was a special regulation on the *argentarii*, a *ius speciale* ruled by certain principles.

In Chapter IV, entitled "*The Mensa Nummularia and its Progressive Osmosis with Argentaria. Other Financial Enterprises Designated as Mensae*" (pp. 253-312) the author deals with other types of Roman bankers, treating primarily the activity of the *nummularii*. Firstly, a very clear survey is given about the development of the *mensae nummulariae* on the basis of the sources and the modern literature. It is a relevant and an original statement that it was not exclusively *nummularii* who dealt with the examination of coins. Yet the examination of coins was not the only activity carried out by the *nummularii*. This the *spectatio nummorum* occurred in the practice of the *argentarii* as well. Furthermore Petrucci ascertains that among the *nummularii* there were slaves functioning *nomine proprio* employed by different social groups: senators, merchants, capitalists, but also by *societates publicanorum, argentarii*, and even by members of the imperial family. Original explanations can be found about the functional correlation of the *mensae nummulariae* with other enterprise activities which are generally neglected by the modern literature.

Subsequently Petrucci deals with the process of the "osmosis" of the *mensa nummularia* and *argentaria*. In his opinion, this had already begun in the 1st century B. C. In the Augustean age, *nummularii* surely dealt with deposits. A relatively perfect integration can be dated from the 2nd A. D., even if some differences between the two types of bankers survived. The *probatio nummorum* remained an important task of the *nummularii* though in contrast to the *argentarii*, they had never taken part at *auctiones*. Petrucci, contesting Bürge's view, attributes greater economic significance to the *nummularii*. He acknowledges, however, that they, similar to the *argentarii*, were far from being bankers in a modern sense.

It is a disputed question in the literature whether Ulpian's fragment in D. 1, 12, 1, 9 reports a prohibition of certain illegal acts or it refers rather to a general prohibition of certain activities of the *nummularii*. It is also under discussion whether the prohibition in question concerned only certain persons or the *nummularii* in general. According to the author's plausible hypothesis, this prohibition was a general one and concerned the participation of the *nummularii* at auctions and some types of falsification. Unfortunately, because of the lack of other sources, it is hardly possible to ascertain the actual meaning of the rule "*temperent his quae sunt prohibita*".

In this regard a question emerges with special significance: Who was to qualify the bankers as *argentarii* and *nummularii* (if an official qualification at all existed), and what preconditions and criteria were applied in this respect? It would have been interesting to deal with this problem.

Next a thorough analysis is given about the *coactores argentarii* who were, according to the author's plausible opinion, entrepreneurs of *mensae*, too. Petrucci ascertains that further entrepreneurs (i.e. who neither *argentarii*, nor *nummularii*, nor *coactores argentarii)* cannot be regarded as having *mensa* even if dealing with financial affairs. In this connection, he refers to a fragment of Ulpian in D. 14, 3, 5, 2-3 in which a clear distinction is made between the *mensa* and the other types of *negotiatio*. Within the framework of the conclusions, the author stresses again that the *differentia specifica* of the *mensae* was the *ratio* being a decisive criterium of these special enterprises.

In Chapter V, entitled "*Structure and Dynamics of the Mensa*" (pp. 313-392) a panoramic survey is given about the "anatomy" and the "physiology" of the *mensae* (especially of the *mensa argentaria*). The structure of this chapter is not only clear and logical but at the same time it shows a modern, even original approach, though it can be said that some inevitable repetitions occur relating to the previous chapters.

In the "static" part the forms with unlimited liability are analyzed. Thereafter, the bankers' enterprises with limited liability are discussed. Within the scope of these sub-sections, the individual and collective enterprises are examined separately.

As far as the individual enterprises with unlimited liability are concerned, Petrucci makes a distinction between the small banks directed specifically by the entrepreneur himself and the larger banks managed by an *institor* who could either be a free person (in general, however, it was a freedman) or a slave. In these cases unlimited liability was based upon the *praepositio*, and the action involved was the *actio institoria*. In addition when the *actio institoria* extended to the bankers' enterprises is discussed. It is an original and plausible statement of the author that the *terminus ante quem* was the creation of the edictum *de edendis argentariis rationibus* and that the extension was made not later than in the 2nd century B.C. Petrucci states it was not a rare phenomenon that more slaves were proposed to the same *mensa* as institor. In this respect, a remarkable observation is that slaves could obtain liberty by making use of their managerial abilities, too.

Thereafter, an interesting case (Scaevola, D. 14, 3, 20) is analyzed, wherein the famous classical jurist excluded the liability of the *libertinus institor* after the death of the *nummularius*. Petrucci points out that

the libertinus institor promise of payment was given only in order to maintain the "good will" of the bank.

As far as the collective enterprises with unlimited liability are concerned, the author treats the preposition of a common slave as *institor* as well as the *societas* without preposing such a manager slave. Petrucci states that the *societas argentariorum*, characterized by active and passive solidarity, was one of the most perfect types of partnership in the Roman world. As an example, for extremely detailed and precise regulations even the validity of the *pactum de non petendo* concluded with the regulation one of the *argentarii* (D. 2, 14, 15 et seq.).

It is very interesting—in light the fact that the harmonisation of individual and collective interests is a problem nowadays—how the author treats the problem of what incomes were to be shared with the partner. A relevant source in this area is a passage of Ulpian in D. 17, 2, 52, 5.

It is the author's new hypothesis that during the 2nd century A.D. the special regulation of the *societates argentariorum* was extended to the partnerships of the *nummularii* and the *coactores argentarii*.

As far as the individual enterprises with limited liability are concerned, the model is the *mensa argentaria* directed by a son or a slave when the *pater* or *dominus* is merely *sciens* or even *ignorans*. This type of enterprise is relatively separate from the *res domini* but still belonging to the *pater's* fortune. An unlimited liability of the *pater* emerges only if being *volens* or in possession of the *rationes*.

It is a relevant statement of the author that in the Digest, apart from one single fragment of Ulpian (D. 2, 13, 4, 2-3), every time slaves are mentioned as managers and not sons. It can be remarked that this fact is in accordance with Róbert Brósz's conclusion stating that the *peculium servi* emerged considerably earlier than that of the *filius* and remained more significant than the latter. [See Brósz, R., Peculium servi. Acta Antiqua Acad. Sci. Hung. 18 (1970), pp. 308 et seq.]

The author raises the question whether the regulation of the master's liability for his servant acting as an *exercitor mensae* is different from the regulation concerning the *tabernae* and other commercial enterprises. Petrucci analyses a number of juristic and other sources and compares the liability of the *argentarii* with that of the *nautae caupones stabularii*. As a special feature of the bankers' liability, it is mentioned that in the case of ignorance the *dominus* could be discharged from liability if swearing that he did not have the *rationes*. Another special feature of the bankers' liability is due to the penal character of the *actio in factum adversus argentarios* which is rightly compared by the author with the *actiones in factum adversus nautas caupones stabularios*.

Petrucci proposes that the limited liability *dumtaxat de peculio* is a vicarious liability for a person *in potestate*. To this general statement it can be added that the eventual *ignoratia domini* and the existence of the *peculium* were special grounds of the limitation of liability.

It is a very interesting hypothesis when the author, criticizing Andreau's view, gives a new interpretation to an inscription (CIL XI 1069) which documents according to his opinion, the existence of enterprises "*a più piani*" (*dominus, servus ordinarius, servus vicarius*) which are concerned with the

mensae nummulariae too. It would be interesting to know, why there is no reference in the juristic sources to such enterprises of bankers, while the existence of this type in other commercial activities is attested by the juristic sources themselves. [See e.g. D. 14, 4, 5, 1 (Ulp.).]

Some general observations can be made about these valuable and in many aspects original explanations by the author. I think though acknowledged by the author, it should have been more expressly stressed that slaves could not only be institor but *exercitores* as well (p. 349). Similarly, it would have been useful, in my opinion, to pay more attention to the actual meanings of *voluntas* and *scientia* respectively as this is not always obvious in the sources of Roman law. Finally, it would have been beneficial to analyze the relationship between the existence of the *peculium* and the possibility of bringing the *actio institoria*. [Cf. namely *Lenel, O.*, Das Edictum Perpetuum. 3 Leipzig, 1927, p. 259.]

Having surveyed the structure of the various types of the *mensa*, the author examines some special institutionscharacterizing the "dynamics" of Roman banks. Though this part of the book is rather short, the questions dealt with here are very interesting. Petrucci scrutinizes the problem of *agere cum compensatione*. As he stresses, this obligation is only imposed on the *argentarii*, and not on their clients. According to his plausible explanation, this different treatment is due to the fact that the *exercitores mensae* were those who had the *rationes*.

Subsequently, the author deals with the *receptum argentarii*. A very interesting analysis is given on a fragment of Paulus in D. 13, 5, 12, the text states that the essence of the problem is the delivery of a sum of money with slave assumed in the form of a *constitutum*. If the word "*constituat*" is genuine, the mentioning of Stichus cannot be explained. In the case of the substitution of the word "*recipiat*", it is not easy to answer why the debtor is discharged from delivering the slave which was not owed. Petrucci's conclusion in which the slave was deposited or otherwise promised is, in my opinion, not convincing as the text does not speak about such facts. I think the passage is considerably interpolated and shall be interpreted on the basis of Justinian's constitution in C. 4, 18, 2, 1. [To this passage see also *Lenel, O.*, Beiträge zur Kunde des Edicts und der Edictcommentare. SZ 2 (1881), pp. 65 et seq., *Partsch, J.*, Der ediktale Garantievertrag durch Receptum. SZ 29 (1908), p. 415 and *Astuti, G.*, Studi intorno alla promessa di pagamento II. Milano, 1941, p. 279.]

In the next section the author deals with the problems of accounting. According to his plausible classification, the *rationes* could perform three functions: they were either documents for evidence, information for the clients, or they were constitutive documents for carrying out financial transactions. Petrucci acknowledges that such operations were used not exclusively by the bankers but he states that the *codex rationum* was a fundamental means of bankers' accounting being characteristic for the *mensae*. [It can be remarked that according to the interesting hypothesis of *Voigt, M.*, Ueber die Bankiers, die Buchführung und die Litteralobligation der Römer. Leipzig, 1887, p. 17; the diffusion of accounting in Rome was due to the *argentarii* coming from Latium, though also the Romans themselves had books of this kind before.]

Relevant and original explanations are to be read furthermore about some criminal

aspects of bankers' accounting (*actio servi corrupti, lex Cornelia de falsis* etc.).

Finally, the author deals with the problems of the transfer of banks and with bankruptcy. As for transfers the author thoroughly analyses a fragment of Papinian in D. 31, 77, 16. According to Petrucci's interpretation, a *fideicommissarius* buys the *ensa* (managed by a *servus negotiator*) by making use of a *cautio*. The author thinks that Papinian, in contrast to Ulpian's opinion in D. 15, 2, 1, 7, granted the *actio de peculio* to the creditors against the *fideicommissarius*. This interpretation seems to be more brilliant than convincing. The passage is undoubtedly very obscure. Perhaps a possible explanation is that the *cautio* is not related to the payment but to the assurance of the heirs so that the buyer will not claim them if he himself is claimed by the creditors of the *defunctus* ("*indemnitate heredum per cautionem*"). Furthermore, Papinian's reference to the *emptio venditio* only expresses that this case is similar in some extent to the *emptio spei*, namely the *fideicommissarius* acquiring the bank free of charge. This must not be claimed if damages exceed benefits. [It is remarkable that this passage is not related by the comprehensive textbooks on Roman law of succession (Fadda, Voci etc.) and—apart from a note of Beseler in vol. 45 (1925), p. 473—not even in the first 100 volumes of the Savigny Zeitschrift, either.]

As far as bankruptcy is concerned, the author states on the basis of a fragment of Papinian in D. 16, 3, 8 that privileged creditors obtain statisfaction on "*omnes facultates*" of the banker. Petrucci raises a plausible hypothesis stating that this rule could be applied also on enterprises with limited liability.

In the last Chapter VI, entitled "*The Mensa in the Framework of Financial Activities: Reflections and New Perspectives of Research*" (pp. 393-401) the author draws general conclusions and sketches the possibilities of further research on the topic. Petrucci convincingly criticizes extremist tendencies of modern literature on ancient economic history. He contest that *mensae* did not have a significant role in ancient economy (as assumed by Heichelheim, Frank, De Martino and Bürge). He also states here that credits given by the Roman bankers were used not only for consumption but also for economic purposes. He expresses his aversion for the concept of the last decades of the 19th and the first decades of the 20th century which regards the *mensae* as being similar to modern banks. Petrucci's well-balanced conception is close to that of Rostovtzeff's, attributing a significant role to the banks in the developed period of Roman economy.

Many scholars' works end with a pathetic conclusion. It is the author's merit that this book has no such decorative "*Schlussakkord*". Instead of drawing a final conclusion, open questions requesting further research are sketched. Petrucci refers, among other things, to the role of the different social strata in the financial enterprises, to the problem of the *permutationes publicanorum*, and to the deposit in temples. These problems have not been explored sufficiently so far.

Pondering Aldo Petrucci's book, we can ascertain that this work is a modern, original and excellent elaboration of the subject. The author's theses, which could only fragmentally reviewed here are based upon a thorough analysis of the almost entire circle of ancient sources and a critical evaluation of the modern literature. The author is undoubtedly a Tomanist *ex asse*, who is not only properly cautious against the extremist views, but at the same time his book is rich in original thoughts and

new hypotheses as well. My remarks made above suggest only possible alternative solutions and are not necessarily more plausible than those of the author.

This book is dedicated first of all to Professor Feliciano Serrao. This dedication shows that the author follows the modern orientation of the school lead by the great Italian romanist of our times. Petrucci's book, being a valuable contribution to the literature on Roman bankers, is not the first evidence of the fertility of this approach.

András FÖLDI

P. SCHLECHTRIEM: **Schuldrecht, Besonderer Teil** (Law of Contracts, Special Part) J. C. B. Mohr Verlag, Tübingen, 1991, 2nd edition, 391 pp.

It is no small enterprising work to attempt a concise presentation of the special part of the German law of contracts as the relevant legal material is covered in 420 articles by the Civil Code (BGB) alone, not to mention the supplementary legislative enactments, and even the so-called Brief Commentary *(Kurzkommentar)* by *Palandt* discusses the special part of the law of contract in over 500 small-type pages running to four times the size of the text book to be reviewed here.

Apart from the vast scope of the material being condensed in a nutshell, a special acknowledgement is due to the impressive ease with which the author, Prof. Schlechtriem of international fame, controls this voluminous subject-matter. Commendation is also deserved for the fact that the volume has hardly changed in comparison with the previous edition despite considerable development of the law during the four years since the first edition. Few authors are capable of this accomplishment, with even the best hardly resisting a temptation to enlarge their material in successive editions.

The genre is "short textbook" *(Kurzlehrbuch)* which is functionally equivalent to university notes, but represents the most demanding type thereof, as can indeed be expected of a renowned legal scholar.

The author states in the Foreword that, along with presenting the basic structure of the German law of contract, he has sought to outline the sets of problems *(Problemenbereiche)* which are likely to witness development in the near future or in which development is imminent. In dealing with related questions he has not consealed his own legal convictions even thought their are at variance with the prevalent views on some aspects. He maintains that although the statement of his own concepts, at times singular, in a short textbook may be objectionable, it is not necessary for them to be left unsaid precisely in a textbook suggesting an orientation or new orientations in respect to fundamental questions, because present-day university students will grow tomorrow to be law enforcement officers and jurists and it will be precisely for them to revise what are now regarded as traditional concepts.

The focus of the textbook is on the contract of sale as well as on questions of liability for damage caused out of contract and for unjust enrichment. What will strike the eyes of foreign readers is in particular a detailed exposition of questions of liability

for unjust enrichment, although the German law, unlike other laws, has always devoted a rather wide space to this set of problems. Foreign readers will find it to be an even more striking feature of the book that liability for damage caused out of contract and for unjust enrichment is discussed in the special part of the law of contracts. This has, of course, nothing to do with the author's eccentricity, but can be attributed to the structure of the BGB, which included the related forms of conduct in the special part of the law of contracts, namely in the last articles following the types of nominale contracts.

Next we shall refer to four aspects, as mentioned by the author himself in the Foreword, which represent a novelty in comparison with the first edition.

The Federal Republic of Germany acceded to the United Nations Convention on *Contracts for the International Sale of Goods* (CISG) with effect from 1 January 1991, so the Convention is now applicable in Hungarian-German relations as well. Therefore, in this respect, the author's statements on the differences between the Convention and the provisions of German law are particularly illuminating. Such differences can be observed in, e.g., the following aspects:

— contract of sale involving carriage of goods, which is performed by handing the goods over the first carrier for transmission to the buyer (para. (a) of Art. 31);

— rule for performance according to quality and description required by the contract (Art. 35, I), which is known to German law only in respect of goods specified in kind;

— the documents relating to the goods must be handed over together with the goods (Arts. 30 and 40);

— if the parties do not fix the price, it must be taken to be that generally charged at the time of making the contract for such goods (Art. 55), whereas under the German law the price is for the court to determine in such cases;

— the buyer must pay the price at the seller's place of business (*Bringschuld*, Art. 57, I), whereas German practice is content with remittance of the price *(qualifizierte Schickschuld)*;

— if the contract of sale involves carriage of the goods, the risk pases to the buyer only when the goods are handed over to him (Art. 67);

— if the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances (Art. 46, III), whereas under German law withdrawal from the contract, reduction of the price and claim for damages are the only remedies;

— if the seller fails to perform any of his obligations under the contract, the buyer may claim also damages (para. (c) of Art. 45, I), whereas liability is of a narrower scope in German law. The author, without saying a word on the advantages of the Convention on contracts for the International Sale of Goods (of which he himself was an architect and advocate), refers to a few deficiencies of the BGB in comparison with the convention, such as those relating to liability for breach of contract and claims for damages on that ground, and relies on the strength of facts for convincing the reader of the usefulness of more streamlined arrangements.

By introducing uniform legal solutions the Convention on Contracts for the International Sale of Goods has considerably increased legal certainty, for application of

choice-of-law norms would often produce different results, which is in no way desirable from the point of view of international trade.

Another new legislation discussed in the textbook is the *Consumers; Credit Act (Verbraucherkreditgesetz)* on hire-purchase, which also became operative on 1 January 1991. We shall mention but a few distinctive features of that Act, because it is applied in exceptional cases in relations between Germany and Hungary. Such features include the requirement for contracts to be made in writing, the determination of conditions for the creditor's withdrawal in case of the buyer's default in payment, the effect of dissolution of contracts of credit on contracts of sale (the two types of contract are made by different enterprises on the creditor's side), the consequences of withdrawal on the relationship between the bank and the buyer, the repudiation of payment by installments in case of faulty performance. In connection with these provisions of law we have roughly outlined here, the author refers to in footnotes to legal practice and the principal views prevalent in literature on the subject.

The new provisions of law briefly discussed in relation to *damage caused out of contract inlude:* 1) the Act on liability for products *(Produkthaftungsgesetz);* 2) the Act on liability for the pollution of the environment; 3) the Act on gene technology.

The texbook is complete with a detailed index and a list of sources of law for ease of reference.

It follows from the nature of things that this textbook is in fact of real interest only to people concerned with the German law of contracts, but the author's concise style and exposition of subject may serve as an example for authors of textbook in other countries in treating voluminous and complicated legal material in condensed form in an exoteric style.

Finally, mention is also deserved for the fact that this material concerns the contract-law of a country which is a leading power of the European continent today and is destined by its economic potential to play a determinant role in world trade as well. and, given that the international sale of goods under discussion is of great importance precisely in the latter context, one cannot but welcome Germany's acceptance of international *communis opinio* by its accession to the relevant United Nations Conventions, renouncing a policy to impose on its trading partners the provisions of its own national law, which has otherwise proved its worth. For his contribution to this achievement the author of the textbook outlined above can also claim great credit, which I believe would not be appropriate to pass over in silence in this review.

Alexander VIDA

Gábor HAMZA: **Comparative Law and Antiquity**, Akadémiai Kiadó, Budapest, 1991, 186 pp.

Gábor Hamza's book under review, which has now been published in English on the basis of its 1985 edition in Hungarian, covers a significant and timely subject as indicated by its title. Comparative law has become of decisive importance in

modern jurisprudence with greater reliance placed on the comparative method in a number of other disciplines. The need for a harmonization of the national systems of law reserves a large role for it especially in today's Europe. The novelty of the subject discussed is an added source of interest, since the work to be reviewed here is known to have made the first attempt at giving a comprehensive in-depth analysis of the relationship between the legal systems of the ancient Mediterranean (first of all Roman law) and comparative law.

The relationship between comparative law and antiquity offers several and completely diverse topics for the researcher. One may think primarily of theoretical foundations for and methods of comparing ancient laws as well as of the results to be expected of such investigation. The Roman law naturally has a determinant role to play in this domain, particularly as regards the extent to which the Roman law, undoubtedly the most developed of ancient laws undergirding as it does even the laws of our time, can be taken for a basis of comparing ancient laws. No less important is the question of how to define the scope of ancient laws, for antiquity is virtually understood to mean Greek-Roman, or classical antiquity only.

Still on the subject of antiquity, one cannot ignore another aspect of the relationship between comparative law and antiquity, namely the question of whether the *seeds of comparative law* can be found, and to what extent, in the works of ancient thinkers, i.e. primarily the Greek philosophers and rhetors concerned also with law as well as of the Roman jurisconsults.

Again, closely related to both subjects is the question concerning the degree of interaction between ancient laws and the underlying socio-economic foundations, which similarly form a background, present in the actual set of circumstances, to the said theoretical problems, and the real basis which exploration of that interaction can provide for drawing appropriate theoretical conclusions.

Along with these aspects, which may perhaps be called "horizontal", of the relationship between comparative law and antiquity, equally interesting are those concerning the influence exercised by ancient laws, first of all Roman law, on the legal development of later ages and, in this context, the comparability of ancient with modern laws.

Finally, an independent area of investigation is that of how all these questions have been treated in the history of science.

Thus the relationship between comparative law and antiquity implies historical, theoretical, dogmatic, methodological, and science history aspects alike, which could be subjects of separate monographs, as is noted by the author himself in the introduction to his book. Nevertheless, Gábor Hamza's work can claim credit, *inter alia*, chiefly for a combined discussion of these questions, which are in fact inseparable from one another.

In principle, this method is apt to present the danger of the analysis remaining at too general a level, where lack of a detailed discussion of some elements of the diverse problems involved may call into question the substantiation of answers. In our view, however, the author has succeeded in overcoming that danger.

His scope of investigation into ancient laws is limited *a priori* to those of the *Mediterranean world*. As the author writes, "this is the geographical area where the economico-political relations, necessary for comparison, are more or less given". He does

not go into details of *institutional history* except in relation to the concept of contract, but in the chapters of a theoretical nature he did deeply penetrating research, often relying on partial results of relevant literature, which contains studies of certain partial aspects of the interrelationship of comparative law and antiquity. Gábor Hamza's book gives a synthesis, too, of existing partial results by amplifying them *in a comprehensive and separate system of exposition.* He has the added merit of filling a gap in this field.

The book consists of five chapters. Chapter I (Comparative Law and Graeco-Roman Antiquity, pp. 5-23) uncovers the seeds of comparative law by analysing works of ancient authors. Chapter II (Comparative Law and Antiquity in European Jurisprudence, pp. 24-92) is a summary of the history of science on the subject from the humanists until today. Chapter III (International Economic and Political Relations and Their Reflection in the Ancient Mediterranean World, pp. 93-191) analyses the economic and social conditions serving as a basis for a comparison of ancient laws. Chapter IV (The Possibilities and Limits of Comparative Law in the Analysing the Laws of Antiquity, pp. 192-220) is a methodological investigation into the comparison of ancient laws. Chapter V (The Concept of Contract and the Laws of the Ancient Mediterranean World, pp. 221-242) illustrates the application of ancient comparative law and gives documentary evidence of its usefulness in respect to a concrete institution of law.

There remain essentially two aspects of the manifold relationship between comparative law and antiquity which the author could not undertake to discuss, at least analytically, as a separate subject, namely the sets of problems concerning the interaction of ancient laws and their effects on subsequent legal development. These questions, otherwise of high importance, could form the subject of a separate study, and in this work the author could not but indicate, by way of laying a theoretical groundwork, certain principles and methods to guide a possible approach to them. Interaction is not a methodological problem of comparative law, but a phenomenon that can be elucidated, *inter alia,* precisely by a comparison of laws.

This notwithstanding, we would have felt it necessary for an analysis of the relationship between ancient laws (naturally the Roman law in the first place) and modern laws, a relationship which is chiefly manifest in the survival of Roman law, to be methodologically carried out at the theoretical level precisely from the aspect of applicability of the comparative method, as the author has done so competently in respect to the interrelationship of ancient laws.

Apart from these critical remarks, the five chapters discuss the subject in its entirety. Of course, its coverage does not mean a full-length study on the material. Rather it is the formal aspect, the arrangement of material, that we think may be arguable. In the introduction to his book the author himself refers to the aforementioned multidimensional relationship between comparative law and antiquity, but he gives no fuller treatment thereof. Therefore the theoretical basis of the sequence of chapters does not emerge with full clarity, at least explicitly, while the last chapter dealing with the concept of contract would seem better to be an appendix to the book.

In this general presentation we cannot fail to mention the exceptionally broad

range of special literature and the rich sources which this study has drawn upon. The bibliography enumerates some 700 works, the overwhelming majority of which have been published in the German, Italian, French, English, Spanish, Portuguese, Russian and other languages. Of course, the author has also heavily drawn upon ancient sources in Latin and Greek. The remark that the author did not study the ancient sources of the East in the original Eastern languages could only be made in the role of *advocatus diaboli,* for very few Romanists in the world are capable of studying the legal sources of the ancient East in the original languages. It is no exaggeration to say that the mere collection and survey of this immense material represents a significant scientific achievement.

In Chapter I, examining the ancient germs of comparative law, the author states that political particularism and the equal rights of certain city-states provided an *a priori* favourable basis for the comparison of laws, in ancient Greece, but he rejects the view that the Greek philosophers looked on law only in terms of political thought. Proceeding from these objective and subjective premises, he analyses in depth the relevant works of Plato, Aristotle and Theophrastos, pointing out that, in *Nomoi* Plato takes into account the laws of city-states and even those of foreign countries, but his comparison of laws is not yet conscious, his goal being the idealization of law.

In respect to *Athenaion politeia,* one of Aristotle's 158 works on the Greek constitutions which has fortunately come down to us and is often referred to by scholars dealing with comparative law, Gábor Hamza points out that Aristotelian comparison follows from the empirical method.

Seen by the author as the real Greek forerunner of comparative law, thought not yet as a comparative jurist, is Theophrastos, who, particularly open as he was to legal dogmatics, made references in one of his works to elaborate legal device concerning contracts.

The main reason for the lack of comprehensive comparative analyses is seen by the author in that there evolved in Athens no jurisprudence to match the Roman, mainly because the Greek philosophers were unable to break away from positive law in dealing with law.

In connection with the Roman jurisconsults the author underlines that they took into account foreign (chiefly Hellenic) law particularly on a theoretical plane. In addition to literature on jurisprudence in the strict sense, he subjects Cicero's works to scrutiny noting that they contain frequent references to Hellenic law, but also show signs of ignoring laws other than the Roman. According to Gábor Hamza, this ambivalent approach could have been a general characteristic of the attitude of Roman jurisconsults. He states that, despite certain trends to comparative law, Roman jurisprudence reveals no outline of a comparative analysis, a fact which the author attributes primarily to the Romans' aspiration and inclination to independence.

Also, among the general conclusions, he points out that comparative law in Rome would have been of importance in the field of criticism of the prevailing law, which in turn was likewise alien to the Roman jurisconsults.

In Chapter II, reviewing the comparison of ancient laws in the European history of jurisprudence the author states that precedence in this field is taken by the humanists (first of all Hotman), although similar

references can also be found in the works of medieval jurists. Then he proceeds to explore, with occasional in-depth analyses in separate subsections, the relationship of the trend of natural law (Raguellus, Selden, Conring, Duck, Leibniz, Grotius, Heineccius, Johann Stephan Pütter, Schilter, Schott), the historical school of jurisprudence (Hugo, Savigny), the trend of general legal history (the two Feuerbachs, Karl Theodor Pütter, Gans, Unger), the ethnical trend (Bunsen, Oppert, Rossbach, Schönbauer, and also Maine and Jhering), the orientalists (Revillout, Lapouge) and the late-nineteenth-century scholars focusing increased attention on the Eastern laws (Mitteis, Goldschmidt, Müller), the science of comparative law (Bernhöft, Kohler, Post), the trend of *antike Rechtsgeschichte* (Wenger, Carusi, De Zulueta), and the more recent literature (Ellul, Monier, Cardascia, Imbert, Gaudemet, Gillissen, Seidl, Taubenschlag, Volterra) to comparative research into ancient laws.

The author's investigations are aimed primarily at exploring how much significance the representatives of different trends attached to Roman law in the comparison of ancient laws. Evaluating the various trends in this context, he highlights the economic, social, and history-of-ideas backgrounds of the attitude to Roman law. Another aspect which the author considers of importance is the so-called question of derivation and the wide range of rather divergent views held by representatives of the different trends concerning the supremacy of Roman law.

A presentation of the profound, critical and thorough expositions of related subjects would go beyond the scope of this review, but there is one inescapable question of a general nature to ask, namely that of how to interpret Roman law when speaking of its role *tertium comparationis*, for we think that when the Roman law is relied upon for analysing the dogmatics of other ancient laws it is no longer the one of antiquity to serve as a basis for investigations, but that role is reserved for the classical dogmatics that has evolved directly from the Roman law. Of course, this legal material is just as difficult, and almost impossible to delimit from the Roman law *stricto sensu* as the said dogmatics still based purely on Roman law is to separate from the dogmatics of modern civil law. [Cf. *Brosy, R.*: Bekämpfung versteinerter Vorurteile und andere aktuelle Aufgaben im Unterricht des römischen Rechts, Acta Jur. et. Pol., Szeged, tom. XVII, fasc. 17, Szeged, 1970.] It appears to us that it would have been useful for this problem to be considered.

Chapter III, which deals with international economic and political relations in the broad sense as the basis for a comparison of ancient laws, is a highly valuable part of the book and perhaps one attracting the greatest interest, not only because the author points out the presence in antiquity of numerous modern categories (monopoly, cartel, commercial company, private international law, etc.), but also because he has subjected to scrutiny the highly important problem of relationship between the economic sphere and legal regulation.

The lack of appropriate source material on the subject raised difficulties to the author's investigations, difficulties that were only increased by an often anachronistic backward projection of modern categories in secondary literature. It commends the author's qualities that he has overcome these difficulties and dangers and has drawn his conclusions by relying on available sources (Plato, Aristotle, Cicero, *Expositio*

totius mundi, and legal sources), stating *inter alia* that, for the Roman jurisconsults, law was in a kind of "splendid isolation" from reality, a fact that is responsible for the lack of scientific analyses in antiquity of the relationship between the economy and law. As regards regulation by positive law, he points out that roman law did not regulate the economic sphere except when regulation was of great importance for political reasons, e.g. in the interest of securing supply of grain. In respect to regulations on "cartels", he maintains that it would be anachronistic to speak of a separate anti-trust Roman law, yet the restrictions on private autonomy are proof that the possibility for legal regulation of economic life was not unknown to Rome.

Next the author discusses in detail the sets of international economic and political relations, analysing and evaluating the practice of concluding interstate treaties, which he considers of importance to the interaction of the various ancient laws.

As concerns the much discussed question of equality of ancient laws, he takes the view, while not questioning the primacy of Roman law in terms of its standard, that the absence in "Greek law" of jurisprudence, so typical of Rome, is compensated for, *inter alia*, by interpretation of law, so there is no obstacle to recognizing equality in the practical field. This is proved by the author on the plane of the specific too when he concludes that Greek law cannot be regarded as a mere form of legal thinking without a certain system, just as the concept of *nomos* cannot be said to be less delimited than that of *lex*.

After a detailed analysis of the problem of the civil law system the author proceeds to discuss the question of ancient private international and commercial law. His cautious and circumspect explanations, avoiding the extremes of the rather controversial literature, convincingly draw the outlines of Roman private international law of an interprovincial level and point up the emergence of conditions for the institutions of commercial law, without falling into the error of anachronistic backward projection.

At the level of theoretical generalization, the author formulates what we may be permitted to call "*ars poetica*" in Chapter IV, which analyses the possibilities and limitations of comparing ancient laws. This synthesis at the level of legal theory is perhaps the main thrust of the work and its most important message to scholars engaged in comparative law, or comparative jurisprudence.

It is on the basis of an extensive and profound analysis that the author draws the conclusion that, while the dogmatics and terminology of Roman law can be used for a dogmatic discussion necessary in respect of ancient laws, as well, the extent of reliance on them should not be greater than that placed on the dogmatics and terminology of modern law applicable in research into Roman law. In addition to formulating these general methodological principles, the author calls attention to the dangers present in the anachronistic approach, the preconception of a "homogeneous" ancient law, rash conclusions experienced in connection with similar institutions (the so-called question of derivation), and the ignorance of differences in standard between ancient laws.

Outstanding importance is attached to the author's statement, made at the level of legal theory, to the effect that comparison of ancient laws necessarily contains elements of valuation, which are a prerequisite for conscious criticism.

In this connection, basically agreeing with the author's conclusions advising cautious and circumspect analysis, the reviewer wishes to reiterate his view concerning the need to clarify in the first place the preliminary—one might say *praeiudi-cialis*—question of what is to be meant in effect by the "dogmatics and terminology of Roman law". As is mentioned by the author himself, "the dogmatics and terminology of Roman law are of dual meaning", but we think this question would need further clarification.

Similarly, Chapter V on the ancient concept of contract does not "sink" to the level of institutional history, but is an excellent example of the author's conception as outlined in the preceding chapter and formulated in light of a profound comparative analysis of this central institution of law. As regards the category of *legal institution*, the author states it to be an artificial devise of 19th century jurisprudence, which, however, is applied even by today's legal literature as a technical term in the broad sense. The contract, which in the author's view can be used as a kind of working hypothesis in analysing ancient laws, is one such institution. Nevertheless the author emphasizes that to him, in opposition to György Diósdi, the contract is a neutral category for purposes of comparative analysis rather than a legal institution of an artificial system of law.

The thesis that one cannot speak of a single concept of contract in ancient laws is proved by the author on the basis of detailed analyses. And, in respect to the contractual system of Roman law, which has acquired exclusive status in the course of its subsistence, the author notes that the Roman law's device of consensual contract, although it is a great achievement, is but one of possible devices. On this score we may cite the author's closing conclusion, giving rise to fresh shoots of thought, that the comparative analysis of ancient laws by illuminating alternatives may also have a serious importance for the practitioner of present-day civil law, who quite often focuses his attention on a single alternative alone, although he may choose from among several concepts which often have a many-thousand-year old past.

By way of a general appraisal of Gábor Hamza's book it may be stated that this monograph has carried out, at the standard of contemporary international science, a comprehensive analysis of a subject which scholars concerned with different disciplines (comparative law, Roman law, history of ancient laws) have not yet studied *in a complex way* precisely because of its borderline nature.

Very sympathetic and exemplary are the author's circumspection and precaution in drawing his conclusions from the sources by avoiding the traps of the pertinent literature, refraining from rash and unfounded hypotheses, and withstanding preconceptions rather widespread in literature and distortions resulting from the anachronistic approach.

Based on ample and exceedingly wide-ranging sources, containing wide coverage of an enormous literature thoroughly studied in an evaluative-critical manner, and reflecting the author's captivating control of his material, this work is a comprehensive and systematic discussion of an extremely ramified subject, with theoretical conclusions drawn in each chapter in addition to giving a synthesis, while formulating new significant scientific results. Thus Gábor Hamza's book is at once a high-standard

summary of scientific results already achieved on the subject and a presentation of a new system of theory providing encouragement and guidance for further research. This makes the study highly recommendable reading for lawyers concerned with Roman law, legal history, comparative law or civil law. It is gratifying to note that after publications of several partial studies in foreign languages this work is available again in its entirety to the international community of specialist readers as well.

András FÖLDI

Acta Juridica Hungarica
1991 33 N° 3-4, pp. 259-273

Akadémiai Kiadó,
Budapest

HUNGARIAN LEGAL BIBLIOGRAPHY

1990 2nd PART

Edited by Katalin BALÁZS-VEREDY

This bibliography contains legal works of Hungarian authors issued as monographs in Hungary between the 1st of July and the 31st of December 1990, material of periodicals (articles) and studies published in collective works.

The material for the period 1945-1980 is resumed in the following publication: Bibliography of Hungarian Legal Literature, 1945-1980, Budapest, Akadémiai Kiadó, 1988, 429 pp.

The material published from the 1st of January, 1981 is currently processed half-yearly in the Acta Juridica, beginning with Tomus 23, 1981, Nos 3-4.

Periodicals processed in this bibliography:

ÁJ 3-4/1989 [1990]; AJurid. 1-2/1989 [1990], 1-2/1990; JK 5-8/1990; MJ 6-12/1990; MKözigazg. 7-12/1990; MTud. 7-12/1990; TSZ 7-12/1990; Valóság 7-12/1990.

For abbreviations of periodicals and other abbreviations see in Acta Juridica Nos 1-2 of 1989.

Collective works processed in this bibliography and their abbreviations:

Antallfy-emlékkönyv. 1990 = Emlékkönyv Antalffy György egyetemi tanár oktatói működésének 40. és születésének 70. évfordulójára. Szerk. Tóth Károly. [Essays honouring professor György Antalffy on his 70th birthday and commemorating his 40 years of teaching.] Szeged, Szegedi Ny. 1990, 290 [2] pp. /Acta Universitatis Szegediensis de Attila József nominatae. Acta juridica et politica. Tomus 39 Fasc. 1-23./

ELTE Acta 30. köt. 1990 = A budapesti Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Karának actái. 30. köt. 1988, Főszerk. Vékás Lajos. Fel. szerk. Hamza Gábor. [Acta of the Faculty of Legal and Administrative Sciences of the Loránd Eötvös University, Budapest. Vol. 30, 1988] [Bp.] ELTE [mimeogr. 1990] 214 pp.

JogtörtSZ 3. sz. 1990 = Jogtörténeti Szemle. Az Eötvös Loránd Tudományegyetem Magyar állam- és jogtörténeti tanszékének közleményei. 3. [sz.] 1990, Szerk. Révész T[amás] Mihály. [History of law. Publications of the Institute for the History of State and Law in Hungary of the Loránd Eötvös University, Budapest. No. 3.] Bp. MTA [mimeogr.] 1990, 180 pp.

COLLECTIONS OF STATUTES & JUDICIAL DECISIONS

Munkajogi döntvénytár. Munkaügyi, szövetkezeti tagsági és társadalombiztosítási jogviták. Bírósági határozatok. 4. köt. 1985-1989. Összeáll. Kissné Bódis Júlia—Maka László—Ripp Miklós—Stefán László. Szerk. Nagy Zoltán. [Labour law casebook. Legal disputes in the field of labour law, membership in co-operatives, and social security. Judicial decisions. Vol. 4, 1985-1989.] Bp. Közgazd. és Jogi K. 1990, 459 pp.

Polgári jogi döntvénytár. Bírósági határozatok. 11. köt. 1986-1989. Összeáll. Horeczky Károly—Imreh Katalin—Olasz Nándor. Szerk. Csíky Ottó. [Civil law casebook. Judicial decisions. Vol. 11, 1986-1989.] Bp. Közgazd. és Jogi K. 1990, 484 [4] p.

COLLECTIONS OF STUDIES

A budapesti Eötvös Loránd Tudományegyetem Állam- és jogtudományi karának actái. 30. köt. 1988. Főszerk. Vékás Lajos. Fel. szerk. Hamza Gábor. [Acta of the Faculty of Legal and Administrative Sciences of the Loránd Eötvös University, Budapest. Vol. 30, 1988] [Bp.] ELTE [mimeogr. 1990] 214 pp. Bibliogr. 124-125.—Rés. franc.

Emlékkönyv Antalffy György egyetemi tanár oktatói működésének 40. és születésének 70. évfordulójára. Szerk. Tóth Károly. [Essays honouring Professor György Antalffy on his 70th birthday and commemorating his 40 years of teaching.] Szeged, Szegedi Ny. 1990, 290 [2] pp. /Acta Universitatis Szegediensis de Attila József nominatae. Acta juridica et politica. Tomus 39, Fasc. 1-23./ Bibliogr. passim. Essays in Hungarian, French, Russian, English or German.—Russk. soderzh.; Eng. summary; Dt. Zusammenfassung; Rés. franc.

Jogtörténeti Szemle. Az Eötvös Loránd Tudományegyetem Magyar állam- és jogtörténeti tanszékének közleményei. 3. [sz.] 1990. Szerk. Révész T[amás] Mihály. [History of law. Publications of the Institute for the History of State and Law in Hungary of the Loránd Eötvös University, Budapest. No. 3.] Bp. MTA [mimeogr.] 1990, 180 pp. Bibliogr. passim. Studies in Hungarian, German and English.

Bibliography

Hungarian legal bibliography. 1988 2nd-1989 1st part.—Vengerskaja juridiceskaja bibliografija. 1988, 2-ja—1989 1-ja csaszt'. Ed. Balázs[né] Veredy Katalin. AJurid. 1-2/89:423-476., 1-2/90:171-212.

I. PHILOSOPHY OF LAW

Books

FICZERE Lajos—NEMES Zoltán: Politikai rendszer—pluralizmus—jogállam. Szerk. Dús Ágnes. [Political system, pluralism, constitutional state.] [Bp.] Kossuth K. 1989 [1990] 132 [4] pp. Bibliogr. 131-133.

POKOL Béla: A jog szerkezete. [Közzéteszi az] MTA Szociológiai Kutató Intézet. [The structure of law.] Bp. s.p. 1990, 226 pp. Bibliogr. 216-226.

Quantitative analyses of law. A comparative empirical study. Sources of law in Eastern and Western Europe. Ed. Rácz Attila—Schäffer, Heinz. Collab. Rhode, Barbara. [Publ.] European Coordination Centre for Research and Documentation in Social Sciences. Bp. Akad. K. 1990, 404 pp. Bibliogr. passim.

SZILÁGYI Péter: A szankcionálás és a szankció a jogi felelősségi rendszerben. [Közzéteszi az] Eötvös Loránd Tudományegyetem, Állam- és jogtudományi kar. [Sanctioning and sanctions in the legal responsibility system.] Bp. OMIKK ny. [mimeogr.] 1990, 114 pp. /A jogi felelősség- és szankciórendszer elméleti alapjai 23./ Bibliogr. passim.

Articles

BALÁZS Tamás: A történeti jogi iskola a marxi kritika tükrében. [The historical law school as reflected by Marxist criticism.] = ELTE Acta. 30. köt. 1990, 24-35.

FÖLDI András: A jogi felelősség fogalmáról. [On the concept of legal responsibility.] = ELTE Acta. 30. köt. 1990, 7-23.

KULCSÁR Kálmán: Etika—jog—demokrácia. [Ethics—law—democracy.] MJ 6/90:481-487.

KULCSÁR Kálmán: Lehet-e jogállam Magyarországon? [Can Hungary become a constitutional state?] MJ 7-8/90:578-588.

POKOL Béla: Alapjogok és alkotmánybíráskodás—jogelméleti nézőpontból. [Fundamental rights and constitutional jurisdiction from the viewpoint of legal theory.] JK 5/90:144-155.

SAMU Mihály: A jogpolitika lényeges vonásainak jogelméleti megközelítése. [Approaching the substantial features of legal policy from the basis of legal theory.] JK 5/90:137-143.

SAMU Mihály: A jogpolitika értékelméleti alapjai. [Value theory bases of legal policy.] MJ 7-8/90:655-662.

SZÁDECZKY-KARDOS[S] Irma: Reform és jogalkotás. [Reform and legislation.] MJ 11/90:931-947.

SZÉKELY Katalin: Gondolatok a törvényhozás technikájáról és a jogszokásokról. [Thoughts on legislation techniques and legal customs.] MJ 9/90:745-748.

SZOBOSZLAI György: Politikai tagoltság 1990-es választások tükrében. [Political articulation in 1990 as reflected by the elections.] TSZ 8-9/90:18-31.

TAMÁS András: The law as a command in the pure theory of law and technical theory of jurisprudence. = Antalffy-emlékkönyv. 1990, 225-239.

VARGA Cs[aba]: Judicial reproduction of the law in an autopoietical system. AJurid. 1-2/90:144-151.

VASTAGH Pál: The effect of the African way of production upon the connection between state and society. = Antalffy-emlékkönyv. 1990, 249-254.

II. PUBLIC LAW & CONSTITUTIONAL LAW

Books

ÁDÁM Antal: Tendances du développement de l'ordre constitutionnel de Hongrie. [Development tendencies of the constitutional order in Hungary.] Pécs, Pécsi Szikra ny. 1990, 23 pp. /Studia iuridica auctoritate Universitatis Pécs publicata 120.

Adatok és tények az 1985-1990. évi Országgyűlésről. Összeáll. Jónás Károly. [Közzéteszi az] Országgyűlési Könyvtár. [Data and facts on the Hungarian Parliament from 1985 to 1990] Bp. OK [mimeogr.] 1990, 138 pp.

LASZLOVSZKY József: A magyar címer története. 2. kiad. [History of Hungary's coat-of-arms. 2nd ed.] Bp. Pytheas K. 1990, 40 pp.

Articles

BÁN Tamás: Magyarország és az Európa Tanács Emberi Jogi Egyezménye. [Hungary and the Council of Europe Convention on Human Rights.] MJ 6/90:488-503.

DEZSŐ M[árta]: The new electoral system of the Hungarian Republic. AJurid. 1-2/90:129-132.

GERGELY András, A.: Hatalom, helyi társadalom, etnikum. [Local society, ethnic ties.] MKözigazg. 9/90:769-776.

GOMBOS Katalin: A klasszikus alapjogoktól a szabadságjogok modern fogalmáig. [From the classical fundamental rights to the modern concept of the basic freedoms.] = Antalffy-emlékkönyv. 1990, 57-66.

HOLLÓ András: Az állampolgári jogok országgyűlési biztosa. Elvi alapvetések és szabályozási elvek egy törvényjavaslat elé... [Parliamentary commissioner of civic rights. Basic of principle and regulation for a draft bill.] MKözigazg. 12/90:1057-1068.

KISS Barnabás: Új tendenciák a legújabb nyugat-európai alkotmányfejlődésben. [New tendencies in the recent development of West European constitutions.] = Antalffy-emlékkönyv. 1990, 105-109.

KOVÁCS István: Constitutional guarantees, Constitutional Council, Constitutional Court. = Antalffy-emlékkönyv. 1990, 111-133.

KUKORELLI I[stván]: The role of the permanent committees of the Parliament in the legislation. AJurid. 1-2/89:349-377.

MAJTÉNYI László: Az adatvédelmi ombudsmann—az adatvédelmi törvényhozás. [The ombudsman in charge of data protection—legislation on data protection.] MKözigazg. 8/90:695-702.

PETRIK Béla: Az országgyűlési képviselők mentelmi joga. [Right of immunity of Member of Parliaments.] MJ 6/90:525-537.

RADNAY József: A magyar sztrájk-törvény. [1989. évi VII. tv. The Hungarian law on strikes. Act VII of 1989] MJ 12/90:993-1006.

SÁRI János: A hatalom területi megosztása. [The territorial distribution of power.] JK 7-8/90:237-241.

TÖRŐ Károly: Sajtószabadság és személyiségvédelem. [Freedom of the press and protection of personality.] MJ 6/90:512-524.

ÚJFALVI Annamária: "Szükség törvényt bont" avagy a rendkívüli jogrend szabályozása a Negyedik Köztársaságban. ["Necessity knows no law" or the regulation of the extraordinary legal order in the Fourth Republic.] MKözigazg. 7/90:614-625.

III. ADMINISTRATIVE LAW

Books

Economic restructuring in Hungary. Lectures of the symposium held by Ohio University, College of Business Administration and Janus Pannonius University, Faculty of Economics. Pécs, August 27-31, 1990 [Pécs], Temporg [mimeogr.] 1990, [4], VI, 165 pp. /Studia oeconomica./ Bibliogr. passim.

Egészségügyi jogi kézikönyv. Szerk. Ádám György. Lezárva: 1990. júl. 31. [Manual of the law on public health. Closed: July 31, 1990] Bp. Közgazd. és Jogi K. 1990, 271 pp.

HALÁSZ Gábor: A tanügyirányítás jövője. [Közzéteszi az] Oktatáskutató Intézet. [The future of educational policy.] Bp. Edukáció K. 1990, 31 pp. /Kutatás közben./ Bibliogr. 31.

Magyar kormányprogramok bibliográfiája. 1944-1990. Összeáll. Jónás Károly. [Közzéteszi az] Országgyűlési Könyvtár. Lezárva: 1990. aug. 31. [Programs of Hungarian Governments. A bibliography. 1944-1990. Closed: August 31, 1990.] Bp. OK [mimeogr.] 1990, 221 pp.

SZAMEL Lajos: A rendészet és a rendőrség jogi szabályozásának elméleti alapjai. [Közzéteszi a] Magyar Tudományos Akadémia Államtudományi Kutatások Programirodája. [Theoretical bases of legal regulation of the police.] Bp. OMIKK ny. [mimeogr.] 1990, 98 pp.

Articles

AGG Zoltán: Hány járás — hány tartomány — hány megye? A területi kérdés Magyarország határain belül és a megyerendszer. [How many districts, provinces, and counties? The territorial problem inside Hungary's territory and the county system.] MKözigazg. 11/90:953-963.

BODÁNÉ PÁLOK Judit—VÁRADI Vilmos: Egy itt felejtett jogintézmény: a helyiséggazdálkodás. [Administration of premises, a forgotten but still existing legal institution.] MJ 10/90:848-851.

BOSÁNSZKY Lajos: A gazdaságra vonatkozó jogszabályok deregulációja. [Deregulation of statutory rules concerning the economy.] MJ 6/90:538-545.

BOZSÓ Péter: A tanácstestületek működése a többpártrendszer keretei között. [Functioning of council bodies in the context of a multi-party system.] MKözigazg. 7/90:647-656.

BŐHM Antal: Az önkormányzat esélyei. [Chances of self-government.] TSZ 7/90:49-55.

CSILLIK Péter—ELEKES Zsuzsa: Helyi önkormányzatok a paternalista szocializmus időszakában. [Local self-governing bodies in the period of paternalist socialism.] MKözigazg. 9/90:839-848.

DEME Gyula: Közigazgatási rendszerek térinformatikai alapjai. [Space informaties bases of administrative systems.] MKözigazg. 8/90:710-716.

DUDÁS Ferenc: A képviselő-testület működésének egy külföldi példája. Kanada. [An example for the functioning of the magistrate. Canada.] MKözigazg. 12/90:1109-1112.

FICZERE Lajos: A tudományos kutatás, felsőoktatás, és műszaki fejlesztés jogi szabályozásáról. [Legal regulation of scientific research, university education, and technical development.] MKözigazg. 9/90:795-803.

GAJDUSCHEK György: A lakosság önkormányzatok általi tájékoztatásának kérdéseiről. [The information of the population by the self-government bodies.] MKözigazg. 11/90:977-992.

HAMZA Gábor: Az egyetemi autonómia kérdéséhez. [On the problem of autonomy of the universities.] = ELTE Acta. 30. köt. 1990, 141-148.

HORVÁTH István: Rendszerváltozás és változó követelmények. A köztisztviselői munkaviszony (újra)szabályozásának dilemmái. [Political change and varying requirements. Dilemmas of the re-regulation of civil servant labour relations.] MKözigazg. 8/90:703-709.

KALTENBACH Jenő: Az önkormányzatok feletti központi felügyelet eszközrendszerének nyugat-európai modellje. [The Western European model of the central supervision over self-government bodies.] MKözigazg. 12/90:1073-1098.

KOVACSICS József: Hozzászólás az önkormányzati reformhoz. [Remarks to the reform of public administration.] MKözigazg. 9/90:831-838.

KÖKÉNYESI József: Földtulajdon és vállalati vagyon az önkormányzatokban. Adalékok a megoldáshoz. [Land property and corporation assets in selfgovernment bodies. Contributions to the solution.] MKözigazg. 12/90:1124-1134.

MOLNÁR Miklós: A mérlegeléses jogalkalmazás és a jogilag kötetlen döntéshozatal néhány kérdése az államigazgatásban. [Some problems of the deliberative application of law and informal decision-making in state admnistration.] = ELTE Acta. 30. köt. 1990, 91-100.

NAGY Istvánné—PINTÉRNÉ CSERMÁK Jolán: A közigazgatási szakemberképzés költségei. [Costs of the training of specialists for public administration.] MKözigazg. 12/90:1069-1072.

NÉMETH Jenő: Lehetőségek és elképzelések a helyi közigazgatás működésének fejlesztésében, racionalizálásában. [Possibilities and concepts of the development and rationalization of local administration.] MKözigazg. 11/90:964-976.

POLGÁR Ildikó—RIKLI Erzsébet—SULYOK György: A lakásgazdálkodás ellentmondásai, feszültségei és időszerű feladatai Budapesten. [Contradictions, tensions, and topical tasks of housing management in Budapest.] MKözigazg. 11/90:1034-1042.

SÁRI János: A kormány és a miniszterelnök. [The government and the Prime Minister.] TSZ 12/90:81-85.

SZABÓ Lajos: A Magyar Közigazgatási Kamara törekvései. [Efforts of the Hungarian Chamber of Public Administration.] MKözigazg. 7/90:665-669.

SZIKINGER István: A belga önkormányzati rendőrség. [The Belgian police of self-government.] MKözigazg. 12/90:1113-1118.

TAKÁCS Albert: A közigazgatás hatalma a kooperatív államban. [The power of public administration in a co-operative state.] JK 5/90:163-172.

TAKÁCS Albert: A közigazgatás személyi állománya és az innováció problémája. [The staff of public administration and the problem of innovation.] JK 7-8/91:242-252.

TÓTH Judit: Vázlat az immigrációval foglalkozó szervezetről és feladatairól. [An outline of the organization dealing with immigration and its tasks.] MKözigazg. 9/90:786-794.

TŐKE Alajos: Gondolatok az árvaszékekről. [Thoughts on the boards of guardians.] MKözigazg. 9/90:826-830.

TRÓCSÁNYI László, ifj.: A közigazgatási bíróságok által gyakorolt normakontroll. [The control of norms as carried out by administrative courts.] JK 7-8/90:253-263.

IV. FINANCIAL LAW

Books

Hungarian financial and stock exchange almanach. 1990. Ed. Kerekes György. Transl. Németh Krisztina. [Closed:] September 15, 1990, [Bp.] Eger Print. 1990, 408 pp.

Ideas about the principles of a law on accountancy. — Provisory property policy-guidelines for 1990. Publ. Ministry of Finance. [Bp.] Perfekt Print. [1990] 49 pp. /Public finance in Hungary 67./

Legal rules on separated state funds. [Publ.] Ministry of Finance. Bp. Perfekt Print. 1990, 153 pp. /Public finance in Hungary 68./

Practical experiences of the Hungarian bank system. [Bp.] Perfekt Print. [1990] 63 pp. /How to do business in Hungary. Some practical legal rules concerning foreigner's investments in Hungary 3./

Praktische Kenntnisse im Zusammenhang mit dem ungarischen Banksystem—das zweitstufige[!] Banksystem Ungarns. [Practical informations in connection with the Hungarian banking system—the two-stage banking system of Hungary.] [Bp.] Perfekt Print. [1990] 66 pp. /Praktische Informationen für Ausländer. Einige praktische juristische Regelungen hinsichtlich der Investitionen der Ausländer—in Ungarn 3./

Articles

FERENCZY E[ndre]: Le contrôle financier - économique. [Financial-economic checking.] AJurid. 1-2/90:61-89.

STOLLÁR György: A helyi adóztatás bevezetésének lehetőségei és feltételei a helyi önkormányzatoknál. [Possibilities and conditions of introducing local taxation by the local self-government bodies.] MKözigazg. 12/90:1099-1108.

TÓTH Mihály: A devizajog tilalmi rendszerének fejlődése és néhány aktuális kérdése. [The development and some topical problems of the prohibition system of foreign exchange law.] JK 7-8/90:298-305.

V. CIVIL LAW

Books

Description of foreign exchange laws for foreigners. [Bp.] Perfekt Print. [1990] 37 pp. /How to do business in Hungary. Some practical legal rules concerning foreigner's investments in Hungary 5./

EGRINÉ RÓNAI Márta—PETTENDI Zsuzsa: Alapítványok létesítése és működése. Az alapítványokra vonatkozó jogszabályok és magyarázatuk. [Establishment and functioning of foundations. Statutory rules with comments.] Bp. Közgazd. és Jogi K. — Pallas K. 1990, 141 [2] pp.

Egyéni vállalkozók kézikönyve. Szerk. Hatházi György—Huszár Péter. [Manual of private entrepreneurs.] Bp. Mentor Mont K. 1990, 315 [2] pp.

Experiences and problems in the application of the legal rules on winding-up (liquidation) and economic rehabilitation. [Bp.] Perfekt Print. [1990] 43 pp. /How to do business in Hungary. Some practical legal rules concerning foreigner's investments in Hungary 4./

Gazdasági társaságok jogszabálygyűjteménye. Cégek alapítása, bejegyzése, átalakulása, működése. Összeáll. Hársfalvi Rezsőné—Nemessányi Attila—Szádeczky-Kardoss Irma. Szerk. Nyéki József. Lezárva: 1990. ápr. 15. [Collection of statutory rules on economic associations. Establishment, registration, transformation, functioning of companies.] [Bp.] Pallas K. 1990, 448 pp.

Internationale Varianten aus dem Angebot des ungarischen Versicherungsmarktes. [International variants from the offer of the Hungarian insurance market.] Bp. Perfekt, [1990] [4] 39 pp. /Praktische Informationen für Ausländer. Einige praktische juristische Regelungen hinsichtlich der Investitionen der Ausländer—in Ungarn 2./

Kisvállalkozások jogszabálygyűjteménye. 1990. [Közzéteszi a] MÜSZI. Lezárva: 1990. márc. 1. [A collection of statutory rules on small enterprises.] [Bp.] Novotrans ny. [mimeogr.] 1990, 294 pp.

Közkereseti társaságok és betéti társaságok kézikönyve. Irta Hirsch László—Juhász József [stb.] [A survey of companies. Manual of co-partnership and limited partnership.] Bp. Pallas K. 1990, 312 pp. /Társaságról-társaságra./

LÁBADY Tamás: Fejezetek a felelősségbiztosítás köréből. Üzemi balesetek, közlekedésjog, termékfelelősség, szerződési kockázatok, környezeti károk—és ezek biztosítása. [Chapters from the field of liability insurance. works accidents, transport law, liability for produce, contractual risks, damages to the environment—with the relevant insurance securities.] [Bp.] Pécsi Szikra ny. [1990, 4], IV, 263 pp. Bibliogr. 233-256.—Dt. Zusammenfassung.

New tendencies in the Hungarian economy. Ed. in-chief Kilényi Géza. Ed. Lamm Vanda. Bp. Akad. K. 1990, 179 pp. /Studies on Hungarian State and Law 2./ Bibliogr. passim.

Policies for international risks in the Hungarian insurance market. [Bp.] Perfekt Print. [1990] 32 [2] pp. /How to do business in Hungary. Some practical legal rules concerning foreigner's investments in Hungary 2./

Probleme und Erfahrungen der Liquidations- und Sanierungstätigkeit. [Problems and experiences in the field of liquidation and rehabilitation activity.] Bp. Perfekt Print. [1990] 44 pp. /Praktische Informationen für Ausländer. Einige praktische juristische Regelungen hinsichtlich der Investitionen der Ausländer—in Ungarn 4./

Questions of civil law codification. [Conference. Budapest, September 3-6, 1989] Ed. Harmathy Attila—Németh Ágnes. Publ. Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences. Bp. MTA [mimeogr.] 1990, 206 [2] pp. Bibliogr. passim. Studies in English, German or French.

A szerzői jog. Szerk. Petrik Ferenc. Lezárva: 1990. máj. 31. [Copyright. Closed: May 31, 1990] Bp. Közgazd. és Jogi K. 1990, 407 pp. /A gyakorló jogász kézikönyve 3./

Articles

BATTA János: A népi iparművészet jogi vonatkozásai. [Legal aspects of folk arts and crafts.] MJ 7-8/90:619-627.

BÉRCZI Imre: A találmányok és újítások szerepe a gazdaságban. [The role of inventions and innovations in the economy.] = Antalffy-emlékkönyv. 1990, 15-21.

DARÁK Péter—KISS Adorján: Versenyjogi szilánkok. [Splinters from the law of competition.] MJ 11/90:948-953.

FELMÉRY Imre: Az államosított házingatlanok volt tulajdonosainak kártalanítása. [Compensation for the former owners of nationalized house-properties.] MKözigazg. 8/90:689-694.

GYERTYÁNFY Péter: A szerzői jog fejlesztésének néhány időszerű kérdése. [Some topical problems of copyright development.] MJ 7-8/90:663-666.

HARMATHY A[ttila]: Building contracts and variations in Hungarian law. AJurid. 1-2/89:307-348.

KOVÁCS Annamária: Az alapítványi szabályozás módosításáról. [Modification of the regulation of foundations.] MJ 10/90:827-837.

KOVÁCS László: A cégek törvényességi felügyeletéről. [Legality supervision of companies.] MJ 9/90:703-717.

KOVÁCS László: Civilisztikai kérdőjelek a társadalmi szervezetek ingatlanhasználati joga és az előprivatizáció körül. [Civil law questions on the right of real estate use of societal organizations and preprivatization.] MJ 12/90:1007-1016.

PATASSY Benedek: Szavatosság—jótállás—kártérítés. [Varranty, guarantee, indemnity.] MJ 7-8/90:628-642.

SAJÓ András: Diffúz jogosultságok ügynököt keresnek, avagy a szocialista gazdaságban működő cégnek a tulajdoni jogosultságok szempontjából való elemzése. [Diffuse authorities in search of an agent or analysis of corporations functioning in socialist economy from the point of view of ownership titles.] ÁJ 3-4/89:641-681.

SALAMONNÉ SOLYMOSI Ibolya: Egy deregulációs szabály margójára azaz valóban nincs szükség a gazdasági életben üzletszerűen tevékenykedő polgári társaságra? [Marginal comments to a deregulation rule, or are civil companies with a business activity really not needed in the economy?] MJ 9/90:724-728.

SÁNDOR Tamás: A társasági jog alapjai az NSZK-ban. [The foundations of the law of companies in the Federal Republic of Germany.] ÁJ 3-4/89:682-756.

SZABÓ Lajos: Az egyesületek tevékenységének és törvényességi felügyeletének tapasztalatai. [Experiences with the activity and legality supervision of societies.] MJ 9/90:762-774.

TÖRŐ Károly: A meg nem született magzat védelme. [Protection of the unborn foetus.] MTud. 7/90:845-848.

TÖRÖK G[ábor]: Kurz über das Umwandlungsgesetz. [Gesetz Nr. XIII vom 1989. Brief remarks on the law of transformation. Act XIII of 1989.] AJurid. 3-4/89:379-382.

VÖRÖS Imre: A versenyjog fejlődésének nemzetközi tapasztalatai és a hazai versenyjogi szabályozás továbbfejlesztése. [International experiences with the development of the law of competition and improvement of the Hungarian regulation.] ÁJ 3-4/90:774-847.

ZOLTÁN Ödön: Dolgok és állatok. [Things and animals.] MJ 11/90:912-917.

VI. LABOUR LAW

Books

ARANY Jánosné—LATKÓCZY Antal—LŐRINCZ György—RADNAY József: Munkajogi kézikönyv. Szerk. Radnay József. 4. átdolg. kiad. Lezárva: 1990. ápr. 30. [Labour law manual. 4th rev. ed. Closed: April 30, 1990] Bp. Közgazd. és Jogi K. 1990, 814 [2] pp.

FAZEKAS Károly—KÖLLŐ János: Munkaerőpiac, tőkepiac nélkül. [Manpower market without capital market.] Bp. Közgazd. és Jogi K. 1990, 274 [2] pp. Bibliogr. 265-274.

PONGRÁCZ László: Bérszabályozásaim. [My regulations of wages.] Bp. Közgazd. és Jogi K. 1990, 177 [2] pp.

Problems of employee's of mixed establishments in Hungary about the statutes of labour. [Bp.] Perfekt, [1990] 63 pp. /How to do business in Hungary. Some practical legal rules concerning foreigner's investments in Hungary 6./

What joint ventures should know about social insurance. [Bp.] Perfekt Print. [1990] 40 pp. /How to do business in Hungary. Some practical legal rules concerning foreigner's investments in Hungary 7./

Articles

CZÚCZ Ottó: Le traitement politique du chômage et de l'emploi en Hongrie. [The political treatment of unemployment and employment in Hungary.] = Antalffy-emlékkönyv. 1990, 23-31.

HÉTHY Lajos: A kormány és a szakszervezetek. [The government and trade-unions.] TSZ 11/90:51-57.

SZENTE Lajos: Az új foglalkoztatáspolitikai eszközök alkalmazásának tapasztalatai és a továbbfejlesztés irányai. [Experiences with the application of new means in employment policy and the trends of subsequent development.] MKözigazg. 9/90:849-858.

VII. FAMILY LAW

Book

CSIKY Ottó: A házasság felbontása. [Dissolution of marriage.] Bp. Közgazd. és Jogi K. 1990, 244 pp. Bibliogr. passim.

VIII. LAND LAW

Book

A földtulajdon és a mezőgazdasági struktúra átalakítása. 1-3. [köt.] A 3. [köt.] Függelék: jegyzetek, táblázatok, dokumentumok és segédanyagok. [Közzéteszi az] Agrárgazdasági Kutató Intézet. Lezárva: 1990. júl. 2. [Transformation of landed property and the agricultural structure. Vols 1-2. Vol. 3. Appendix: notes, tables, documents, auxiliary material. Closed: July 2, 1990] Bp. s.p. [mimeogr.] 1990 [2], V, 294, [2], VI, 295-552, 217 p. Bibliogr. passim.

Articles

FENYŐ György: A földhivatalok helye és feladata a magyar közigazgatásban. [Place and tasks of the authorities in charge of land relations in Hungarian public administration.] MKözigazg. 8/90:743-748.

PRUGBERGER Tamás: Adalékok az agrárjog jogrendszerbeli elhelyezéséhez. [Contributions to the placement of agricultural law within the legal system.] JK 5/90:178-181.

PUSZTAY Béla: Földügyi jogalkotásunk. [The Hungarian legislature on land law.] MJ 11/91:954-959.

SÜVEGES Márta: A földmagántulajdon korlátozásának eszközei a dán jogban. [The means of private landed property limitation in the Danish law.] MJ 11/90:960-968.

TANKA Endre: A termőföld forgalom jogi szabályozásának nemzetközi tapasztalatai. [International experiences with the legal regulation of the sale of arable land.] MJ 9/90:729-734.

IX. LAW OF CO-OPERATIONS

Book

DOMÉ Györgyné: Felelősségi viszonyok a termelői típusú szövetkezetekben. [Közzéteszi az] Eötvös Loránd Tudományegyetem, Állam- és jogtudományi kar. [Responsibility relations in co-operative production forms.] Bp. OMIKK ny. [mimeogr.] 1990, 171 pp. /A jogi felelősség- és szankciórendszer elméleti alapjai 15./ Bibliogr. passim.

Articles

BOBVOS Pál: A mezőgazdasági termelőszövetkezeti tagok földbeviteli kötelezettsége. [The obligation of cooperative farm members of ceding their landed property to the cooperative farm.] = Antalffy-emlékkönyv. 1990, 7-13.

HALMAI Péter: Tulajdon a mezőgazdaság vállalati szektorában. [Ownership in the entrepreneurial sector of agriculture.] = ELTE Acta. 30. köt. 1990, 101-129.

VERES József: A szövetkezeti tag munkavégzésének jogi szabályozása. [Legal regulation of the work of cooperative members.] = Antalffy-emlékkönyv. 1990, 255-263.

VERES József: A szövetkezeti tag munkavégzésének jogi szabályozása. [Legal regulation of the performance of work of the members of co-operatives.] MJ 6/90:504-511.

X. CRIMINAL LAW. CRIMINAL SCIENCES

Books

A büntetőjogi kodifikáció időszerű kérdései.—Beszélgetés időszerű jogpolitikai kérdésekről.—Anómia, bűnözés vagy csak pánik?—A bűnözésről és a bűnözés megelőzésének lehetőségeiről. Szerk. Kerezsi Klára.

[Közzéteszi az] MTA Magyar Kriminológiai Társaság. [Topical problems of criminal law codification.—Discussions on topical problems of legal policy.—Anomia, criminality or panic only?—Criminality and the possibilities of its prevention.] Bp. IM.Bv.Háziny. [mimeogr.] 1990, 143 pp. /Kriminológiai közlemények 29-30-31-32./

GYÖRGYI Kálmán—KÓNYA Imréné—MARGITÁN Éva: Az állam elleni bűncselekményekre vonatkozó rendelkezések módosításáról. [Közzéteszi az] Eötvös Loránd Tudományegyetem, Állam- és Jogtudományi Kar. [Amendment of the rules concerning criminal acts against the state.] Bp. OMIKK ny. [mimeogr.] 1990, 57 pp. /A jogi felelősség- és szankciórendszer elméleti alapjai 19./

IRK Ferenc: Társadalom, gondatlan bűnözés, megelőzés. [Society, criminality by negligence, prevention.] Bp. BM K. 1990, 239 pp. Bibliogr. 213-219.—Eng. summary.

MOLNÁR József: Korspecifikus hatások a kriminológiai elméletekben és a kriminológiai kutatásokban. [Közzéteszi az] Eötvös Loránd Tudományegyetem, Állam- és Jogtudományi Kar. [Age-specific effects in theories of, and researches in criminology.] Bp. OMIKK ny. [mimeogr.] 1990, [4] 85 pp. /A jogi felelősség- és szankciórendszer elméleti alapjai 18./ Bibliogr. passim.

Articles

CSERHÁTI Ágota: A szabadságvesztést helyettesítő intézmények. [Institutions substituting imprisonment.] = Antalffy-emlékkönyv. 1990, 33-44.

FEHÉR Lenke: Büntetés és kezelés. [Punishment and treatment.] JK 6/90:204-206.

GATTER László: Néhány gyakorlati probléma a devizabűncselekményeket tárgyaló bírák szemszögéből. [Some practical problems for judges hearing crimes concerning foreign exchange rules.] MJ 12/90:1066-1067.

GÖRGÉNYI Ilona: Az 1980-as évek erőszakos bűnözésének viktimológiai jellemzői Magyarországon. [The victimological characteristics of agressive criminality of the 80-ies in Hungary.] MJ 12/90:1021-1032.

KABÓDI Csaba: Börtönrendszerünk a mérlegen. A szabadságvesztés-büntetés végrehajtásának jelenlegi hazai helyzete a nemzetközileg elfogadott—és elvárt—előírások tükrében. [Balancing the Hungarian prison system. The present situation of the implementation of imprisonment as reflected by internationalionally acknowledged and demanded prescriptions.] JK 5/90:156-162.

MERÉNYI Kálmán: A rablás megvalósításának körülményei. [The circumstances of realising a robbery.] = Antalffy-emlékkönyv. 1990, 135-147.

NAGY Ferenc: Sanktions- und Strafvollzugspraxis in der Bundesrepublik Deutschland und in Ungarn im Vergleich. [Comparing the practice of the execution of sanctions and punishments in the Federal Republic of Germany and Hungary.] = Antalffy-emlékkönyv. 1990, 163-175.

NAGY Ferenc: Az osztrák büntetésvégrehajtás jogi alapjai, elvei és szervezeti rendszere. [The legal foundation, principles and organizational system of the enforcement of punishments in Austria.] JK 7-8/90:316-320.

POÓR János: A feltételes szabadságra bocsátás egyes kérdéseiről. [Some problems of probation.] JK 6/90:223-225.

SZABÓ András: Megelőzés és arányos büntetés. Megjegyzések a büntetéstan újabb fejleményeihez Európában és az Egyesült Államokban. [Prevention and proportionate punishment. Comments to the recent development of penology in Europe and the United States.] MJ 11/90:897-911.

SZŰK László: "Via gratiae"—feljegyzés a kegyelmi útról. ["Via gratiae"—notes on the course of grace.] MKözigazg. 12/90:1119-1123.

VIGH József: A büntető igazságszolgáltatás néhány problémája. [Some problems of the administration of penal justice.] = ELTE Acta. 30. köt. 1990, 152-157.

VIGH József—TAUBER István: A fiatalkori bűnözés Hamburgban és Budapesten. Összehasonlító kriminológiai tanulmány. [Juvenile delinquency in Hamburg and Budapest. A comparative criminological study.] = ELTE Acta. 30. köt. 1990, 158-178.

VIGH József: Szolgáltassunk igazságot a bűncselekmények áldozatainak is. [Justice also for the victims of criminal acts.] MJ 9/90:718-723.

VÓKÓ György: A büntetésvégrehajtási jog továbbfejlesztésének, tudományos művelésének szükségességéről. [The necessity of the improvement and scientific study of the law of the enforcement of punishments.] JK 7-8/90:291-297.

VÓKÓ György: A büntetésvégrehajtási bíró szerepe a végrehajtás alakításában. [The role of the judge in charge of penalty enforcement in the realization phase.] MJ 10/90:844-847.

WIENER A. Imre: A *ne bis in idem* elve a nemzetközi büntetőjogban. [The principle of "ne bis in idem" in international criminal law.] JK 7-8/90:272-275.

XI. JUDICIAL ORGANIZATION

Articles

BÓKAI Judit: A közjegyzői szervezet reformja. [Reform of the notary public organization.] MJ 7-8/90:607-612.

GOSZTOLYA Imre: A [jogi] képviselet. [Representation in law.] MJ 12/90:1033-1054.

PÁLMAI Gyula: Törvény készül a jogi képviselőkről. [Act on legal representatives in preparation.] MJ 7-8/90:613-618.

SZEGEDINÉ SEBESTYÉN Katalin: Mit ér az ember, ha bíró? [What is worth he or she if being a judge?] MJ 12/90:1017-1020.

SZÉKELY János: Diszharmóniák a szakértői bizonyítás szabályozásában. [Disharmonies in the regulation of expert evidence.] JK 6/90:226-231.

SZIGETI Ágnes: A bírósági szervezet reformja. [Reform of the judicial organization.] MJ 7-8/90:597-606.

VISEGRÁDY Antal–GÁTOS György: Gondolatok a bírói jogalkalmazás hatékonyságáról. [Thoughts on the efficiency of the judicial application of the law.] JK 7-8/90:276-282.

XII. CIVIL PROCEDURE

Books

KENGYEL Miklós: A polgári bíráskodás hétköznapjai. [Working days of jurisdiction in civil cases.] Bp. Közgazd. és Jogi K. 1990, 157 [2] pp. Bibliogr. 153-157.

ÚJLAKI László: A fél polgári eljárásjogi felelősségének elméleti vázlata és megjelenési formái. [Közzéteszi az] Eötvös Loránd Tudományegyetem, Állam- és Jogtudományi Kar. [A theoretical outline of civil procedure responsibility of the party and its forms of appearance.] Bp. OMIKK ny. [mimeogr.] 1990, 118 pp. /A jogi felelősség- és szankciórendszer elméleti alapjai 16./ Bibliogr.passim.

Articles

HORVÁTH János: A polgári per tárgyalásának neurológikus gócai. [Some neuralgical centres in civil case proceedings.] MJ 7-8/90:667-672.

ÚJLAKI László: Méltányosság a polgári eljárásban. [Equity in civil procedure.] ÁJ 3-4/89:847-868.

XIII. CRIMINAL PROCEDURE

Articles

LŐRINCZY György: Gondolatok a büntető eljárás "nyomozati" (előkészítő) szakaszának reformjáról. [Ideas on the reform of the investigation (preparatory) phase of criminal proceedings.] MJ 12/90:1055-1061.

PÁL Lajos: A büntetőbírói ítélet társadalombiztosítási jogkövetkezményei. [The consequences of a criminal sentence in the field of social security.] JK 7-8/90:283-290.

PUSZTAI L[ászló]: Freie Beweiswürdigung und das Gutachten. [Free assessment of evidence and expert's views.] AJurid. 1-2/90:3-26.

SCHÄFER Annamária: Az előzetes letartóztatás bírói elhatározásának problémáiról. [Problems concerning the judicial decision of remand.] MJ 10/90:815-826.

VARGA Zoltán: A nyomozati vallomás felolvasásának néhány problémája. [Problems of reading the testimony made during investigation.] MJ 12/90:1062-1065.

XIV. INTERNATIONAL LAW

Books

LAMM Vanda: Az államok közötti viták bírói rendezésének története. [Közzéteszi az] MTA Állam- és Jogtudományi Intézet. [History of the judicial settlement of interstate disputes.] Bp. Akad. K. 1990, 162 [2] pp. /Jogtudományi értekezések./ Bibliogr. passim.

Articles

HEINERNÉ KECSKÉS Aranka: A Nemzetközi Munkaügyi Szervezet normaalkotói tevékenysége. [The normestablishing activity of the International Labour Organization.] = Antalffy-emlékkönyv. 1990, 67-72.

KARDOS Gábor: Mi is az a nemzetközi soft law? [What is soft international law?] = ELTE Acta. 30. köt. 1990, 69-76.

KECSKÉS L[ászló]: State immunity and liability for damages. AJurid. 1-2/90:91-127.

MAVI Viktor: Univerzalizmus és regionalizmus az emberi jogok nemzetközi szabályozásában. [Universalism and regionalism in the international regulation of human rights.] ÁJ 3-4/89:757-773.

MAVI V[iktor]: Social and economic rights of refugees. AJurid. 1-2/90:137-143.

MAVI Viktor: Az Európa Tanács és az emberi jogok nemzetközi védelme. [The Council of Europe and the international protection of human rights.] JK 7-8/90:264-271.

NAGY Boldizsár—SZÉNÁSI György: A nemzetközi szerződések jogának újabb kodifikációja. Bécs, 1986. [Recent codification of the law of international contracts. Vienna, 1986.] = ELTE Acta. 30. köt. 1990, 77-90.

NAGY Károly: Önvédelem és jogos védelem a mai nemzetközi jogban. [Self-protection and rightful protection in contemporary international law.] = Antalffy-emlékkönyv. 1990, 177-192.

USTOR Endre: A kilencvenes évek: a nemzetközi jog évtizede. [The nineties, a decade of international law.] JK 7-8/90:306-310.

XV. PRIVATE INTERNATIONAL LAW

Books

SÁNDOR Tamás: A nemzetközi adásvétel. Az áruk nemzetközi adásvételéről szóló 1980. évi ENSZ-egyezmény magyarázata. [International sale. Comments to the UN Convention of 1980 on the international trade of commodities.] [Bp.] Napraforgó K. [1990] 434 [2] pp. Bibliogr. 421-425.

Article

MÁDL F[erenc]: Die Parteiautonomie im ungarischen internationalen Privatrecht. [Autonomy of the parties in Hungarian private international law.] AJurid. 1-2/89:289-305.

XVI. HISTORY OF STATE AND LAW

Books

BAKA András: Eötvös Józseftől Jászi Oszkárig. A magyar nemzetiségi politikai gondolkodás változásai. [From József Eötvös to Oszkár Jászi. Changes in Hungarian political thinking on the nationalities.] Bp. Közgazd. és Jogi K. 1990, 245 [2] pp. Bibliogr. 217-234.

ÉRSZEGI Géza: Az Aranybulla. [Latin nyelvű szövege és magyar fordítása. The Golden Bull. 1222, 1231. Text in latin with Hungarian translation.] [Bp.] Helikon K. 1990, 50 [2] pp.

KURUCZ Mihály: A szövetkezeti jogi felelősség történeti fejlődése a jogi szabályozás tükrében. [Közzéteszi az] Eötvös Loránd Tudományegyetem, Állam- és Jogtudományi Kar. [Historical development of responsibility under the law of co-operatives as reflected in codification.] Bp. OMIKK ny. [mimeogr.] 1990, 94 pp. /A jogi felelősség- és szankciórendszer elméleti alapjai./ Bibliogr. 93-94.

MEZEY Barna: A büntetőjogi felelősségrevonás intézményi hátterének kialakítása a 18-19. században. Az önálló magyar büntetésvégrehajtás jogi és szervezeti kereteinek kiépítése. [Közzéteszi az] Eötvös Loránd Tudományegyetem, Állam- és Jogtudományi Kar. [Formation of the institutional background of criminal responsibility in the 18-19. centuries. Establishment of the legal organizational frames of the separate administration of punishments in Hungary.] Bp. OMIKK házi ny. [mimeogr.] 1990, 102 pp. /A jogi felelősség- és szankciórendszer elméleti alapjai./ Bibliogr. 98-102.

NAGY Marianna: Az államigazgatási jogi szankció szabályozásának története. [Közzéteszi az] Eötvös Loránd Tudományegyetem, Állam- és Jogtudományi Kar. [History of the regulation of legal sanctions in state administration.] Bp. OMIKK ny. [mimeogr.] 1990, 90 pp. /A jogi felelősség- és szankciórendszer elméleti alapjai 11./ Bibliogr. passim.

WERBŐCZY István: Tripartitum. A dicsőséges magyar királyság szokásjogának hármaskönyve. Latin-magyar kétnyelvű kiad. Bev. Bónis György. [Bőv. kiad. Utánny. Tripartitum. Customary law of the glorious Hungarian Kingdom. Latin Hungarian bilingual text. Enl. ed. Reprint.] Bp. Téka K. 1990, XL, 560 [2] pp. /Tudománytár./

Articles

BOBROVSZKY Jenő: 100 éves az önálló magyar védjegyoltalmi rendszer. [Hundred years of the separate Hungarian system of trade mark protection.] MTud. 11/90:1369-1370.

FARKAS Gábor: Önkormányzati tisztviselők képzése a koalíciós kormányzás idején. 1945-1948. [Professional training of the local authority staff during the coalition government. 1945-1948.] = JogtörtSZ 3. sz. 1990, 60-65.

HAMZA Gábor: Százéves a szemináriumi rendszer az ELTE Állam- és Jogtudományi Karán. [Hundred years of institute seminars in the Faculty of Legal and Administrative Sciences of the Loránd Eötvös University.] = JogtörtSZ 3. sz. 1990, 66-71.

HORVÁTH Pál: An international conference on the establishment and development of the socialist state and law. [Prague, May 20-23, 1985.] = JogtörtSZ 3. sz. 1990, 174-176.

HORVÁTH Pál: A jog újabbkori történelméhez. [On the recent history of law.] MJ 12/90:1074-1078.

JASZOVSZKY László—JASZOVSZKY Rudolf: A Magyar Alkotmány történeti áttekintése. [A historical survey of the Hungarian Constitution.] MJ 9/90:748-761.

KÁLLAY István: Meghívott bírák az úriszéken a XVIII-XIX. században. [Invited judges at the manor courts in the 18-19th centuries.] = JogtörtSZ 3. sz. 1990, 91-96.

MÁTHÉ Gábor: Intézménytörténet és jelenkor. [The history of institutions and the present time.] = JogtörtSZ 3. sz. 1990, 103-105.

MÁTHÉ G[ábor]: Ermächtigung und Regierung im Verordnungsweg. 1944-1949. [Authorization and governing by means of decrees. 1944-1949.] AJurid. 1-2/90:27-44.

MERÉNYI Kálmán: A család (házasság) büntetőjogi védelmének kezdeti kialakulása a különböző jogrendszerek ben. [Initial formation of family (marriage) protection under criminal law in various legal systems.] JK 6/90:197-203.

MEZEY Barna: Tömlöc és áristom. Börtönök a feudális Magyarországon. [Dungeons and clinks. Prisons in feudal Hungary.] = JogtörtSZ 3. sz. 1990, 3-30.

RÁCZ L[ajos]: State structure und government in 18th-century feudal absolutism. AJurid. 1-2/90:45-60.

RÉVÉSZ T[amás] Mihály: A jogtörténet jelene és jövője. [Present and future of the history of law.] = JogtörtSZ 3. sz. 1990, 97-102.

RUSZOLY József: A német tartományi rendi képviselet történetéből. [From the history of estates representation in the German Länder.] = Antalffy-emlékkönyv. 1990, 207-224.

SZABADFALVI József: "Demokrácia és jog". Adalékok Horváth Barna politikaelméletéhez. 1945/[19]46. ["Democracy and law". Contributions to Barna Horváth's theory of politics.] MKözigazg. 7/90:605-613.

SZABÓ József, N.: Rendszerváltozás és közigazgatás. A koalíciós pártok viszonya a közigazgatási értelmiséghez 1945-1946-ban. [Change of system and public administration. The relation of the coalition parties to the administrative intelligentsia in 1945-1946.] MKözigazg. 8/90:717-725.

TÓTH Lajos: A magyar agrár szövetkezés eszméje és szabályozása 1948 előtt, különös tekintettel a társadalmi szervezeti jellegre. [The idea and regulation of agricultural cooperation in Hungary prior to 1948, with particular respect to its social organisation character.] = Antalffy-emlékkönyv. 1990, 241-247.

TRÓCSÁNYI László: Visszaemlékezés az Igazságügyminisztérium régi tisztviselői karára. [Reminiscences of the staff of the Hungarian pre-war Ministry of Justice.] MJ 12/90:1079-1080.

XVII. ROMAN LAW

Books

HAMZA, G.: Comparative Law and Antiquity, Akadémiai Kiadó, Budapest, 1991, 186 pp.

Cf. BROSY, R.: Bekämpfung versteinerter Vorurteile und andere aktuelle Aufgaben im Unterricht des römischen Rechts, Acta Jur. et. Pol., Szeged, tom. XVII., fasc. 17. Szeged, 1970.

Articles

FÖLDI András: A biztosítási szerződés előképe a római jogban. [The archetype of insurance contract in Roman law.] JK 6/90:215-222.

JAKAB Éva: Archaikus adásvételi előírások. [Archaic prescriptions of sale.] = Antalffy-emlékkönyv. 1990, 73-94.

MOLNÁR Imre: A custodia-felelősség tartalmi elemei a klasszikus római jogban. [Elements of content of custody responsibility in the classical Roman law.] = Antalffy-emlékkönyv. 1990, 149-161.

XVIII. MISCELLANEOUS

Articles

BOKORNÉ SZEGŐ Hanna: Az Emberi Jogok Magyar Központjának megalakulása. [Establishment of the Hungarian Centre of Human Rights.] JK 5/90:187-188.

GYÖRGYI Kálmán: Egyetemi jogászképzés ma és holnap. [The present and future university training of lawyers.] MJ 7-8/90:589-596.

HAMZA Gábor: Cicero és a jogtudomány. [Cicero and jurisprudence.] = ELTE Acta. 30. köt. 1990, 36-51.

HORVÁTH Pál: Frank Ignácz emlékére születésének 200 éves évfordulója alkalmából. [Commemorating the 200th anniversary of the birthday of Ignacz Frank.] = ELTE Acta. 30. köt. 1990, 132-140.

PAPP Ignác: Antalffy György, az államtudós-politológus. [Professor György Antalffy as a scientist of the state and law and politology.] = Antalffy-emlékkönyv. 1990, 193-205.

POKOL Béla: Jogászság és jogrendszer. [Lawyers and the legal sytem.] MJ 11/90:918-930.

TRÓCSÁNYI László: Az Állam- és Jogtudományi Intézet helye a jogi dokumentáció történetében. [The place of the Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences in the history of legal documentation.] JK 6/90:232-233.

PRINTED IN HUNGARY
Akadémiai Kiadó és Nyomda Vállalat, Budapest

HUNGARIAN ACADEMY OF SCIENCES

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

Vol. 33 **1991** **N° 1–4**

AKADÉMIAI KIADÓ, BUDAPEST

ACTA JURIDICA HUNGARICA, Vol. 33

CONTENTS

STUDIES

KALEIDOSCOPE

OBITUARY

BOOK REVIEW

HUNGARIAN ACADEMY OF SCIENCES

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

AUTHORS:

Pál HORVÁTH, Professor of Law, University of Budapest
Tibor HORVÁTH, Professor of Law, University of Miskolc
Csaba VARGA, Professor, Institute for Legal and Administrative Sciences, Hungarian Academy of Sciences, Budapest
András BRAGYOVA, Senior Research Fellow, Institute for Legal and Administrative Sciences, Hungarian Academy of Sciences, Budapest
Albert TAKÁCS, Lecturer, School for Public Administration, Budapest
Miklós UDVAROS, Reserach Fellow, Hungarian Academy of Sciences, Budapest
András FÖLDI, Lecturer, University of Budapest
Alexander VIDA, Professor of Law, Legal Adviser of Danubia Ltd, Budapest

HU ISSN 1216–2574