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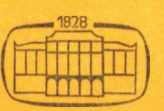

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Sein und Sollen in der modernen Rechtsphilosophie

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In der Abhandlung wird zunächst versucht, den Begriff von Sein und Sollen klarzulegen. Im Anschluss sind die zwei grundsätzlichen, typischen theoretischen Konzeptionen, die sich in der modernen bürgerlichen Rechtsphilosophie über das Verhältnis von Sein und Sollen entwickelten — einerseits der Dualismus von Sein und Sollen in Hans Kelsens Reiner Rechtslehre, anderseits das Verhältnis zwischen Sein und Sollen in den naturrechtlichen Konzeptionen — einer kritischen Analyse unterzogen. Schliesslich macht der Verfasser einen Versuch die Beziehung zwischen Sein und Sollen von marxistischem Standpunkt aus zu beleuchten.

1. In der Rechtsphilosophie gibt es Fragen — unterscheiden sie sich auch durch ihre Formulierung und ihren Inhalt von Ort und Zeit ihrer Erscheinung, von den bestehenden wirtschaftlich-gesellschaftlichen Verhältnissen, von der rechtlichen, politischen, im allgemeinen von der theoretisch-ideologischen Lage bestimmt, und weisen sie auch in ihrer eigenen Konkretheit spezifische Züge vor —, die fast in jedem Zeitalter, in jeder rechtsphilosophischen Schule oder Richtung immer wieder auftauchen und die von den bis hin gegebenen Antworten verschiedene und über diese hinausgehende Lösungen beanspruchen. So ein sogenanntes ewiges Problem der Rechtstheorie scheint das Verhältnis zwischen Sein und Sollen, konkret in seiner Beziehung zum Recht, zu sein. Dies ist scheinbar durch die historische Tatsache bewiesen, dass das Verhältnis zwischen Sein und Sollen im allgemeinen, konkretisiert aber in der Relation des Rechts — wenn auch nicht immer in dieser klaren und direkten Formulierung — für die Rechtstheorie seit dem Altertum her als problematisch behandelt wird. Aus der Tatsache, dass das Verhältnis zwischen Sein und Sollen in bezug auf das Recht sozusagen in jeder Epoche der historischen Entwicklung, beinahe in jeder rechtstheoretischen Bestrebung zur Frage gestellt wird, ja was noch mehr ist, bei grösseren und bedeutsameren gesellschaftlich-rechtlichen Wandlungen als ein ausdrücklich akutes Problem auftritt, lässt sich daraus erschliessen, dass die Bestimmung der Stelle des Rechts im Beziehungssystem des Seins und Sollens das Wesen des Rechts als gesellschaftlicher Erscheinung berührt, dass diese Frage aus den objektiven gesellschaftlich-rechtlichen Verhältnissen hervorwächst und demzufolge kein spekulatives, sondern infolge der objektiven gesellschaftlichen Erscheinungen und Beziehungen ein gegebenes, wirkliches Problem ist.

Unterzieht man nämlich die Rechtsnorm einer unmittelbaren Untersuchung, so geht ihre wesentliche strukturelle Eigenschaft hervor — die sie von anderen gesellschaftlichen Objektivationen nicht normativen Charakters klar unterscheidet —, dass sie Vorschriften, Forderungen und Möglichkeiten enthält, was soviel zu bedeuten hat, dass in jeder Norm, so auch in der Rechtsnorm — natürlich in einer spezifischen Weise und Form — »etwas *seiend* gedacht wird, das noch nicht wirklich ist«.[1] Das in der Rechtsnorm den Mitgliedern der Gesellschaft umschriebene und vorgeschriebene menschliche Verhalten ist in so mancher Beziehung nicht das wirkliche, tatsächliche, konkrete menschliche Verhalten; die Rechtsnorm ist nämlich die Widerspiegelung des wirklichen menschlichen Verhaltens, und zwar eine Ausprägung eigener Art, nicht in seiner konkreten Einzelheit, sondern in seiner abstrakten Besonderheit, in seiner Typizität; das ist kein erkenntnistheoretisches Erfassen des wirklichen menschlichen Verhaltens, sondern seine normative Bestimmung, in der es auf die Mitglieder der Gesellschaft, der Rechtssubjekte bezogen mit allgemeiner Gültigkeit als das zu befolgende, zu realisierende Verhalten erscheint. Diese wesentlichen, strukturellen Züge der Rechtsnorm kommen konzentrierter in der Feststellung zum Ausdruck, dass das Recht, die Rechtsnorm einen Sollen-Charakter hat.

Dieser wesentliche Zug des Rechts und das wirkliche Problem der Rechtstheorie macht sich in der Geschichte der Rechtsphilosophie im allgemeinen, konkret auch in der modernen Rechtsphilosophie — davon abhängend, welcher Sinn dem Sein und dem Sollen verliehen und wie der Charakter ihrer Beziehung bestimmt wird — in den unterschiedlichsten Formen bzw. Formulierungen und mit verschiedenem Inhalt bemerkbar. Der abweichende Sinn und die verschiedenen Beziehungen der Frage und ihrer Beantwortung verursachen gewisse Verirrungen nicht allein in Begreifen und Beleuchtung des eigentlichen Problems, eines der wesentlichsten Eigenschaften des Rechts, sondern hüllen auch jene wichtige Frage in wohltätige Dunkelheit, die hinter jedem Versuch, das Verhältnis zwischen Sein und Sollen auf das Recht bezogen zu klären, verborgen ist, nämlich das Problem von Materialismus und Idealismus. Das Verhältnis von Sein und Sollen ist also auf das Recht bezogen nicht bloss ein grundlegendes Problem der modernen Rechtsphilosophie, weil es auf die Klärung einer wesentlichen Eigenschaft der Rechtsnorm abzielt, sondern weil dieses Problem, wenn auch nicht in seiner Unmittelbarkeit, schliesslich aber doch auf die grundsätzliche Frage der Philosophie: auf das Verhältnis zwischen Sein und Bewusstsein zurückzuführen ist. Um jedes Missverständnis zu vermeiden, soll hier die bestehende Vermittelbarkeit stark betont werden. Es würde nämlich zu irreparablen Irrtümern führen, wenn wir mit einer unzulässigen Verein-

[1] HEGEL: *Phänomenologie des Geistes*. Leipzig, 1949. S. 426.

fachung und Vulgarisierung das Verhältnis zwischen Sein und Sollen unmittelbar als die Beziehung zwischen Sein und Bewusstsein auffassten. Wir meinen, es genügt hier so viel vorauszuschicken, um zu beleuchten, dass das Verhältnis zwischen Sein und Sollen ein grundsätzliches Problem der modernen Rechtsphilosophie darstellt; die weitere Aufgabe und das Ziel der Abhandlung ist die detailliertere Darstellung der Zusammenhänge zwischen den erwähnten zwei Relationen. Vorangehend ist es aber notwendig, die verschiedenartig ausgelegten Bestimmungen des Seins und Sollens durchzusehen und den Begriff dieser Kategorien zu klären.

2. Es ist keine leichte Aufgabe, den Begriff von Sein und Sollen zu klären. Trotzdem können wir uns mit der Agnostizismus und Irrationalismus andeutenden Feststellung Kelsens nicht begnügen: »Der Unterschied zwischen Sein und Sollen kann nicht erklärt werden. Er ist unserem Bewusstsein unmittelbar gegeben.«[2] Wir dürfen uns natürlich nicht verlocken lassen, alle Versuche zu untersuchen, die sich in der modernen Rechtsphilosophie auf die Erklärung von Sein und Sollen richteten. Wir müssen uns begnügen, von den Bestrebungen, die die Bedeutung des Seins und Sollens verschiedenartig bestimmen, die grundlegenden, typischen Tendenzen hervorzuheben. Sein und Sollen haben nämlich in den einzelnen rechtstheoretischen Konzeptionen unterschiedliche Bedeutung, je nachdem, in welcher Art von Relationen, in welchem Beziehungssystem Sein und Sollen erscheinen. Als Kelsen das Problem von Sein und Sollen auf das Naturrecht bezogen analysiert, weist er sehr richtig darauf hin, dass »the contrast of reality and norm ('is' and 'ought') must be recognized as relative«.[3] Dies scheint auch die Tatsache zu unterstützen, dass insofern wir das Sein nicht als eine relative, in irgendeiner Relation erscheinende, sondern – wie auch Franz Achermann[4] – als eine Kategorie auffassen, die alles Existierende, die Gesamtheit der existierenden Sachverhalte, das Materiale eben so, wie das Ideale umfasst, ist das nicht allein gegenüber der grundlegenden Frage der Philosophie indifferent, lässt nicht nur den Gegensatz zwischen Materialismus und Idealismus verschwinden, sondern sagt auch über die früher umschriebene, wesentliche Eigenschaft des Rechts wenig, höchstens soviel – was Hermann Klenner als beachtenswert bezeichnet[5] –, dass das Sollen ein Sein ist. Das bedeutet nämlich: »Wie über andere Sachverhalte, können auch über das Sollen sinnvolle Aussagen gemacht werden, z. B. über seine Entstehung, Struktur und Wirkung, über seine Geltung und seinen Wert.«[6] Es ist kaum zu bezweifeln, dass in gewissen Beziehungen und

[2] KELSEN, H.: *Reine Rechtslehre.* Wien, 1960. S. 5.

[3] KELSEN, *General theory of law and state.* Cambridge—Massachusetts, 1949. S. 393.

[4] ACHERMANN, F.: *Das Verhältnis von Sein und Sollen als ein Grundproblem des Rechts.* Winterthur, 1955. S. 47.

[5] KLENNER, H.: *Lenins »Empiriokritizismus« und die Grundfrage der Rechtstheorie.* Staat und Recht, 1967. S. 1618.; denselben Standpunkt vertritt in seinem jüngsten Buch STOYANOVITCH, K.: *Le domaine du droit.* Paris, 1967. S. 444.

[6] KLENNER: a. a. O S. 1618.

im Zusammenhang mit einigen rechtsphilosophischen Konzeptionen auch dies nicht unbeachtet bleiben kann. Es ist des Nachdenkens wert, dass die Rechtsnorm eine gesellschaftliche Erscheinung, eine konkrete gesellschaftliche Tatsache und Wirklichkeit, also ein Sein ist, und als solches nicht nur erkennbar ist, sondern im Gewebe der gesellschaftlichen Verhältnisse als eine reelle Kraft und als reeller Faktor wirkt. Es ist angezeigt, dies den philosophischen Ansichten gegenüber zu betonen, die entweder ausschliesslich auf den Sollen-Charakter der Rechtsnorm[7] oder auf irgendein das Recht bestimmendes Sollen konzentriert[8] vergessen, dass im früher geschilderten Sinn auch das Sollen ein Sein darstellt. Als wir die rechtsphilosophischen Konzeptionen erwähnten, die den Sollen-Charakter der Rechtsnorm bzw. das Recht bestimmende Sollen in den Mittelpunkt des Interesses stellen, deuteten wir schon auf die beiden Haupttendenzen hin, wo sich der — von Kelsen hervorgehobene — relative Charakter von Sein und Sollen zeigt und die sogleich auch in die verschiedenen Bedeutungen von Sein und Sollen ein Licht bringen.

Es genügt, die moderne Rechtsphilosophie flüchtig durchzugehen, um die relative und rationale Bedeutung von Sein und Sollen klar vor uns zu sehen. Diese zwei rechtsphilosophischen Richtungen, in deren Spiegel sich der relative Charakter von Sein und Sollen auf das Recht bezogen am klarsten erblicken lässt, sind der Rechtspositivismus und die naturrechtliche Auffassung. Während in der positivistischen Rechtsphilosophie das Sollen die positive Rechtsnorm, das in der positiven Rechtsnorm sich ausdrückende Sollen darstellt, demgegenüber als Sein eine realisierte, konkrete, tatsächlich verwirklichte Form des in der Rechtsnorm mit Sollen-Charakter formulierten und umschriebenen menschlichen Verhaltens erscheint, wird in den naturrechtlichen Konzeptionen das Sein einerseits durch das positive Recht, anderseits durch die verschiedenartig aufgefasste menschliche Natur verkörpert, das Sollen ist aber das aus ihr stammende, und das positive Recht bestimmende Naturrecht. Aus all dem wird begreiflich, dass dieselbe Erscheinung, namentlich das positive Recht, in einer Relation als Sollen, in der anderen dagegen als Sein auftritt. Diese zwei rechtstheoretischen Tendenzen zeigen uns nicht allein die Relativität von Sein und Sollen in bezug auf das Recht, sondern auch jene Tatsache, dass sowohl das Sein wie das Sollen je nachdem, in welchen Relationen sie erscheinen, unterschiedliche Bedeutungen besitzen. Was immer auch in den verschiedenen Relationen der konkrete Bedeutungsinhalt von Sein und Sollen sei, ist es beiden allemal gemein, dass dem Sein das Sollen, und umgekehrt, dem Sollen das Sein gegenübersteht. Das soll hier nachdrücklich betont werden, um ganz klar zu sehen, dass in diesen Relationen das Sein nicht mehr als eine Kategorie erscheint, die alles Existierende umfasst,

[7] KELSEN: *Reine Rechtslehre*, S. 3—9., ff.

[8] Solche sind meistens die naturrechtlichen Konzeptionen, die das Naturrecht als Sollen über das positive Recht als Sein stellen.

sondern die ihren Sinn und ihre Bedeutung in der Gegenüberstellung mit dem Sollen, durch ihre Manifestation in der Beziehung zum Sollen erhält; und umgekehrt, auch das Sollen hat nur in der Relation des Seins einen Sinn. Mit anderen Worten: das Sein stellt hier das Wirkliche, Tatsächliche, das schon Verwirklichte dem Sollen gegenüber dar, das etwas zu realisierendes, zu verwirklichendes, also noch nicht das Wirkliche ausdrückt. »Denn *Fordern* drückt aus, dass etwas *seiend* gedacht wird, das noch nicht wirklich ist.«[9]

Diese ziemlich abstrakte und allgemeine Bestimmung von Sein und Sollen erhält in der modernen Rechtsphilosophie nicht allein dadurch konkreten Sinn und konkrete Bedeutung, die sich bisweilen voneinander wesentlich unterscheiden, da sie in verschiedenen Relationen auftreten, und ihr Verhältnis relativ ist, sondern weil das Sein — obwohl in Relationen gleicher Natur, also wo das Sollen das positive Recht bzw. das Naturrecht ist — verschiedene konkrete Inhalte vertritt. Um dies anzudeuten, genügt hier einerseits innerhalb der Tendenz, die das positive Recht für Sollen ansieht, auf die Auffassungen hinzuweisen, die das Sein als ein empirisches, konkretes menschliches Verhalten (Kelsen), als Gesetzmässigkeiten der Natur, Biologie, Anthropologie und Psychologie (ontologische Argumentation) oder als gesellschaftliche Verhältnisse (Soziologie) erklären; anderseits müssen hier, bei der das Sollen als Naturrecht bezeichnenden Tendenz, jene Sein-Interpretationen erwähnt werden, nach denen das Sein »das Wesen der Natur« (Rommen), das »apriori Wesen der Sache« (Phänomenologie) oder die auf die verschiedenste Art verstandene »Natur der Sache« darstellt. Es bedarf kaum einer nachdrücklicheren Betonung, dass sich diese Buntheit und Varietät des konkreten Inhalts auch in der Beziehung des Sollens zeigt; man denke nur an die zahlreichen abweichenden Bestimmungen in der modernen Rechtsphilosophie über das Wesen des Rechts.

Eine allgemeine Kategorie, die alles Existierende, alle existierenden Erscheinungen umfasst, hat in der marxistischen Philosophie und Rechtstheorie nicht Boden gefasst, da sie geeignet ist, den grundsätzlichen Unterschied zwischen Sein und Bewusstsein, gesellschaftlichem Sein und gesellschaftlichem Bewusstsein zu verwischen. Wie der dialektische Materialismus, so lehnt auch die auf ihm beruhende Rechtstheorie die von Kant klassisch verfasste Tendenz kategorisch ab, die die Erscheinungen der Welt auf die gegensätzlichen, antinomischen Bereiche des Seins und Sollens zerlegt. Wenn auch die sich zur dialektischen Einheit der materiellen Welt bekennende marxistische Rechtstheorie die antinomische Gegenüberstellung von Vernunft und Verstand, Natur- und Freiheitsbegriff, theoretischer und praktischer Vernunft — also Sein und Sollen als zwei Welten an sich vorauszusetzen — nicht akzeptiert, kann sie aber auch nicht bestreiten, dass im Bereich des Rechts eine solche eigentümliche, wirkliche Erscheinung, der oben umschriebene Sollen-

[9] HEGEL: a. a. O. S. 309.

Charakter der Rechtsnorm wahrzunehmen ist, nämlich, dass die Struktur der Rechtsnorm ein Sollen ausdrückt. Diese Sollen-Struktur der Rechtsnorm ist eine tatsächliche, unbestreitbare Eigenschaft des Rechts als gesellschaftlicher Erscheinung. Man darf auch nicht vergessen — worauf ebenfalls schon hingewiesen wurde —, dass dieser Sollen-Charakter des Rechts nur im Zusammenhang mit der Wirklichkeit, mit dem Sein verstanden sein kann. Aus dem Gesagten folgt, dass die marxistische Rechtstheorie diesen wirklich existierenden Sollen-Charakter des Rechts auch nur dann beleuchten kann, wenn sie diesem Sollen ein Sein gegenüberstellt. Bevor wir aber an die ausführlichere Analyse dieser Frage herangingen, müssen wir wiederholen, was wir auch bisher schon öfters betont haben, dass die Feststellung, laut der das Recht einen in diesem Sinne aufgefassten Sollen-Charakter hat, nichts mit jenen Versuchen der modernen Rechtsphilosophie zu tun hat, die den Spuren der neukantianischen Rechtsphilosophie folgen und das Recht in die Welt des sogenannten »Sollens« einordnen. Es darf hier kein Missverständnis geben: es handelt sich bloss um einen wesentlichen Zug, um eine strukturelle Eigenschaft des Rechts als einer wirklichen institutionellen, gesellschaftlichen Erscheinung.

Es stellt sich aber in drängender und selbstverständlicher Weise die Frage: hat das Recht diesen Sollen-Charakter, was versteht dann die marxistische Rechtsphilosophie unter Sein? Da wir nun den Sinn eines Seins forschen, das einem charakteristischen Zug des Rechts, seinem Sollen-Charakter gegenübersteht, ist es klar, dass dieses Sein keine allgemeine Kategorie sein kann, die jede existierende Erscheinung, also auch das Recht in sich erfasst. Das sich im Recht manifestierende Sollen als etwas, was nicht wirklich, nur seiend gedacht ist, kann man nur in dem Zusammenhang vollkommen verstehen, wo das mit dem Sollen-Charakter und in der Sollen-Struktur ausgedrückte, seiend gedachte, aber nicht Wirkliche der seienden Wirklichkeit gegenübersteht. Nachdem in der Sollen-Struktur der Rechtsnorm als Sollen im allgemeinen irgendein menschliches Verhalten ausgedrückt ist, und in der Rechtsnorm ein zu verwirklichendes menschliches Verhalten als Forderung formuliert ist, erscheint in der Beziehung auf das so umschriebene Verhalten von Sollen-Charakter als Wirklichkeit, als Sein unmittelbar das tatsächliche, der Vorschrift der Rechtsnorm entsprechende menschliche Verhalten. Wie den Sollen-Charakter des Rechts, kann man auch das in seiner Unmittelbarkeit als Sein erscheinende konkrete menschliche Verhalten nicht isoliert an sich auffassen, sondern mit all seinen Momenten und Zusammenhängen, durch welche und in welchen sich dieses Verhalten offenbart. Der Mensch als Träger gesellschaftlicher Verhältnisse bringt durch sein konkretes, tatsächliches Verhalten gesellschaftliche Verhältnisse hervor und verwirklicht sie. Die Wirklichkeit, die Tatsächlichkeit des im Recht mit Sollen-Charakter bestimmten menschlichen Verhaltens ist also das wirkliche Verhalten des Trägers gesellschaftlicher Ver-

hältnisse. Das mit dem Sollen-Charakter des Rechts auftretende Sein ist also nicht das konkrete, tatsächliche menschliche Verhalten in seiner einfachen Unmittelbarkeit, sondern jenes Verhalten des gesellschaftliche Verhältnisse tragenden Menschen, das gesellschaftliche Verhältnisse realisiert und verwirklicht. Hierzu wollen wir noch eine Bemerkung hinzufügen. Wie das in der Sollen-Struktur der Rechtsnorm als Sollen formulierte menschliche Verhalten als Nicht-Wirkliches mit Sollen-Charakter im allgemeinen nicht in seiner konkreten Einzelheit, sondern in seiner Typizität erscheint, stellt das mit dem Sollen zusammenhängende Sein auch kein konkretes, individuelles menschliches Verhalten dar, sondern die typischen Verhalten und die durch sie entstehenden gesellschaftlichen Verhältnisse.

Die Kategorien von Sein und Sollen haben also im Lichte der materialistischen Dialektik folgende Bedeutung: einerseits ist das Sollen keine selbständige, eigene Welt der Erscheinungen; es gehört bloss zu dem Wesen, der strukturellen Eigenschaft gewisser Erscheinungen und darunter auch des Rechts, dass sie etwas zu verwirklichendes, eine Forderung ausdrücken; anderseits umfasst das Sein, im Zusammenhang mit diesem Sollen nicht alles Existierende im allgemeinen, sondern bloss die Wirklichkeit der im Recht mit Sollen-Charakter ausgedrückten menschlichen Verhalten und die durch sie zustande gebrachten Verhältnisse.

Untersucht man genauer die Versuche der modernen Rechtsphilosophie, die auf die Klärung des Begriffes von Sein und Sollen ausgerichtet sind, so lassen sich schon in der Bestimmung des Begriffes von Sein und Sollen wesentliche Unterschiede erkennen. Die Unterschiede, die zwischen diesen modernen rechtsphilosophischen Bestrebungen bestehen, der verschiedene Charakter der theoretischen Stellungnahmen und Konzeptionen zeigen sich ganz klar in den Erörterungen über das Verhältnis, über die Beziehungen von Sein und Sollen.

3. Wenn man überlegt, dass man bei der Analyse des Begriffes von Sein und Sollen zur Feststellung gelangte, wonach in der modernen Rechtsphilosophie hinsichtlich der Relativität von Sein und Sollen sich zwei Haupttendenzen herausgebildet haben, ist es nicht überraschend auch in den modernen rechtsphilosophischen Konzeptionen, die das Verhältnis zwischen Sein und Sollen analysieren, im wesentlichen zwei grundlegende Richtungen wahrnehmen zu können. Zusammenfassend kann man über das Wesen dieser zwei bestimmenden Tendenzen folgendes sagen. Einerseits gibt es rechtsphilosophische Konzeptionen, die behaupten: bedeutet auch der Dualismus von Sein und Sollen nicht soviel, dass sie beziehungslos nebeneinander stehen, könne man zwischen Sein und Sollen nicht von einem Verhältnis, einer gegenseitigen Beziehung sprechen, wo das eine durch das andere bestimmt ist, das eine von dem anderen abgeleitet werden kann; anderseits wieder soll man jene, zu den früheren diametral entgegengesetzten rechtstheoretischen Auffassungen beach-

ten, die das gegenseitige Verhältnis zwischen Sein und Sollen feststellen, nämlich dass das eine von dem anderen abgeleitet werden kann, und sie zueinander in einer sich gegenseitig determinierenden Beziehung stehen. Diese zwei grundlegenden Tendenzen, die in der modernen Rechtsphilosophie hinsichtlich des Verhältnisses zwischen Sein und Sollen wahrzunehmen sind, konzentriert Franz Achermann in den Gegensatz von Naturrecht und Positivismus.[10] Das ist wahr, aber nicht die volle Wahrheit. Achermann zieht nämlich einerseits jene naturrechtlichen Auffassungen nicht in Betracht, die die positivistische Argumentation fast Wort für Wort wiederholen, die Unableitbarkeit des Sollens vom Sein betonen;[11] anderseits vergisst er jene modernen rechtstheoretischen Konzeptionen zu erwähnen, die ein gegenseitiges Verhältnis zwischen Sein und Sollen zwar feststellen, aber innerhalb der naturrechtlichen Doktrin kaum eingereiht werden können; so z. B. gewisse rechtssoziologische Bestrebungen, ganz zu schweigen von der marxistischen Rechtstheorie. Was also die Beziehung zwischen Sein und Sollen betrifft, sind innerhalb der modernen Rechtsphilosophie tatsächlich die erwähnten zwei Haupttendenzen vorhanden, man soll aber hinzufügen, dass diese zwei theoretischen Richtungen unmittelbar in den verschiedensten rechtsphilosophischen Konzeptionen auftreten. Daraus lässt sich folgendes erschliessen: Untersucht man das Verhältnis zwischen Sein und Sollen innerhalb dieser zwei grundlegenden Tendenzen der modernen Rechtsphilosophie, sind stets jene spezifischen Argumentationen zu beachten, die die verschiedenen rechtsphilosophischen Konzeptionen kennzeichnen.

Nachdem das Verhältnis von Sein und Sollen auf klassische Weise, in seiner geschichtlichen Erscheinung als Problem zuerst von Kant dargelegt wurde, und eine schon erwähnte, den Charakter dieses Verhältnisses bestimmende, grundlegende Tendenz – die wir versuchen, hauptsächlich an Hand der Theorie von Hans Kelsen darzustellen – auf Kants Fragestellung zurückzuleiten ist, wollen wir unsere Auseinandersetzungen mit dieser Tendenz der modernen Rechtsphilosophie beginnen. Es gibt keine entsprechendere Stelle zu unserem Vorhaben, den Standpunkt der Reinen Rechtslehre darzustellen, durch den sie das Verhältnis zwischen Sein und Sollen klarlegt, als die innerhalb des Rechtspositivismus nunmehr als grundlegend angenommene Feststellung Kelsens: ». . .daraus, dass etwas ist, nicht folgen kann, dass etwas sein soll, so wie daraus, dass etwas sein soll, nicht folgen kann, dass etwas ist.«[12] Mit Hilfe der formalen Logik können wir also weder aus dem Sein auf das Sollen noch aus dem Sollen auf das Sein schliessen.

Eine weitere logische Unterstützung und Festigung dieses Kelsenschen Grundsatzes durchführt Ulrich Klug in seiner interessanten Abhand-

[10] ACHERMANN: a. a. O. S. 3.

[11] COHEN, M. R.: *Reason and nature*. Glencoe, Illinois, 1953. S. 419. Zitiert von BROWN, B. F.: *The natural law reader*. New York, 1960. S. 182.

[12] KELSEN: a. a. O. S. 5.

lung,[13] die er dem Ziel widmet, einerseits die logische Begründung der Grundthesen der reinen Rechtslehre, anderseits die logische Verfehltheit jenes »Zauberkunststückes« nachzuweisen, das aus dem Sein ein Sollen hervorbringt. Klugs ganze Argumentation beruht auf jener grundsätzlich formallogischen Regel der syllogistischen Folgerung, nach der im Schluss-satz kein Terminus enthalten sein kann, der in der Prämisse nicht vorkommt. Dies verfasst Klug mit anderen Worten im sogenannten normen-logischen Regress-Axiom: »Alles, was notwendige Bedingung für das Sein dessen ist, was sein soll, soll ebenfalls sein.«[14] Aus dem Sein kann man also auf formallogischem Wege zu keinem Sollsatz gelangen. Ja sogar nicht die logische Folgerung aus Sein auf Sollen allein, auch der logische Widerspruch zwischen den beiden ist ausgeschlossen, denn ein logischer Widerspruch kann nur zwischen Sein und Sein oder Sollen und Sollen, aber nicht zwischen Sein und Sollen bestehen.[15] Durch diese formallogischen Überlegungen gelangt Klug zur Feststellung, dass alle rechtsphilosophischen Konzeptionen, die aus dem Sein auf das Sollen schliessen, in der Terminologie der traditionellen Folgerungen eine Sprung-Deduktion, bestenfalls ein Enthymem, einen gekürzten Syllogismus *(syllogismus decurtatus)* ergeben.

Es ist kein Zufall, dass Klug so stolz betont: Bis heute ist keinem der Gegner Kelsens geglückt aus einer Aussage über ein Sein einen logisch korrekten Schluss auf eine Aussage über ein Sollen zu ziehen,[16] wenn wir es auch für kein »Zauberkunststück« halten, dass aus dem Sein ein Sollen entstehen soll.[17] Wie Kelsens, so sind nämlich auch Klugs Folgerungen auf das Verhältnis zwischen Sein und Sollen nach der Regel der formalen Logik wirklich korrekt. Aufgrund der erwähnten, traditionellen Formel des Syllogismus kann man tatsächlich zu keiner Folgerung gelangen, ein Terminus derer in den Prämissen nicht vorgekommen ist. In der sterilen Welt der formalen Logik ist also jener Grundsatz des Rechtspositivismus, dass aus dem Sein nach den orthodoxen Regeln der formalen Logik das Sollen nicht abgeleitet werden kann, unantastbar und unanfechtbar. Wir können aber nicht genug betonen, dass dies nur für die formale Logik, nicht aber für den Bereich des Rechts bzw. der Rechtstheorie gilt. Man darf jedoch nicht vergessen – was Kelsen selbst manchmal als etwas selbstverständliches erwähnt –, dass das Recht, die Rechtsnorm eine gesellschaftliche Erscheinung und kein logischer Begriff, keine logische Kategorie ist. Spricht man von einer wesentlichen Eigenschaft, von dem Sollen-Charakter des Rechts als gesellschaftlicher Kategorie, darf man nicht versäumen darauf hinzuweisen, dass das Wesen des Rechts in seiner

[13] KLUG, U.: *Die Reine Rechtslehre von Hans Kelsen und die formallogische Rechtfertigung der Kritik an dem Pseudoschluss von Sein auf das Sollen. Law, State and International Legal Order. Essays in Honour of Hans Kelsen.* Knoxville, 1964. S. 153—171.
[14] KLUG: a. a. O. S. 157.
[15] KELSEN: a. a. O. S. 102.
[16] KLUG: a. a. O. S. 154.
[17] KLUG: a. a. O. S. 160.

Gesellschaftlichkeit besteht; anderseits — so sehr verlockend auch wäre, in der Beziehung des Rechts irgendein scheinbar harmonisches, formallogisches Bauwerk zu errichten — kann man die in Frage stehende Eigenschaft dieser im wesentlichen gesellschaftlichen Erscheinung, ihren Sollen-Charakter nicht als eine syllogistische Folgerung, eine rein logische Kategorie behandeln und verstehen. Die Logik der Reinen Rechtslehre ist also korrekt, wenn es sich um eine logische Folgerung aus Sein auf Sollen handelt, aber sie war schon vornherein verfehlt, da sie einen Zusammenhang, der im wesentlichen kein erkenntnistheoretischer ist, ausschliesslich aufgrund der Regeln der formalen Logik verstehen und erklären will. Kelsen und seine Anhänger überschieben also die ontologische Frage der Beziehung zwischen Sein und Sollen auf das Gebiet der Erkenntnistheorie, sie fassen einen ontologischen Zusammenhang als eine gnoseologische Beziehung auf, und wenden auf sie, unzulässig, ausschliesslich die Regeln der formalen Logik an. Und was mit anderen Worten denselben fatalen Irrtum bedeutet: Die Untersuchung des Sollen-Charakters des Rechts im Zusammenhang mit dem Sein als einer rein erkenntnistheoretischen, logischen Kategorie durchführen sie nur um den Preis, dass sie das Recht, die Rechtsnorm und einen ihrer wesentlichen Momente, ihren Sollen-Charakter ihrer Gesellschaftlichkeit berauben. Obwohl das Verhältnis zwischen Sein und Sollen auf das Recht bezogen nur als ein ontologisches und im wesentlichen gesellschaftliches Verhältnis verstanden werden kann.

Ein beliebtes, viel diskutiertes und sehr zeitgemässes Problem der modernen Rechtsphilosophie ist, ob man auf die Rechtsnorm, allgemeiner formuliert auf das rechtliche Sollen die Kategorien von logischer Wahrheit und Falschheit anwenden kann.[18] Wie betont diese Frage im Mittelpunkt der Rechtsphilosophie steht, dafür gibt es keinen besseren Beweis, als dass die in der modernen Rechtsphilosophie auftretenden und sich immer mehr verbreitenden »norm-logischen«, »deontisch-logischen« Tendenzen auf dieses Grundproblem zurückzuführen sind. [19] Sie begründen die Berechtigung der Norm-Logik, der deontischen Logik in der Rechtsphilosophie nämlich letzten Endes mit der Behauptung, dass die Kategorien der traditionellen Logik »wahr« und »falsch« (»unwahr«) in der Beziehung der Normen, der Sollsätze nicht gültig sind, weswegen auch in der Welt des Sollens eigentümliche, deontische, normlogische Regeln festgestellt werden können. Wir können auch weitergehen und darauf aufmerksam machen, dass sich die Frage, nach der die Anwendbarkeit

[18] ACHERMANN: a. a. O. S. 66—67.; LARENZ, K.: *Methodenlehre der Rechtswissenschaft.* Berlin, Göttingen, Heidelberg, 1960. S. 152.; WEINBERGER, O.: *Können Sollsätze (Imperative) als wahr bezeichnet werden.* Rozpravy, Rocnik 68. Praha, 1958. S. 9.; KLAUS, G.: *Die Macht des Wortes.* Berlin, 1965. S. 166—171. usw.

[19] WRIGHT, G. H.: *Norm and action. A logical enquiry.* London, New York, 1963.; KALINOWSKI, G.: *Théorie des propositions normatives.* Studia Logica. 1. 1953.; WEINBERGER: *Die Sollsatzproblematik in der modernen Logik.* Rozpravy Ceskoslovenske Akademie Ved. Praha, 1958.

des logisch Wahren und Unwahren auf das Recht, auf die Rechtsnorm bezogen im wesentlichen gegen die Widerspiegelungstheorie des dialektischen Materialismus richtet, und offen oder mittelbar bestreitet, dass das Sollen als die »Abbildung« des Seins, als seine Widerspiegelung anzusehen sei. Wie dem nun sei, steht eines fest: Das logisch Wahre und Unwahre, die materialistische Widerspiegelungstheorie auf das Sollen, auf die Rechtsnorm bezogen als problematisch aufzuwerfen, stellt eigentlich nichts anderes, als das Verhältnis zwischen Sein und Sollen dar. Es ist also nicht überraschend, wenn die Frage mit dem geschilderten Doppelsinn auch in Kelsens Reiner Rechtslehre eine Formulierung bekommt. Umso mehr aber die paradoxe Art der Problemstellung und der Lösung, was des Nachdenkens wert ist. Der Geltungsbereich des logischen Wahren und Falschen ist zweifellos die Erkenntnistheorie. Dass Kelsen diese im wesentlichen erkenntnistheoretischen Kategorien mit dem Sollen, mit der Rechtsnorm überhaupt in Beziehung stellt, trifft uns nicht unerwartet, da er — wie schon bekannt — auch die zwei selbständigen Welten von Sein und Sollen als eine erkenntnistheoretische, logische Beziehung geschaffen und begründet hatte. Die auf das Sollen gerichtete Frage, ob die Rechtsnorm, das Sollen wahr oder falsch sei, ist also auch diesmal eine gnoseologische Frage. Kelsen begeht anscheinend — auch hier den gleichen Fehler, wie bei der theoretischen Begründung des Verhältnisses bzw. des Dualismus von Sein und Sollen; das heisst, er behandelt eine ontologische Beziehung als ein erkenntnistheoretisches Verhältnis. Er löst aber das Problem der Wahrheit oder Unwahrheit von Sollen auf eine paradoxe Art damit, dass er sehr richtig sagt: Die in die Welt des Sollens gehörenden »*Rechtsnormen* sind keine Urteile, das heisst Aussagen über einen der Erkenntnis gegebenen Gegenstand«.[20] Während er also bei der theoretischen Begründung des Dualismus von Sein und Sollen das Sollen als eine logische Folgerung, einen Schlusssatz des Syllogismus — wie wir darauf hingewiesen haben, unrichtig —, als eine logische Kategorie auffasste, bezweifelt und bestreitet er dies jetzt, nimmt es zurück und sagt, die einen Sollen-Charakter besitzende Rechtsnorm sei kein logisches Urteil, kein erkenntnistheoretischer Begriff. Nachdem er die auf die ontologische Beziehung von Sein und Sollen gerichtete erkenntnistheoretische Frage mit der Argumentation, dass das Sollen in dieser Relation keine Aussage über einen der Erkenntnis gegebenen Gegenstand ist — als unberechtigte verwirft, verfasst er zugleich seine im wesentlichen richtige Antwort, laut der »Sollnormen weder wahr noch unwahr, sondern nur gültig oder ungültig sind«.[21]

An diesem Punkt scheinen uns einige kritische Bemerkungen nötig. Lassen Sie uns bedenken, dass Kelsen, als er den Dualismus von Sein und Sollen begründete, zwischen den beiden ein logisches, erkenntnistheoretisches

[20] KELSEN: a. a. O. S. 73.
[21] KELSEN: a. a. O. S. 76.

Verhältnis vorausgesetzt, aufgrund der logischen Regeln des Syllogismus bewiesen hat, dass Sein und Sollen zwei Welten an sich sind, da ein logischer Schluss aus dem einen auf das andere ausgeschlossen ist; aus dem Sein kann nur durch einen verfehlten Syllogismus ein Sollen-Urteil hervorgebracht werden. Es sei hier auch daran erinnert, dass das Hauptargument unserer Kritik gegenüber dieser Konzeption der Reinen Rechtslehre darin bestand, dass hier eine unzulässige Veränderung eines ontologischen Verhältnisses zu einem erkenntnistheoretischen vorgeht. Wie stichhältig unsere kritische Bemerkung war, beweist nichts besser als Kelsens Feststellung, die den Bezug der logischen Kategorien »wahr« und »unwahr« auf die Sollnormen betrifft, nämlich, dass man davon, ob die in die Welt des Sollens gehörenden Rechtsnormen wahr oder unwahr seien, nicht sprechen könne, da diese nicht logische Kategorien seien. Diesmal versucht also Kelsen den Dualismus von Sein und Sollen theoretisch dadurch zu verstärken, dass er das gnoseologische Verhältnis der beiden verneint und das Sollen wie eine Kategorie auffasst, die zum Sein keine erkenntnistheoretische Beziehung haben kann. Und darin hat er auch recht. Wie auch dann, wenn er fragt, ob es möglich sei, insofern die Rechtsnormen als Sollnormen weder wahr noch richtig sind, auf sie logische Prinzipien, besonders den Satz über den Widerspruch und die Regeln der Folgerung anzuwenden. Er hat, bekanntlich, den Gedanken ausgeführt, dass zwischen Sein und Sollen weder eine logische Folgerung noch ein logischer Widerspruch möglich sei, weil sie nur zwischen Sein und Sein bzw. Sollen und Sollen bestehen können; nun krönt er dies mit der Feststellung, dass die logischen Prinzipien da sie der traditionellen Auffassung entsprechend nur auf Aussagen, die wahr oder unwahr sein können, anwendbar sind – auf die in die Welt des Sollens gehörenden Rechtsnormen – nachdem sie keine Aussagen, keine logischen Urteile sind — nicht angewendet werden können. Die logischen Prinzipien können nur auf Sollnormen beschreibende, einen Sollen-Charakter besitzende Sätze angewendet werden, die wahr oder unwahr sein können. Der Irrtum und der innere Widerspruch der Reinen Rechtslehre ist klar; in seiner Schlussfolgerung verneint Kelsen einerseits die gnoseologische Beziehung zwischen Sein und Sollen, nämlich, dass auf diese Kategorien und ihr Verhältnis die logischen Grundprinzipien anwendbar wären, anderseits wieder gelangt er zu diesem theoretischen Resultat dadurch, dass er zwischen den beiden ein erkenntnistheoretisches Verhältnis voraussetzt, Sein und Sollen als logische Kategorien, als Termini eines Syllogismus auffasst und sagt, man könne vom Sein zum Sollen nur durch eine logisch verfehlte Folgerung gelangen, was also den Dualismus von Sein und Sollen bedeutet.

Die Reihe unserer kritischen Bemerkungen wäre nicht vollständig, würden wir davon nicht sprechen, worauf wir schon früher hindeuteten, wie nämlich Kelsen durch die geschilderte, theoretische Begründung des Dualismus von Sein und Sollen die Unhaltbarkeit der Widerspiegelungstheorie des dialek-

tischen Materialismus in der Beziehung der in der Welt des Sollens auftretenden Rechtsnormen zu rechtfertigen versucht. Aus dem Dualismus von Sein und Sollen, daraus, dass das Sollen auf logischem Weg aus dem Sein nicht abzuleiten ist, dass das Sollen keine Aussage über das Sein, nicht der begriffliche, logische Ausdruck des Erkenntnisobjekts oder eines seiner Eigenschaften ist, zieht Kelsen die Schlussfolgerung, man könne vom Sollen als Widerspiegelung des Seins nicht sprechen, vielmehr von dem dem Sollen entsprechenden Sein, davon, dass das Sein das Sollen widerspiegelt. »If the human behaviour prescribed or permitted by the law or, what amounts to the same, if the human behaviour which forms the content of the legal norms, takes place in space and time, this real behaviour is evidently not reflected in or by the legal norms prescribing or permetting it, but, on the contrary, the legal norms are, so to speak, reflected in or by this behaviour.«[22] Kelsen missversteht oder verdreht hier sogar in mehreren Beziehungen die Widerspiegelungstheorie des dialektischen Materialismus, anderseits fasst er das Verhältnis zwischen Sein und Sollen einseitig auf. Was Kelsens Kritik über die Widerspiegelungstheorie in der Beziehung von Sein und Sollen betrifft, geht Kelsen den Weg weiter, den er bei der theoretischen Begründung des Dualismus von Sein und Sollen verfolgte, und beschränkt die bewährte Methode angewandt die Widerspiegelungstheorie auf die Erkenntnistheorie. Während Kelsen bei der Klärung der Beziehung zwischen Sein und Sollen dieses ontologische Verhältnis zu einem gnoseologischen umwandelte, identifiziert er jetzt, unzulässig, die Widerspiegelungstheorie mit der Erkenntnistheorie. Da es feststeht, dass eine zwischen Sein und Sollen angenommene logische, erkenntnistheoretische Beziehung nicht zu begründen ist, wird es klar, dass auf dieses Verhältnis auch die mit der Erkenntnistheorie identifizierte Widerspiegelungstheorie nicht anwendbar ist, weil von einer Widerspiegelung des Seins durch das Sollen in diesem Sinne keine Rede sein kann. Und wie schon früher, können wir auch diesmal Augenzeugen eines Vorgehens umgekehrten Vorzeichens sein; nämlich, nachdem Kelsen die Unmöglichkeit des Sollens als der Widerspiegelung des Seins mit der Voraussetzung der erkenntnistheoretischen Beziehung begründete, gelangt er aus der wirklichen, ontologischen Eigenschaft der Rechtsnorm als einer in die Welt des Sollens gehörenden Erscheinung, dass sie menschliche Verhalten regelt zur Feststellung, man könne in diesem Sinne von einer Spiegelung, aber von keiner Abbildung des Seins durch das Sollen sprechen, im Gegenteil, davon, dass das Sein das Sollen widerspiegelt. Es ist merkwürdig, wie sich hier richtige und irrtümliche Feststellungen vermischen. Vor allem soll festgesetzt werden, dass die Widerspiegelungstheorie des dialektischen Materialismus nicht auf die Erkenntnistheorie beschränkt werden kann, dass man von einer Widerspiegelung der objektiven Wirklichkeit im Sinne der materialisti-

[22] KELSEN: *The communist theory of law.* London, 1955. S. 14—16.

schen Dialektik nicht allein bei den verschiedenen Formen der Erkenntnis (alltägliche, logische, wissenschaftliche usw.), sondern auch in bezug auf andere (z. B. ästhetische, ethische, staatliche, rechtliche, politische usw.) Objektivationen sprechen kann. Die Widerspiegelung der objektiven Wirklichkeit hat zahlreiche eigene Arten und Formen, deren Beschränkung auf die erkenntnistheoretische Widerspiegelung das Verstehen der Genesis und Funktion der verschiedenartigen Objektivationen verhindern würde und dadurch — wie bei der theoretischen Begründung des Dualismus von Sein und Sollen sowie des Sollen-Charakters der Rechtsnorm innerhalb der Reinen Rechtslehre wahrnehmbar ist — für die idealistische Auslegung der verschiedenen Objektivationen ein weites Feld geboten wäre. Wir deuteten in unserer Einleitung nicht zufällig darauf hin, dass hinter dem rechtstheoretischen Problem der Beziehung zwischen Sein und Sollen das Verhältnis von Sein und Bewusstsein, die Frage des Materialismus und Idealismus steckt. Ist nämlich im allgemeinen das Sollen keine Widerspiegelung des Seins, das in der Rechtsnorm formulierte menschliche Verhalten nicht die Widerspiegelung des reellen menschlichen Verhaltens, sagt dies konkret und mittelbar soviel, dass sich auch jener bedeutsame Teil der in die Welt des Seins gehörenden realen menschlichen Verhaltungsweisen und der in ihnen realisierten gesellschaftlichen Verhältnisse nicht in den Rechtsnormen von Sollen-Charakter widerspiegelt, den wir materielle gesellschaftliche Verhältnisse nennen; dass diese objektiven wirtschaftlich-gesellschaftlichen Verhältnisse weder unmittelbar noch mittelbar die aus dem Sein unableitbaren Sollnormen bestimmen. Jene Soll-artigen Rechtsnormen, die unter die im weiteren Sinne aufgefassten Bewusstseinserscheinungen gehören und die aus dem auch die materiellen gesellschaftlichen Verhältnisse in sich erfassenden Sein nicht ableitbar sind, bestimmen dagegen, infolge ihrer regulierenden, ordnenden Funktion die in der Welt des Seins auftretenden menschlichen Verhaltungsweisen und auch die gesellschaftlichen, materiellen und wirtschaftlichen Verhältnisse, die sich in ihnen realisieren, so, dass diese eigentlich die Widerspiegelungen der Sollnormen sind. Der Idealismus der Argumentation Kelsens, mit der er die materialistische Widerspiegelungstheorie auf den Kopf stellt, ist augenfällig.

Für wie richtig auch sich also die syllogistischen Folgerungen nach den Regeln der formalen Logik erwiesen, die den Dualismus von Sein und Sollen begründeten, stellt sich aus der konkreten Analyse heraus, dass das verwickelte, dialektische Verhältnis zwischen Sein und Sollen kein logisches, erkenntnistheoretisches, sondern im wesentlichen ein ontologisches Verhältnis ist, das man also als eine rein logische Beziehung auch nicht verstehen kann; das ontologische Verhältnis zwischen Sein und Sollen in ein erkenntnistheoretisches zu verändern und es nach den Regeln der formalen Logik zu behandeln, führt zu einer idealistischen Konzeption, die die objektive Wirklichkeit verdreht, den Dualismus von Sein und Sollen behauptet und irrtümlich ist; ihre Anwendung in

der Rechtsphilosophie hat die weitere schwere Folge, dass sich das gesellschaftliche Wesen des Rechts, seine gesellschaftlichen Zusammenhänge verlieren.

4. Das »geistesgeschichtliche Kuriosum«, das Klug, ungeachtet der klaren und evidenten Beweisführung der Reinen Rechtslehre, in den theoretischen Bestrebungen sieht, die versuchen, das Sollen aus dem Sein abzuleiten,[23] zeigt sich in der modernen Rechtsphilosophie – wie schon erwähnt – in verschiedenen Formen und Konzeptionen. Wir richten nun unser Augenmerk auf jene am meisten kennzeichnende Richtung der modernen Rechtstheorie, die versucht, durch die theoretische Überholung des vom Rechtspositivismus begründeten Dualismus zwischen Sein und Sollen, ihre gegenseitige Beziehung zu erklären, das Sollen aus dem Sein abzuleiten; dies ist die *naturrechtliche Konzeption.*

Als typisches Beispiel für die modernen rechtsphilosophischen Auffassungen, die den Dualismus von Sein und Sollen verkünden, analysierten wir Kelsens Reine Rechtslehre; die naturrechtliche Konzeption, die das Sollen aus dem Sein ableitet, wird in ihrer reinsten Form von Heinrich Rommens Theorie vertreten. Es lässt sich im allgemeinen sagen, dass nach der Grundthese der naturrechtlichen Auffassung über das Verhältnis zwischen Sein und Sollen – dem Dualismus des Rechtspositivismus gegenüber – das Sollen aus dem Sein ableitbar, die rigide Absonderung des Seins vom Sollen unrichtig sei, da sie eine bestimmte Einheit bilden. Im wesentlichen geht auch Rommen von dieser Voraussetzung aus, indem er feststellt: ». . .Sein und Sollen müssen im letzten Grunde zusammenfallen. Anders ausgedrückt: Das Sein und das Gute, die ontologische und die deontologische, moralische Ordnung müssen im tiefsten und letzten eins sein.«[24] Um diesen grundlegenden, naturrechtlichen Satz zu beweisen, deutet Rommen in seiner Argumentation und Kritik über Kelsen darauf hin, dass das Sollen aus dem Sein tatsächlich nicht abgeleitet werden kann, wenn man das Sein – wie Kelsen – als das einfache Dasein, das rein Faktische ansieht: ». . .bedeutet hier 'Sein' nicht das einfache Dasein, die unvollkommene Form des Seins, die *existentia*, sondern das Wesenssein, das *esse essentiae.*«[25] Der Weg vom Sein zum Sollen, genauer zum Sein, das das Sollen begründet, also zum Wesen der Sache, zur *essentia*, führt durch die realistische Erkenntnis. Auf dem Unterschied zwischen der empirischen und der realistischen – auf das Wesen gerichteten – Erkenntnis ». . .beruht die von *existentia* und *essentia*, beruht auch das teleologische Denken und zuletzt die Einheit von Sein und Sollen im Metaphysischen«.[26]

Wenn wir nun bedingt, aber unerlaubt, davon absehen, dass in den bisher geschilderten naturrechtlichen Erörterungen das Sein bzw. sein Wesen in bezug

[23] KLUG: a. a. O. S. 154.
[24] ROMMEN, H.: *Die ewige Wiederkehr des Naturrechts.* München, 1947. S. 173.
[25] ROMMEN: a. a. O. S. 172.
[26] ROMMEN: a. a. O. S. 178.

auf das rechtliche Sollen des näheren nicht bestimmt, nur in seiner abstrakten Allgemeinheit formuliert wurde, und auch ungeachtet dessen, worin eigentlich Rommen den Grund sieht, dass das Sollen vom Sein bestimmt ist, können wir aus der besprochenen naturrechtlichen Argumentation mehrere Momente herausheben, die sich zur Klärung des Verhältnisses zwischen Sein und Sollen auf das Recht bezogen als bedeutsam erweisen. Um die Rolle der Erkenntnis im Verhältnis von Sein und Sollen herauszuheben, möchten wir betonen, dass in der Ableitung des Sollens aus dem Sein die Erkenntnis ein bedeutsames und unentbehrliches Element ist. Zur Lösung unseres Problems ist es nicht weniger wichtig klarzulegen, dass es sich nicht um die empirische, sondern um die auf das Wesen gerichtete Erkenntnis des Seins handelt und dass in der Erkenntnis das Wissen und das Erkenntnisobjekt übereinstimmen.

Wenn wir nun unsere Untersuchungen fortsetzen, um Antwort auf die Frage zu bekommen, warum »Das erkennbare Sein . . . das Prinzip des Sollens«[27] und »Die Wesenheit eines Dinges . . . die Norm und das Ziel seines Werdens«[28] ist, findet man, dass im Gang der objektiv-idealistischen, theologischen und teleologischen theoretischen Begründung und Erörterung des als Frage aufgestellten Problems die erwähnten, dem Anschein nach positiven Momente, infolge ihrer immanenten, negativen Funktion dermassen entarten, dass ihr eigentliches Wesen verschwindet. Die Wesenheit eines Dinges wird nämlich als die Norm und das Ziel seines Werdens qualifiziert, weil Rommen, entsprechend dem neothomistischen Weltbilde, einen Demiurg, eine göttliche Vernunft voraussetzt, die denkend die Wesenheit des Dinges schafft. Die Wesenheit des Dinges, die *essentia*, mit einem Wort das Sein stellt den Grund des Sollens dar, sie fallen zusammen, weil das durch die göttliche Teleologie in das Dasein gesetzt wurde. »Die Ordnung alles Seins hat ihr Prinzip in Gott: als Ordnung der Wesenheiten in Gottes Wesenheit, als geschaffene, existente Ordnung in Gottes Willen.«[29]

Die neothomistischen theoretischen Erörterungen, mit denen Rommen die Verwurzelung des Sollens als Naturrechts im Sein begründet, sind keines Wortes mehr wert. Der spekulative, objektiv idealistische Charakter dieser Konzeption ist ganz klar, und sämtliche kritische Bemerkungen von Marx über den im Hegelschen absoluten Geist sich manifestierenden objektiven Idealismus, sind auch diesbezüglich gültig.[30] Einer grösseren Beachtung ist aber jener Prozess wert, in dem sich das Sein zum Sollen unwandelt. Haben wir früher die Betonung der Funktion, die die Erkenntnis im Verhältnis zwischen Sein und Sollen erfüllt, positiv bewertet, müssen wir jetzt feststellen, dass der wirkliche Charakter dieser Relation durch die Absolutisierung dieses

[27] Rommen: a. a. O. S. 188.
[28] Rommen: a. a. O. S. 182.
[29] Rommen: a. a. O. S. 188.
[30] Marx—Engels: *Werke*. Bd. 2. (ung.) Budapest, 1958. S. 56—59., 166., 191.

wir betonen Momentes, durch seine Aufbauschung zum Wesen des Verhältnisses zwischen Sein und Sollen verstellt und verfälscht wird. So wird nämlich auch in Rommens Auffassung das Verhältnis von Sein und Sollen auf eine rein erkenntnistheoretische Beziehung eingeschränkt, dadurch nämlich, dass das erkannte Wesen des Dinges, also das erkannte Sein in seiner Unmittelbarkeit und Objektivität das Sollen selbst, das Naturrecht darstellt: »Das ontologische Gesetz wird sittliches Gesetz, die Seinsordnung Sollensordnung.«[31] Das Wesen des Verhältnisses zwischen Sein und Sollen ist die Erkenntnis des Seins. »Die Ordnung des Seins vor der Erkenntnis wird zur Ordnung des Sollens vor dem Willen.«[32] Auf diese Weise fallen Sein und Sollen zusammen, und es liegt am subjektiven Betrachter, ob es als Sein oder Sollen qualifiziert wird. Darauf, dass es unrichtig ist, das im wesentlichen ontologische Verhältnis zwischen Sein und Sollen auf eine erkenntnistheoretische Beziehung einzuschränken, haben wir schon hingewiesen, als wir die positivistische Konzeption kritisch analysierten, die den Dualismus von Sein und Sollen verkündet. Auf paradoxe Art geht die auf das Verhältnis von Sein und Sollen bezogene naturrechtliche Konzeption, ebenso wie die Reine Rechtslehre, von der gnoseologischen Beziehung zwischen Sein und Sollen aus. Während aber Kelsen daraus zur Folgerung gelangt, dass das Sollen aus dem Sein nicht abzuleiten ist, ihr Verhältnis im wesentlichen im Dualismus besteht, sieht Rommen zwischen Sein und Sollen eine erkenntnistheoretische Beziehung und stellt die Einheit von Sein und Sollen, die Verwurzelung des Seins im Sollen fest. Das Sollen unmittelbar aus dem Sein, also rein aufgrund der Erkenntnis, angeblich ohne Bewertung und Willenssatzung, auf naturrechtlicher Grundlage abzuleiten, ist wie darauf Achermann hindeutet[33] unrichtig, weil, durch die Erkenntnis allein, aus dem Sein ein Sollen nicht zustandekommt, ihr Verhältnis ist viel komplizierter und vielfältiger. Die Erkenntnis der Beziehung zwischen Sein und Sollen ist – wie wir es schon sagten — tatsächlich ein wichtiges Moment, aber nur ein Element des Widerspiegelungsprozesses, wo das Sollen vom Sein bestimmt und das Sein vom Sollen ausgedrückt wird.

5. Des weiteren versuchen wir die kritische Würdigung der bedeutsamsten Richtungen der modernen Rechtsphilosophie, die die Erklärung der Beziehung von Sein und Sollen erstreben, mit Erörterungen zu ergänzen, die diese Beziehung aufgrund der materialistischen Dialektik analysieren. Es gibt kaum einen zutreffenderen Passus, der die theoretische Grundlage unseres Versuches klarer verfassen und zugleich ein Licht in den Hauptgrund des Irrtums der kritisch analysierten, modernen Konzeptionen der bürgerlichen Rechtsphilosophie bringen würde, als die klassische Feststellung von Marx: »Alles gesellschaftliche Leben ist wesentlich *praktisch*. Alle Mysterien, welche die Theorie

[31] Rommen: a. a. O. S. 189.
[32] Rommen: a. a. O. S. 185.
[33] Achermann: a. a. O. S. 39.

zum Mystizism veranlassen, finden ihre rationelle Lösung in der menschlichen Praxis und in dem Begreifen dieser Praxis.«[34] Wir glauben, unsere Beurteilung ist richtig, wenn wir den grundsätzlichen Irrtum dieser Konzeptionen, die sich auf die Erklärung des Verhältnisses von Sein und Sollen richten, in ihrer idealistischen Auffassung und darin sehen, dass sie das praktische Wesen des menschlichen, gesellschaftlichen Lebens ausser acht lassen, und wir meinen auf dem rechten Weg zu sein, wenn wir die metaphysische Trennung zwischen dem kontemplativen, erkennenden, theoretischen und dem wollenden, handelnden, praktischen Menschen aufgehoben versuchen – das praktische Wesen des gesellschaftlichen Lebens im materialistischen Sinn aufgefasst – die Beziehung zwischen Sein und Sollen auf das Recht bezogen aufzudecken. Schon bei Hegel ist es zu lesen: »Diejenigen, welche das Denken als ein besonderes, eigentümliches *Vermögen*, getrennt vom Willen, als einem gleichfalls eigentümlichen *Vermögen*, betrachten und weiter gar das Denken als den Willen, besonders den guten Willen für nachteilig halten, zeigen sogleich von vornherein, dass sie gar nichts von der Natur des Willens wissen.«[35] Die Wahrheit dieser Feststellung Hegels wurde von der Psychologie unseres Zeitalters aufgrund des dialektischen Materialismus, ohne jeden Zweifel, gerechtfertigt. Bei der Untersuchung des Zusammenhangs zwischen Bewusstsein und Willen hat die marxistische Psychologie bewiesen, dass das Bewusstsein nicht allein Erkenntnis und Abbildung, also die Reflexion des Seins, sondern auch die praktische Beziehung des Subjekts zum Sein ist. Ja sogar ist das theoretische Verhältnis eigentlich eine derivierte Beziehung, da gewöhnlich das praktische Verhältnis primär und bestimmend ist. Die praktischen Beziehungen des Menschen umfassen und durchdringen letzten Endes die theoretische Aktivität des Bewusstseins. Auch der Zusammenhang zwischen intellektuellen und Willensprozessen wird im Bewusstsein der Menschen von der Einheit gekennzeichnet, die im theoretischen und praktischen Verhältnis des Subjekts mit dem Sein zum Ausdruck kommt. In jeder wirklichen Einheit des Bewusstseins sind beide Grundelemente enthalten: sowohl das intellektuelle oder Erkenntnismoment wie das affektive Moment. »Wenn wir die Willensprozesse von den anderen psychischen Prozessen unterscheiden, stellen wir sie nicht den intellektuellen und emotionalen gegenüber. Wir proklamieren keine sich gegenseitig ausschliessende Gegensätzlichkeit zwischen Intellekt, Gefühl und Wille. Ein und derselbe Prozess kann sowohl intellektuell als auch emotional oder volitiv sein und ist es auch gewöhnlich. Jeder Willensprozess enthält zugleich intellektuelle und emotionale Momente, und die intellektuellen und emotionalen Prozesse sind ihrerseits durchweg auch volitiv . . .«[36] Aus dem Gesagten geht hervor, dass diese zwei bedeutsamen Momente und Seiten des psychischen

[34] Marx—Engels: *Die deutsche Ideologie*. Berlin, 1953. S. 595.
[35] Hegel: *Grundlinien der Philosophie des Rechts*. Berlin, 1956. 2. §, S. 30.
[36] Rubinstein, S. L.: *Grundlagen der allgemeinen Psychologie*. Berlin, 1958. S. 625.

Prozesses gemäss der Lehre der modernen Psychologie eine dialektische Einheit bilden und dem Dualismus von Sein und Sollen bei weitem nicht zur psychologischen Grundlage dienen können. K. Stoyanovitch verfasst dies sehr geistvoll in seiner skeptischen Frage: »Si le sujet en particulier est doué à la fois de la faculté de connaître et de celle d'agir, comment peut-il oublier ou négliger, pendant qu'il connaît ou qu'il agit, l'autre partie de lui-même, tout aussi importante?«[37]

Es ist kein Zufall, dass wir an die Spitze unserer Erörterungen über die Beziehung zwischen Sein und Sollen die Feststellung von Marx stellten, in der er die Wichtigkeit der menschlichen Praxis heraushebt. Verlassen wir nämlich das Gebiet der auf das individuelle Denken konzentrierenden Psychologie[38] und wenden unsere Aufmerksamkeit dem unmittelbaren, praktischen, gesellschaftlichen Leben der Menschen, einem unentbehrlichen Moment zum Begreifen des Sollens, der Sollenserscheinungen zu, taucht wiederum die bestimmende Bedeutung der Praxis, der praktischen Tätigkeit der Menschen auf. Untersucht man die elementarsten Sachverhalte des Alltagslebens, findet man, dass seine grundsätzliche Struktur von unmittelbar praktischen Zielen und Tätigkeiten bestimmt ist. Die extensive und intensive Unendlichkeit der objektiven Welt zwingt die Menschen, sich ihrer Umwelt anzupassen und geeignet dazu zu werden, jene neuen Aufgaben zu lösen, die ihnen durch das gesellschaftliche Sein und durch die auf diesem Boden entstandenen Bedürfnisse gestellt werden. Das Alltagsleben der Menschen, ihre Tätigkeit und ihr Denken sind von der unmittelbaren Beziehung zwischen Theorie und Praxis, von ihrer unmittelbaren Einheit gekennzeichnet. Die unmittelbare praktische Tätigkeit und das Durchdenken, die Widerspiegelung dieser Tätigkeit und ihres Objekts, also die Theorie trennen sich hier noch nicht, sie fallen unmittelbar zusammen. Stossen die Menschen im Laufe ihrer alltäglichen Tätigkeit an Aufgaben, Hindernisse, die mit einer auf der unmittelbaren Einheit von Theorie und Praxis beruhenden menschlichen Tätigkeit nicht mehr zu besiegen sind, spalten sie diese Unmittelbarkeit wie bei der Arbeit und schalten zwischen die Theorie und die Praxis, zwischen die Zwecksetzung und ihrer Verwirklichung vermittelnde Momente ein.

Geht man von dem Alltagsleben der Menschen und von ihrer konkreten praktischen Tätigkeit aus, die unmittelbare praktische Ziele verfolgt, ist es klar, dass im Entwicklungsgang der Gesellschaft eigentümliche, vermittelnde Mittel, Objektivationen zustandegebracht wurden, die sich zwischen die alltäglichen, unmittelbaren, praktischen Ziele der Menschen und ihre Verwirklichung einschalten, eben um diese praktischen Ziele des Alltagslebens auf verschiedenen Umwegen, durch Einschiebung vermittelnder Momente leichter und erfolgreicher realisieren zu können.

[37] Stoyanovitch: a. a. O. S. 444.
[38] Rubinstein: *Sein und Bewusstsein.* (ung.) Budapest, 1962. S. 55.

Auch bei Soll-Erscheinungen stehen wir im wesentlichen einem vermittelnden Moment gegenüber, das sich zwischen die praktische Zwecksetzung und ihre unmittelbare Verwirklichung einschaltet. Die Struktur des Alltagslebens der Menschen bezeugt nicht allein, dass Theorie und Praxis unmittelbar zusammenfallen, sondern dass sich die praktische Handlung und ihre Regel, ihre Norm noch nicht voneinander getrennt haben. Die unmittelbare Beziehung zwischen Theorie und Praxis wird aufgehoben, provisorisch abgeschaffen, um dadurch — wie wir darüber schon gesprochen haben — die infolge des gesellschaftlichen Seins und der daraus entstandenen Bedürfnisse gegebenen neuen Zwecke und Aufgaben besser verwirklichen bzw. lösen zu können. Ähnliche Bedürfnisse und Überlegungen führen auch zur Objektivation der Soll-Erscheinungen, der Normen bzw. der Verhaltungsnormen. Um den Prozess besser zu verstehen, im Laufe dessen sich die Soll-Erscheinungen aus dem Sein, aus dem Alltagsleben, aus der Tätigkeit der Menschen hervorheben bzw. als eine eigentümliche Objektivation lostrennen, genügt es an die entwickelteste Objektivation des Alltagslebens, an den Arbeitsprozess zu denken. Schon auf der primitivsten Stufe der Arbeit sind Vermittlungen zwischen die Bedürfnisse und ihre Befriedigung, zwischen den praktischen Zweck und die praktische Handlung eingeschaltet. Es genügt hier auf das zwischen die Arbeit und ihr Subjekt sich einschaltende Arbeitsmittel hinzuweisen, das Hegel über den Zweck stellt: »Das *Mittel* . . . ist die äusserliche Mitte des Schlusses, welcher die Ausführung des Zweckes ist; an demselben gibt sich aber die Vernünftigkeit in ihm als solche kund, *in diesem äusserlichen Andern* und gerade *durch* diese Äusserlichkeit sich zu erhalten. Insofern ist das *Mittel* ein *Höheres* als die *endlichen* Zwecke der äusseren Zweckmässigkeit.«[39] Jene bedeutsame Lebenstatsache, dass zwischen den ideell vorausgesetzten Zweck und das verwirklichte Resultat sich Vermittlungen einschieben, und dass sich das vermittelnde Element über den Zweck hebt, gibt sich schon im Arbeitsprozess kund. Ein ebenfalls wesentliches Element im Arbeitsprozess — das für die Erklärung dessen, warum sich das Sollen vom Sein lostrennt, eine besondere Bedeutung hat — ist noch der teleologische Charakter der Arbeit: »Am Ende des Arbeitsprozesses kommt ein Resultat heraus, das beim Beginn desselben schon in der *Vorstellung des Arbeiters*, also schon *ideell* vorhanden war. Nicht dass er nur eine Formveränderung des Natürlichen *bewirkt;* er *verwirklicht* im Natürlichen zugleich *seinen Zweck*, den er *weiss*, der die Art und Weise seines Tuns als Gesetz bestimmt und dem er seinen Willen unterordnen muss.«[40] Konkretisiert man die sich im Arbeitsprozess manifestierende Zweckmässigkeit im allgemeinen Verhältnis zwischen menschlichem Handeln und seinem Resultat als Zweck, kann festgestellt werden, dass der Zweck und das Sollen

[39] Hegel: *Werke*. V. Bd. Berlin, 1840. S. 226.
[40] Marx: *Kapital*. Moskau—Leningrad, 1934. Bd. I. S. 186.

die gemeinsame Eigenschaft haben, dass in ihnen etwas für seiend gedacht ist, was noch nicht wirklich ist; das Resultat des Handelns ist im Zweck ideell schon früher vorhanden, als in der Wirklichkeit, im Sollen dagegen geht das ideell erforderte Handeln dem verwirklichten konkreten Verhalten voran. Ein anderes bedeutsames Moment der von Marx umschriebenen Teleologie des Arbeitsprozesses, dessen Beachtung das Begreifen der Beziehung zwischen Sein und Sollen erleichtern kann, ist der Charakter des Zwecks durch den es den Weg des Tuns und den Willen des Handelnden als Gesetz bestimmt. Es scheint, dass ein gewisser »Sollen«-Charakter, den Marx mit der Formulierung »als Gesetz bestimmt« und »die Unterordnung des Willens« ausdrückt, auch im Arbeitsprozess vorhanden ist.

Nach gründlicher Untersuchung lässt sich feststellen, dass man bei der Zweckmässigkeit des Arbeitsprozesses und im allgemeinen bei den rein teleologischen Prozessen von keinem wirklichen, eigentlichen Sollen sprechen kann. In der Zweckmässigkeit der praktischen Handlung im Alltagsleben – so auch in der meistentwickelten Objektivation des Alltagslebens, im Arbeitsprozess – hat sich das Sollen vom Sein, von der unmittelbar praktischen Handlung noch nicht fortgelöst. Jener eigentümliche, speziale »Sollen«-Charakter, der in der erwähnten Zweckmässigkeit des Arbeitsprozesses wahrzunehmen ist, stellt eigentlich die determinierende Kraft der Notwendigkeit, der Gesetzmässigkeit des Seins dar.

In der Zweckmässigkeit des Arbeitsprozesses bestimmt die in den Bereich des Seins gehörende, durch die Erkenntnis aufgedeckte kausale Beziehung unmittelbar die Art und Weise der Handlung. Das zum Zweck gesetzte Resultat als Wirkung determiniert im teleologischen Prozess als Gesetz das zweckmässige Verhalten, das nichts anderes als die Ursache der Wirkung ist. Der Mensch gelangt nämlich durch seine alltägliche praktische Tätigkeit zur Erkenntnis, dass eine bestimmte Wirkung durch gewisse Ursachen herbeigeführt werden kann, dass ein gewisses Verhalten, eine Tätigkeit zu einer bestimmten Wirkung, einem Resultat führt. »Hierdurch, durch die *Tätigkeit des Menschen*, begründet sich die Vorstellung von *Kausalität*, die Vorstellung, dass eine Bewegung die *Ursache* einer anderen ist . . . die Tätigkeit des Menschen *macht die Probe* auf die Kausalität.«[41] Die Erkenntnis des Kausalzusammenhanges und die im menschlichen Verhalten realisierte Probe der Kausalität bestimmen an sich und unmittelbar das Verhalten, das zur Wirkung als Zweck, also zum Resultat führt und dieses Verhalten kann nur das als Ursache erscheinende Glied jener Kausalität sein, die in der Erkenntnis aufgedeckt und in der menschlichen Tätigkeit gerechtfertigt und gegeben ist. Der scheinbare, eigentümliche Sollen-Charakter des im Arbeitsprozess und im allgemeinen in den rein teleologischen Prozessen gesetzten Zweckes, des ideell postulierten Resul-

[41] MARX—ENGELS: *Werke*. Bd. 20. Berlin, 1958. S. 497.

tats stammt *unmittelbar* aus den objektiven Prozessen, aus den kausalen Gesetzmässigkeiten dieser Prozesse, also aus dem Sein. Wird in der zweckmässigen Tätigkeit der Menschen dieser bestimmende Charakter des Seins, die Kausalität ausser acht gelassen, hat das zur Folge, dass sich der Zweck nicht verwirklicht, d. h. im Bereich des Seins die beabsichtigten Kausalzusammenhänge nicht entstehen. Übersetzt also der erkennende, zwecksetzende und handelnde Mensch die determinierende Kraft des erkannten und bestätigten Kausalzusammenhanges in die Sprache der Tätigkeit und, die Wirkung als Zweck ausgedrückt, formuliert er sich auch das zu ihm führende Verhalten als Sollen, ist die einzige Folge der Nicht-Realisierung dieses Sollens, dass der Kausalzusammenhang zwischen dem gesetzten Zweck bzw. dem Zweck als Wirkung und der zu ihr führenden Ursache in Wirklichkeit nicht entsteht. In diesem Fall verursachte in der alltäglichen praktischen Handlung und in ihren Konsequenzen überhaupt keine strukturelle Veränderung, dass die Ursache der zweckgesetzten Wirkung im Bewusstsein des Individuums als Sollen eine Formulierung erhalten hatte. Hier steht man, in der Tat, einem rein verbalen, semantischen Prozess und Problem gegenüber.

Bevor wir unsere Erörterungen fortsetzen und versuchen, die wesentlichen Momente der Beziehung von Sein und Sollen aufzudecken, scheint uns eine kurze Einschaltung nötig. Es ist beachtenswert, dass wie so oft auch das Verhältnis zwischen Sein und Sollen betreffend, das Objektive mit dem Subjektiven unzulässig durcheinandergebracht wird. Man vergisst nämlich bei der Darstellung des Verhältnisses von Sein und Sollen die Dialektik vom Subjektiven und Objektiven, und fasst das Sollen einseitig und unerlaubt ausschliesslich auf das Subjekt bezogen, als etwas Subjektives auf, was sagt, dass alles, was sich für das konkrete, individuelle Subjekt als Sollen zeigt, als Sollen qualifiziert wird. Ob sich etwas als Sein oder Sollen erweist, liegt solcherweise allein an dem Subjekt, an dem Aspekt und an der Beurteilung des Subjekts. Das ist in rechtsphilosophischen Versuchen wahrzunehmen, die das wesentliche Zusammenfallen, die Identität von Sein und Sollen betonen und den Unterschied zwischen den beiden nur darauf zurückführen, dass sie diesem das kontemplative, erkennende bzw. handelnde, wollende Subjekt gegenüberstellen, genauso, wie in den dualistischen Konzeptionen, wo nämlich das Sein nur für das erkennende, das Sollen aber für das wollende Subjekt allein existiert. Obwohl das Sollen, obwohl es durch und für das Subjekt entsteht, nachdem es erschien, sich herausgestaltete und objektivierte, als solches vom Subjekt unabhängig als Sollen existiert. Das Sollen qualifiziert sich nicht deswegen als Sollen, weil es vom Subjekt als solches aufgefasst wird, sondern weil es seinem Wesen nach und an sich ein Sollen ist; es besitzt eine vom Sein in mehreren Beziehungen verschiedene, eigentümliche innere Struktur. In bezug auf das Verhältnis zwischen Sein und Sollen ist also keinerlei Ästhetisierung angebracht, es ist ein Irrtum zu behaupten, wie das ästhetische

Objekt, so existiert auch das Sollen als Objekt nicht ohne Subjekt.[42] Vom Sollen im eigentlichen Sinne des Wortes, als von einer vom Sein wesentlich verschiedenen Struktur kann man also nur sprechen, wenn sich die eigentümliche, eine Sollen-Struktur und einen Sollen-Charakter besitzende Objektivation von dem Sein loslöst, sich objektiviert und nicht bloss als eine Funktion des Subjekts existiert. Während im Alltagsleben und im Arbeitsprozess sich Sein und Sollen voneinander noch nicht trennen, was soviel bedeutet, dass das Subjekt das Sein, den Kausalzusammenhang des Seins als Sollen auffassen kann, das aber an sich, von seiner Beziehung zum Subjekt unabhängig, eigentlich und dem Wesen nach Sein ist, heben sich durch die Absonderung des Handelns von der Norm der Handlung aus dem Alltagsleben eigentümliche Objektivationen hervor, die dadurch gekennzeichnet sind, dass sie, nachdem sie entstanden, ebenfalls unabhängig von ihrer Beziehung zum Subjekt, im wesentlichen einen Sollen-Charakter haben. Diese Objektivation des Sollens zeigt nicht allein, dass es eine vom Sein verschiedene, sich von ihm abgesonderte, eigentümliche Sollen-Struktur gibt, sie macht auch darauf aufmerksam, dass dieses Sollen dem Sein entsprungen ist, sich von ihm loslöste und ebendeshalb entstand, um das Sein zu beeinflussen. Das Sein mit dem Sollen zu identifizieren, die eigentümlichen strukturellen Unterschiede zu verwischen ist genauso unrichtig, wie diese strukturellen Elemente und Unterschiede unerlaubt zu absolutisieren, das Sollen vom Sein dualistisch zu trennen. Genau aus ihrem gegenseitigen und eigentümlichen, dialektischen Verhältnis wird einerseits die vom Sein abweichende strukturelle Eigenschaft des Sollens, anderseits jene Beziehung klar, dass das Sollen seine strukturellen, kategoriellen Elemente vom Sein entleiht, aber auf eine eigentümliche Art gruppiert, betont und hervorhebt und in neue Beziehungen stellt; mit anderen Worten also ist das Sollen eine eigentümliche, spezifische Widerspiegelung des Seins.

Untersuchen wir das Sollen als eine spezifische Widerspiegelung des Seins, so ziehen wir vorerst jene besonderen Momente in Betracht, die die Struktur des Sollens vom Sein bzw. von der Struktur des Alltagslebens sowie von der Zweckmässigkeit des Arbeitsprozesses unterscheiden. In den teleologischen Prozessen setzt das Subjekt für sich selbst einen Zweck vor, von dem es wann immer abweichen kann, nur steht es unmittelbar der zwingenden Notwendigkeit des Kausalzusammenhanges gegenüber. Nicht so jedoch beim Sollen; in der Sollen-Struktur wird der Zweck immer für andere gesetzt. Im einfachen teleologischen Prozess kann das Subjekt die Empfindung oder das Bewusstsein haben, sich den Zweck als Sollen zu setzen, was aber kein wirkliches Sollen ist; das Subjekt kann ja davon wann immer abweichen und die Nichtbefolgung des Sollens hat in der Wirklichkeit die einzige Folge, dass sich

[42] Lukács, Gy.: *Az esztétikum sajátossága (Die Eigenschaft des Ästhetikums).* Budapest, 1965. Bd. I. S. 514–515.

der Zweck nicht realisiert. Diese Möglichkeit besteht natürlich auch dann, wenn der Zweck anderen vorgesetzt wird, zwar steht es ohne Zweifel, dass die Trennung der Person, die den Zweck vorsetzt, von jener, der er vorgesetzt ist, jedenfalls die Änderung ergibt, dass die Abweichung vom Zweck nunmehr nicht allein oder überhaupt nicht an der zwecksetzenden Person liegt. Was die Struktur des Sollens betrifft, gewinnt aber an erster Stelle nicht jener Umstand eine Bedeutung, dass der Zweck für andere bestimmt wird, sondern dass diese Zwecksetzung für andere Personen einen Sollen-Charakter besitzt, d. h. dass die Befolgung oder Nichtbefolgung des Zweckes nicht allein die Konsequenz haben kann, ob sich der Zweck im Sein realisiert oder nicht, das kann auch zu sonstigen, vom Zwecksetzenden an den Zweck, an seine Realisierung oder an die Abweichung von ihm gebundenen Konsequenzen führen.

In unserem Versuch, den Sollen-Charakter der für andere Personen geltenden Zwecksetzung zu erklären – wobei wir gewollt oder ungewollt, die Bestimmtheit des Sollens durch das Sein und die eigentümliche Widerspiegelung des Seins im Sollen bewiesen haben – müssen wir wieder auf den Kausalzusammenhang zurückkommen, der in der Welt des Seins zwischen dem Verhalten und dem Resultat wahrzunehmen ist. Die Widerspiegelung des Seins im Sollen ist vor allem mit der eigentümlichen Umwandlung des Kausalzusammenhanges zwischen Verhalten und Resultat verbunden. Als der im Sein wahrnehmbare Kausalzusammenhang zwischen menschlichem Verhalten und seinem Resultat sich im Sollen widerspiegelt, erscheint nämlich als Zweck, als anderen vorgesetzter Zweck, nicht das Resultat des Verhaltens, die Wirkung, sondern ihre Ursache, das menschliche Verhalten. Das beweist nicht allein das tiefe Verständnis des Kausalzusammenhanges zwischen menschlichem Verhalten und seinem Resultat in der Soll-artigen Widerspiegelung, sondern die Erkenntnis, dass jenes Glied des Kausalzusammenhanges zwischen dem Verhalten und dem Resultat, worauf das Sollen unmittelbar einwirken kann, das sich als Ursache kundgebende menschliche Verhalten ist. Darin kommt zum Ausdruck, wie äusserst ökonomisch – im Vergleich zu den im Alltagsleben und in den Arbeitsprozessen sich vollziehenden einfachen, teleologischen Prozessen – die Soll-artige Widerspiegelung ist. Es handelt sich um jenes die gesellschaftlichen Institutionen, Objektivationen im allgemeinen kennzeichnende, wesentliche Moment, das Gehlen, sehr zutreffend, »Entlastung« nennt.[43] Ist bei einer Widerspiegelung mit Sollen-Charakter das Verhalten und nicht sein Resultat, also die Ursache und nicht die Wirkung zum Zweck gesetzt, so bedeutet das soviel, dass es unnötig ist – abweichend von der Zweckmässigkeit des Alltagslebens, die verhältnismässig frei von Gewohnheiten, konservierenden und stabilisierenden Prinzipien ist – die Art und

[43] GEHLEN, A.: *Urmensch und Spätkultur*. Bonn, 1956. S. 179.

Weise des zum Resultat führenden Verhaltens immer wieder zu suchen und durchzudenken, denn im Sollen ist genau jene Ursache, nämlich das menschliche Verhalten zum Zwecke gesetzt, das zum Resultat führt. Das gekürzte und entlastende Umformen des Kausalzusammenhanges zwischen Verhalten und Resultat, das sich in der Soll-artigen Widerspiegelung vollzieht, ist ein wichtiges Moment der Widerspiegelung des Seins im Sollen, wodurch man besonders gut wahrnehmen kann, dass es sich im Sollen dem Wesen nach um einen eigentümlichen Ausdruck des vom Sein entlehnten Kausalzusammenhanges handelt, was aber den Sollen-Charakter dieser für andere geltenden, eigentümlichen Zwecksetzung, nämlich warum die Adressaten den umschriebenen Zweck verwirklichen *sollen*, an und für sich noch nicht erklärt.

Man darf jedoch nicht glauben, dass die Untersuchung dieses Momentes in der Soll-artigen Widerspiegelung des Seins ein überflüssiger Abstecher von jenem Weg war, der zum Begreifen des Sollens führt. Im Gegenteil, die eigenartige Ausprägung des Kausalzusammenhanges zwischen Verhalten und seinem Resultat im Sollen ist hinsichtlich des Wesens, der spezifischen Struktur des Sollens von ausschlaggebender Bedeutung. Der entscheidende Punkt der Widerspiegelung des Seins im Sollen, als in einer Objektivation mit eigentümlicher Struktur, wo sich im Vergleich zum »Sollen«-Charakter der Zweckmässigkeit des Arbeitsprozesses die entscheidende Umwandlung abspielt, ist eben der, dass genau das menschliche Verhalten als Ursache und nicht sein Resultat als Wirkung zum Zweck gesetzt wird. In der Widerspiegelung des Seins im Sollen das Verhalten und nicht sein Resultat zum Zweck zu setzen bedeutet nämlich nicht nur das vollständige Begreifen des Kausalzusammenhanges und die Erkenntnis dessen, dass dieses Resultat eine notwendige Folge des zum Zweck gesetzten Verhaltens ist, sondern zugleich auch soviel, dass durch die spezifische Hervorhebung der Ursache, des Verhaltens als Zweck die Realisierung dieses Verhaltens und seines Resultats nicht allein der »gesetzlich bestimmenden« Kraft der Zweckmässigkeit überlassen wird, die den Kausalzusammenhang umkehrt, sondern diesen in der Wirklichkeit sich im Sein kundgebenden Kausalzusammenhang in Betracht gezogen, sogar durch die Förderung und Sicherung seiner Verwirklichung das als Ursache auftretende Glied des Kausalzusammenhanges zum unmittelbaren Zweck wird, dessen Verwirklichung nicht mehr durch die gesetzlich bestimmende Kraft seines Resultats, seiner Wirkung als Zweck gesichert ist, sondern durch eine Folge, die in der Sollen-Struktur zum Verhalten, an die als Zweck auftretende Ursache geknüpft ist. Die Wirkung des im Sollen für andere zum Zweck gesetzten Verhaltens, also der Ursache wird nicht allein das in der Wirklichkeit schon gekannte Resultat sein, es wird genau infolge seiner Hervorhebung und Formulierung als Sollen auch andere Folgen haben. In der Struktur des Sollens finden wir also einesteils durch die Hervorhebung des als Ursache auftretenden Glieds, des menschlichen Verhaltens den abgekürzten, antizipier-

ten Ausdruck eines Kausalzusammenhanges, anderenteils einen ebenfalls in Aussicht gestellten, aber nicht in seiner abgekürzten Form, sondern in seiner Totalität formulierten Kausalzusammenhang, in dem die Ursache auch das als Ursache auftretende Glied des früheren Kausalzusammenhanges, also das menschliche Verhalten ist, aber seine Wirkung ist nicht das in der Wirklichkeit schon gekannte Resultat, sondern eine gleichfalls in der Wirklichkeit, im Sein eintretende, zur früheren dazukommende, neue Wirkung, Folge. Um jedes Missverständnis zu vermeiden, kann man nicht oft genug betonen, dass es sich bei dem Sollen, genauso wie auch bei den teleologischen Prozessen, um eine ideelle Antizipation, um eine Ausprägung im Bewusstsein, um die Widerspiegelung des Seins handelt. Im Sollen kommen sowohl das zum Zweck gesetzte menschliche Verhalten, als auch seine unausgesprochene sowie die ausdrücklich an ihn geknüpfte Folge nur als Nicht-Wirkliches, Nicht-Seiendes, nur Seiend-Gedachtes zum Ausdruck. Aber beide ideell antizipierten Kausalzusammenhänge, die die Struktur des Sollens bilden, beruhen auf dem Sein; einerseits auf der Erkenntnis des im Sein sich manifestierenden Kausalzusammenhanges, aus dem das als Ursache auftretende Glied, das menschliche Verhalten zum Zweck des Sollens gesetzt wurde; anderseits auf jenem, sich ebenfalls im Sein abspielenden und erst nach dem Erscheinen des Sollens sich manifestierenden Kausalzusammenhang, der zwischen der als Zweck des Sollens bezeichneten Ursache und der Realität der im Sollen an sie geknüpften, in Aussicht gestellten Folge besteht. Der Sollen-Charakter des im Sollen bestimmten Zweckes, der an Stelle der objektiven Notwendigkeit oder an ihre Seite tretende zwingende Charakter wird nämlich genau dadurch bestimmt, wie sich der im Sollen ausgedrückte, als zweiter bezeichnete, antizipierte Kausalzusammenhang in der Wirklichkeit realisiert. Man darf jedoch einen bedeutsamen Unterschied nicht vergessen, der zwischen den im Sollen ideell ausgedrückten, bloss seiend gedachten, nicht wirklichen zwei Kausalzusammenhängen zweifellos besteht. Während nämlich der im Zweck des Sollens ausgedrückte, gekürzte Kausalzusammenhang schon vor der Herausbildung der Soll-artigen Objektivation besteht und nur im Sollen und in bezug auf die Zukunft ideell antizipiert vorhanden ist, erscheint der Kausalzusammenhang zwischen der als Zweck des Sollens formulierten Ursache und der im Sollen an sie geknüpfte, in Aussicht gesetzte Folge im Sein, in der Wirklichkeit erst nach der ideellen Antizipation in der Soll-artigen Objektivation. Das Spezifikum der Bestimmtheit des Sollen-Charakters durch das Sein liegt eben darin, dass sich hier die eigentliche determinierende Kraft des Seins nachträglich zeigt; hat nämlich die im Sollen formulierte Folge keine Realität, und sie realisiert sich nicht, erlischt der Sollen-Charakter der Objektivation. Dieser Prozess ist natürlich äusserst zusammengesetzt und kompliziert. Um dies anzudeuten, genügt hier – unseres Erachtens – Kelsens zutreffende Feststellung über die Spannung zwischen Sein und Sollen zu zitieren, laut der diese

Spannung »can be determined only by an upper or lower borderline«.[44] Die eigentümliche Struktur des Sollens, dass nämlich der zwingende, bestimmende Charakter des im Sollen gesetzten Zwecks im Sein wurzelt und auf ihm beruht, macht zugleich klar, dass der spezifische Sollen-Charakter und die Qualität des wirklichen, eigentlichen Sollens nicht vom Subjekt, nicht davon abhängt, wie das Subjekt dies in seinem Bewusstsein auffasst; das Sollen ist in dieser Relation und in diesem Sinne eine objektive Kategorie, darunter wir verstehen, dass sein eigentümlicher Sollen-Charakter und seine Qualität nicht vom Bewusstsein des Subjekts des Adressaten bestimmt sind, sondern von der Realisierung im Sein bzw. der Realität des im Bewusstsein in Aussicht gestellten, ideell ausgedrückten, spezifischen Kausalzusammenhanges, jener Folge, die an das als Ursache auftretende Glied dieses Zusammenhanges geknüpft ist. Der Sollen-Charakter der Soll-artigen Objektivationen rührt also nicht von dem Umstand her, dass sie das Subjekt für Sollen ansieht; solche Objektivationen haben — unabhängig davon, ob sie das Subjekt für Sollen empfindet oder denkt — einen Sollen-Charakter, weil ihnen die Sollen-Qualität durch den in dieser Relation objektiven Umstand geliehen wird, dass der Eintritt, die Geltung dieser erwähnten, seiend gedachten Folge eine Realität hat.

Wenn wir nun die Erörterungen über die abstrakte Allgemeinheit des Verhältnisses von Sein und Sollen zusammenfassen, kann folgendes festgestellt werden: Sein und Sollen stehen in einer gegenseitigen, dialektischen Beziehung zueinander; das Wesen dieses Verhältnisses besteht darin, dass das Sollen vom Sein bestimmt und seine eigentümliche Widerspiegelung ist. Inhalt und Form des Sollens stammen aus dem Sein; das Sollen entnimmt den seinen Inhalt darstellenden Zweck, das menschliche Verhalten aus dem Sein; dies ist nichts anderes als eine spezifische teleologische Ausprägung, Widerspiegelung des als Ursache auftretenden Glieds des im Sein enthaltenen Kausalzusammenhanges; der Sollen-Charakter dieses Zweckes ist nämlich wie es zu sehen war — durch die Realität des Eintritts der in Aussicht gestellten Folge bestimmt.

Um den Zusammenhang zwischen Sein und Sollen noch klarer zu machen, versuchen wir nun die Gültigkeit unserer auf der Ebene der abstrakten Allgemeinheit formulierten Feststellungen an dem Beispiel einer konkreten, Soll-artigen Objektivation — und da es sich um ein Problem der modernen Rechtsphilosophie handelt —, an der Rechtsnorm ganz kurz und in grossen Umrissen zu beweisen.

Die gesellschaftliche Funktion und Aufgabe der Rechtsnorm ist die Ordnung konkreter gesellschaftlicher Verhältnisse durch die Regelung des Verhaltens der Träger, der Subjekte dieser Verhältnisse. Diese Funktion und Aufgabe erfüllt die Rechtsnorm dadurch, dass sie menschliche Verhaltungs-

[44] KELSEN: *General theory of law and state*, S. 120.

weisen und Situationen als zu realisierend, als Sollen vorschreibt, die die bezweckte, von der Totalität der gesellschaftlichen Verhältnisse, vor allem von den objektiven wirtschaftlichen und Produktionsverhältnissen beanspruchte Gestaltung der konkreten gesellschaftlichen Verhältnisse hervorrufen. Dazu also, dass sich in den bestehenden gesellschaftlichen Verhältnissen der verlangte, bestimmte Gestaltungsprozess vollziehe, ist es ebenfalls notwendig, die objektiv bestimmten und vorausgesetzten menschlichen Verhaltungsweisen und Situationen zu entwickeln und zu realisieren. Welche jene menschlichen Verhaltungsweisen sind, deren Realisierung die abgezielte Gestaltung der gesellschaftlichen Verhältnisse hervorruft, kann der Gesetzgeber in der objektiven Totalität der gesellschaftlichen Verhältnisse erkennen. Der Gesetzgeber nimmt also die als Inhalt der Rechtsnorm formulierten menschlichen Verhaltungsweisen aus dem Sein, aus der Wirklichkeit der gesellschaftlichen Verhältnisse. Im Prozess, wo sich die gesellschaftlichen Verhältnisse in der Rechtsnorm inhaltlich-rechtlich widerspiegeln, erscheinen gewisse, in den wirklichen, bestehenden gesellschaftlichen Verhältnissen ausgeübte, bestimmte menschliche Verhaltungsweisen als Inhalt der Rechtsnorm. Der Sollen-Inhalt der Rechtsnorm stammt also aus dem Sein; der Sollen-Inhalt der Rechtsnorm ist jedoch — und das kann man nicht genug betonen — in der objektiven Wirklichkeit nicht unmittelbar gegeben. Inhaltliche Elemente der Rechtsnorm, wie die zu regelnden menschlichen Verhaltungsweisen, Situationen und Sachverhalte spiegeln in der objektiven gesellschaftlichen Wirklichkeit vorhandene Handlungen und Situationen wider, aber nicht in der Unmittelbarkeit, in der sie konkret und in ihrer Individualität erscheinen, sondern in eigentümlichen Kategorien aufgearbeitet. Man denke nur an die in ihrer Allgemeinheit und Individualität dargestellten Sachverhalte in den Rahmen- bzw. kasuistischen Rechtsnormen und an die Verhaltungsweisen und Situationen,[45] die in den Rechtsnormen im allgemeinen als Typen formuliert sind. Die Erkenntnis des Seins, der wirklichen gesellschaftlichen Verhältnisse, Situationen und der menschlichen Verhaltungsweisen bedeutet an und für sich nicht — wie es die Naturrechtler denken — das Wissen des Sollen-Inhalts der Rechtsnorm, die Ergebnisse der Erkenntnis der objektiven Wirklichkeit bilden bloss ein weiter zu bearbeitendes Rohmaterial zur Widerspiegelung der gesellschaftlichen Verhältnisse in der Rechtsnorm. Diese Widerspiegelung zeigt aber zugleich, dass auch der Rechtspositivismus auf einen Irrweg gerät, da er doch die Bestimmung des Sollen-Inhalts der Rechtsnorm durch das Sein überhaupt verneint.

Es ist angezeigt, kurz über die Funktion zu sprechen, die die Erkenntnis in der Widerspiegelung des Seins im Sollen im allgemeinen und der gesellschaftlichen Verhältnisse in der Rechtsnorm im besonderen hat. Das ist umso

[45] PESCHKA, V.: *Jogforrás és jogalkotás (Rechtsquelle und Rechtssetzung)*. Budapest, 1965. S. 309—345.

notwendiger, als wie es schon zu sehen war ein grundlegender Irrtum der analysierten, modernen rechtsphilosophischen Konzeptionen, die den Dualismus von Sein und Sollen oder eine gegenseitige Beziehung zwischen den beiden voraussetzen, genau darin liegt, dass sie die Erkenntnis, ein bedeutsames Moment in der Beziehung zwischen Sein und Sollen, unrichtig auffassen und auslegen. Wir möchten hier an unsere Erörterungen über den handelnden und betrachtenden, den erkennenden und wollenden Menschen, über das Verhältnis zwischen Theorie und Praxis erinnern; nämlich, dass es die menschliche, gesellschaftliche Praxis ist, die die erkennende Tätigkeit des Menschen, die Theorie bestimmt und rechtfertigt. Um der Rechtsnorm die Verwirklichung ihrer gesellschaftlichen Bestimmung und Funktion, die Regelung der bestehenden gesellschaftlich-wirtschaftlichen Verhältnisse sichern zu können, müssen wir die objektiven Gesetzmässigkeiten kennen, die in den gesellschaftlichen Verhältnissen zur Geltung kommen; auf die inhaltliche Widerspiegelung der gesellschaftlichen Verhältnisse in der Rechtsnorm bezogen haben wir aber darauf hingewiesen, dass die Erkenntnis auch jener konkreten Situationen, menschlichen Relationen und Verhalten unerlässlich ist, die in dem Alltagsleben und in der Tätigkeit der Träger von gesellschaftlichen Verhältnissen vorkommen. All dies zeigt, dass die menschliche Erkenntnis in dem Entstehen einer Rechtsnorm als einer Soll-artigen Objektivation eine bedeutsame Rolle spielt. Aber schon in unseren Ausführungen über die Widerspiegelung der gesellschaftlichen Verhältnisse im Sollen-Inhalt der Rechtsnorm haben wir betont, dass die Erkenntnis und das Wissen über die wirklichen menschlichen Situationen, Verhaltungsformen und -weisen an und für sich noch nicht die Rechtsnorm, das Sollen bedeuten; wie auch durch die Erkenntnis der objektiven Gesetzmässigkeiten der wirtschaftlich-gesellschaftlichen Verhältnisse die Rechtsnorm noch nicht gegeben ist: die Rechtsnorm ist also nicht die erkenntnistheoretische Ausprägung, die unmittelbare Widerspiegelung dieser objektiven Gesetzmässigkeiten. Die Erkenntnis ist ein unentbehrliches Element zur Herausbildung der Rechtsnorm als einer Objektivation von Sollen-Charakter; die Widerspiegelung der gesellschaftlichen Verhältnisse in den Rechtsnormen ist ohne die Erkenntnis, ein unerlässliches Moment dieses Prozesses, unvorstellbar. Wie aber die Widerspiegelung der gesellschaftlichen Verhältnisse in den Rechtsnormen auch nicht allein in der früher erwähnten, inhaltlich-rechtlichen Widerspiegelung besteht, genauer gesagt, die Letztere bloss eine Phase des ganzen rechtlichen Widerspiegelungsprozesses ist, die ein weiter zu bearbeitendes Rohmaterial liefert, kann auch die Erkenntnis nicht mit dem Widerspiegelungsprozess identifiziert werden, sie ist nur ein wesentliches Moment davon. Es wäre ein Irrtum zu glauben, dass die Erkenntnis nur in Prozessen eine bedeutsame Rolle hat, die sich auf der inhaltlichen Seite der rechtlichen Widerspiegelung abspielen; wie es ebenfalls zu Missverständnissen führen würde, wenn wir die inhaltliche Widerspiegelung der gesellschaftlichen Ver-

hältnisse in der Rechtsnorm mit der Erkenntnis der erwähnten gesellschaftlichen Relationen identifizieren wollten. Über die bedeutsame, eigentümlich kategoriale Bearbeitung der erkannten, menschlichen Situationen, Relationen und Verhaltungsweisen, die sich in diesem inhaltlichen Prozess der rechtlichen Widerspiegelung der gesellschaftlichen Verhältnisse vollzieht (Individualität, Besonderheit, Allgemeinheit, Typus usw.), haben wir schon gesprochen. Wir können es nicht versäumen auch darauf hinzuweisen, welches bedeutsame Moment die Erkenntnis im eigentümlichen Prozess darstellt, in dem sich die formale, normative Bearbeitung des aus der inhaltlich-rechtlichen Widerspiegelung der gesellschaftlichen Verhältnisse gewonnenen, erwähnten Rohmaterials abwickelt.

Es handelt sich ganz einfach darum, dass sich die im Laufe der inhaltlich-rechtlichen Widerspiegelung erkannten menschlichen Verhaltungsweisen und Situationen in der Rechtsnorm nicht allein in gewissen Kategorien (Typus, Besonderheit), sondern als Resultat einer bestimmten Bewertung als zu befolgende Verhaltungsweisen ausdrücken. Um jedes Missverständnis zu vermeiden und unsere Auffassung von einigen axiologischen Konzeptionen zu unterscheiden, möchten wir betonen, dass auch diese Bewertung nicht aufgrund eines von der objektiven Wirklichkeit getrennten, isolierten Sollens, sondern aufgrund sogar sehr wirklicher, in die Welt des Seins gehörender Faktoren geschieht. Die Grundlage dieser Bewertung bilden nämlich zu jeder Zeit die Interessen und der Wille der herrschenden Klasse. Und nur ein gesellschaftlicher Inhalt, der diesen aus der Welt des Seins entlehnten Faktoren entsprechend bewertet und bearbeitet ist, wird im Willen des Staats als normativer Form allgemeingültig, da die bislang verfolgte Widerspiegelung der objektiven Wirklichkeit dadurch einen eigentümlichen, rechtlichen Charakter gewinnt, dass sie als staatliche Forderung in einer bestimmten, abstrakten, allgemeinen Form zum Ausdruck kommt.[46] Es ist vielleicht unnötig zu sagen, dass in diesem Prozess der Formierung des gesellschaftlichen Inhalts zum Normativen das Interesse und der Wille der herrschenden Klasse als Massstab nur angewendet werden kann, insofern durch die Erkenntnis geklärt wird, was eigentlich in der gegebenen Frage der allgemeine Wille der herrschenden Klasse ist. Die Erkenntnis spielt also auch in dieser formalen Etappe der rechtlichen Widerspiegelung der gesellschaftlichen Verhältnisse eine bedeutsame Rolle. Die Normativität der Rechtsnorm beruht nämlich *unmittelbar* auf jener gesellschaftlichen Basis, die in der Besonderheit des tatsächlichen, allgemeinen Willens der herrschenden Klasse besteht. Eine unerlässliche Bedingung zur Normativität der Rechtsnorm ist, dass sich in dieser der tatsächliche, wirkliche, allgemeine Wille der herrschenden Klasse ausdrücke, der sich im Erkenntnisprozess wahrnehmen lässt.

[46] Peschka: a. a. O. S. 354—357. ff.

Untersucht man die Funktion der Erkenntnis im allgemeinen im Verhältnis zwischen Sein und Sollen, konkret aber im Zusammenhang zwischen gesellschaftlichen Verhältnissen und Faktoren sowie der Rechtsnorm, kann man also feststellen, dass die Erkenntnis ein unerlässliches Moment im Verhältnis von Sein und Sollen, aber – wir möchten betonen – nur ein wesentliches Moment ist, das dieses Verhältnis nicht erschöpft. Jeder rechtsphilosophische Versuch soll also für unrichtig angesehen werden, der das Verhältnis zwischen Sein und Sollen auf eine erkenntnistheoretische Beziehung beschränkt. Da in diesem Verhältnis die Erkenntnis bloss ein wesentliches Element darstellt, ist es auch selbstverständlich, dass die Gültigkeit der logischen Regeln auf die Beziehung zwischen Sein und Sollen nur teilweise, auf das Moment der Erkenntnis beschränkt bestehen kann. Deswegen ist eine Fragestellung verfehlt und überschreitet ihren Geltungsbereich, die stets auf die im logischen Sinne genommene Wahrheit oder Falschheit des Sollens, konkret der Rechtsnorm zurückkommt. Das Sollen, so auch die Rechtsnorm ist im wesentlichen keine logische, keine erkenntnistheoretische Kategorie, somit kann sie logisch weder wahr noch falsch sein. Die Frage nach logischer Wahrheit oder Unwahrheit in bezug auf das Sollen, auf die Rechtsnorm, ist insofern stichhaltig, als sie sich auf die Erkenntnis, die erkenntnistheoretischen Feststellungen richtet, die in den Soll-artigen Prozessen und Objektivationen als wesentliche Momente auftreten. Mit der Berührung des Verhältnisses zwischen dem sich im Recht manifestierenden Klassenwillen und der Erkenntnis gelangten wir sogleich bei einem Punkt an, der den Sollen-Charakter der Rechtsnorm bzw. seine Bestimmtheit vom Sein erklärt. Bei der Untersuchung der Beziehung von Sein und Sollen in ihrer Allgemeinheit kamen wir zur Feststellung, dass der eigentliche Sollen-Charakter von der Realität und Realisierung jener Folge bedingt ist, die zur — als Zweck ausgedrückten – Ursache geknüpft und in Aussicht gestellt ist. Das kann man hinsichtlich der Rechtsnorm ebenfalls beobachten. Der Zweck und die gesellschaftliche Bestimmung der Rechtsnorm, der rechtlichen Regelung werden nur dann erreicht bzw. erfüllt, wenn ihre Vorschriften durch die Anwendung auf konkrete, in den gesellschaftlichen Verhältnissen vorkommende Fälle zur Geltung kommen, wenn sich das Verhalten der Teilnehmer an den gesellschaftlichen Verhältnissen den Verfügungen dieser Rechtsnormen entsprechend entwickelt, also wenn es gelingt, zwischen der Rechtsnorm und den gesellschaftlichen Verhältnissen entsprechende Beziehungen herauszubilden. Denn, wie Jhering sehr zutreffend schreibt: »Die Funktion des Rechts im allgemeinen besteht nun darin, sich zu verwirklichen.«[37] Die Normativität, der Sollen-Charakter der Rechtsnorm hängt also davon ab, ob sich die in ihr formulierten und versprochenen Rechtsfolgen – sind die in der Rechtsnorm umschriebenen Bedingungen vorhanden — im allgemeinen

[37] JHERING, R.: *Geist des römischen Rechts.* Leipzig, 1873. I. Teil, S. 49.

realisieren oder nicht, ob die gesellschaftliche Realität dazu besteht, dass sich die Rechtsnorm durchsetzen kann. Jene unmittelbare, reale gesellschaftliche Basis aber, die die Normativität der Rechtsnorm sichert, besteht in der Wirklichkeit des im Recht ausgedrückten, allgemeinen Willens der herrschenden Klasse und der tatsächlichen zwingenden Macht des Staatsapparates, also aus den in der Welt des Seins auftretenden zwei Faktoren gemeinsam.

Die Erörterungen über die Rechtsnorm zusammengefasst, kann man im allgemeinen sagen, dass der Sollen-Charakter, die Normativität der Rechtsnorm in mehreren Beziehungen vom Sein bestimmt ist; nicht allein dadurch, dass die Situationen, Relationen und Verhaltungsweisen, die sich als Sollen-Charakter der Rechtsnorm manifestieren, eigentümliche Widerspiegelungen der objektiven Wirklichkeit sind, sondern das lässt sich auch daraus ersehen, dass sogar die Normativität der Rechtsnorm von den gesellschaftlichen Prozessen und Faktoren gesichert ist, die sich in der Welt des Seins zeigen. Da aber der Zweck, die Aufgabe, Bestimmung und Funktion der Rechtsnorm in der Gesellschaft – was wir wegen der unmittelbaren Evidenz nur flüchtig berührten – die Regelung menschlicher Verhalten und gesellschaftlicher Verhältnisse ist, die ebenfalls in der Welt des Seins erscheinen, kann man in bezug auf die Rechtsnorm mit allgemeiner Gültigkeit feststellen, dass zwischen Sein und Sollen eine gegenseitige, dialektische Beziehung besteht, in dem schliesslich das Sein das entscheidende, bestimmende Element darstellt.

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Es kann vielleicht der inneren Ordnung und Übersicht dienen, als Abschluss zu versuchen, unter den modernen Konzeptionen, die das Problem des Seins und Sollens analysieren, die Stelle der marxistischen rechtstheoretischen Auffassung kurz zu bestimmen. Die marxistische Rechtstheorie lehnt jede rechtsphilosophische Konzeption ab, die auf subjektiv oder objektiv idealistische Art von dem Dualismus von Sein und Sollen, von ihrem antinomischen Gegensatz ausgeht und verneint, dass das Sollen aus dem Sein abgeleitet werden kann. Dies ist der Grund, weswegen die marxistische Rechtstheorie jeder formellen, positivistisch-normativistischen Auffassung genauso wie allen Konzeptionen gegenübersteht, die das Recht aus einer eigengegesetzlichen Welt der Werte des vom Sein abstrahierten Sollens ableiten. Es wäre verfehlt daraus – wie viele — den Schluss zu ziehen, dass die marxistische Rechtstheorie jene soziologischen und realistischen rechtstheoretischen Ansichten teilt, die den Sollen-Charakter der Rechtsnorm verneinen bzw. das Sein mit dem Sollen identifizieren. Die marxistische Rechtstheorie betont die materielle Einheit der Welt, erkennt den Sollen-Charakter der Rechtsnorm an, aber hält dieses Sollen für eine eigentümliche Widerspiegelung des Seins. Sie sieht die Rechtsnorm als eine die objektive Wirklichkeit widerspiegelnde, eigentümliche gesell-

schaftliche Objektivation an, eine Eigenschaft derer genau in ihrer Normativität, in ihrem Sollen-Charakter zum Ausdruck kommt. Die Tatsache jedoch, dass die marxistische Rechtstheorie die Rechtsnorm als die Widerspiegelung der objektiven Wirklichkeit, das Sollen als Widerspiegelung des Seins auffasst, bedeutet auch keine Grundlegung irgendeines marxistischen Naturrechts, denn die Ableitung der Rechtsnorm aus der objektiven Wirklichkeit, des Sollens aus dem Sein ist auch keine mechanische, photokopische Abbildung des Seins, der Wirklichkeit, nicht die Voraussetzung dessen, dass das Sollen, die Rechtsnormen im Sein, in der objektiven Wirklichkeit, in der Natur des Menschen oder in der Gesellschaft schon gegeben, fertig vorzufinden sind.

Wie wir in diesem Aufsatz darzustellen versuchten, besteht also zwischen den modernen, bürgerlichen rechtsphilosophischen Konzeptionen und der marxistischen Rechtstheorie, infolge ihrer dialektisch-materialistischen Betrachtungsweise, in der Frage von Sein und Sollen — obwohl sie an manchen Punkten zu gemeinsamen Feststellungen gelangten — ein wesentlicher und grundsätzlicher Unterschied.

»Sein« et »Sollen« dans la philosophie moderne du droit

V. Peschka

L'étude essaye d'abord d'éclaircir les notions du «*Sein*» et du «*Sollen*». Puis elle donne une analyse critique des deux tendances théoriques typiques relatives à la relation entre «*Sein*» et «*Sollen*» qui se sont développées dans la philosophie moderne du droit bourgeois; ce sont d'une part le dualisme du «*Sein*» et du «*Sollen*» dans la doctrine pure du droit *(Reine Rechtslehre)* de Hans Kelsen, d'autre part la relation entre «*Sein*» et «*Sollen*» dans les conceptions du droit naturel. L'auteur essaye enfin de mettre à la lumière la connexité entre «*Sein*» et «*Sollen*» sur la base de la conception marxiste.

Проблема «Sein» и «Sollen» в современной теории права

В. ПЕШКА

Статья вначале делает попытку выяснить понятие *Sein* и *Sollen*, затем критически анализирует две основные типичные теоретические концепции, сложившиеся в современной философии права относительно отношения между Sein и Sollen: с одной стороны, показывает дуализм Sein и Sollen в чистой теории права Ганса Кельзена; с другой стороны, связь между Sein и Sollen в естественно-правовых концепциях. Наконец, автор делает попытку дать марксистское освещение взаимосвязей между Sein и Sollen.

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The Settlement of Labour Disputes by Courts or through Official Channels in the European Socialist Countries

by

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There is a specific category of procedure where labour disputes are settled neither by arbitration committees nor by conciliation committees but are brought directly before the courts or settled through official channels. Thus in his paper the author analyzes in the first place the reasons of relegating by the legislators in socialist countries the settlement of labour disputes directly to the authority of courts or to that of superior official organs respectively.

The author sums up his conclusions of general character by setting forth that both the direct judiciary procedure and the proceedings of superior official organs are irregular forms of the settlement of labour disputes but, at the same time, he refers to the essential difference between the two categories of procedure. His final conclusion is as follows: legal disputes can only be settled satisfactorily by impartial organs to which the contesting parties are not subordinated and thus the conditions of the objectivity of decision is assured.

In our paper "Les questions fundamentales due droit de la procedure"[1] we have already touched upon the problem that besides the arbitration committees also the courts of justice and superior official organs may proceed in settling the labour disputes. Whereas in most of the socialist countries the settlement in the first instance of labour disputes falls within the competence of the arbitration committees and thus the procedure before these committees is to be considered to be the general way of the settlement of such disputes. Any action by the courts of justice or by the superior official organs is exceptional as these shall proceed — as a rule — only if a recourse to the generally competent authorities were impossible or inexpedient.

This paper is intended to provide an analysis of the problem whether there are to be found in the socialist countries any typical solutions and common elements with regard to the settlement in the first instance of labour disputes either by the courts or through the official channels.[2]

[1] Acta Iuridica Academiae Scientiarum Hungaricae 3—4/1967 p. 369.

[2] We should like to mention in this context that the appellate procedure of the courts, being a generally adopted way of the settlement in the second instance of labour disputes everywhere — except Hungary — will not be touched upon in this paper. Namely, in Hungary the labour disputes are settled, as a rule, by the arbitration committees established at the county seats and in the Capital. The settlement in the second instance of a labour dispute falls within the competence of the courts only if the dispute has arisen from a deficit in the inventory taken by commercial or warehouse employees, from a damage incurred by injuries caused in life or health of the worker (employee), from the refunding of damages caused by an offence committed by the employee or

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While examining the factors serving as the basis of the primary competence of the courts of justice we have, first of all, to lay down that not only legal-normative elements fall within the sphere of the norms regulating the labour problems, but in addition manysided and intricate problems devolve on the organs doing practical organizatory and operative-technical work in settling labour disputes, and so – among others — also on the courts of justice, inasmuch as they decide labour disputes. Namely, the characteristic features of this regulation are often of such a nature that legal aspects are intermingled therein with the point of view of professional correctness and expediency and thus the separation of these two kinds of elements would not only be unrealizable but would also interfere with the objectives set by the legislators in codifying these rules. That is just why the proceeding organs have to take account of the professional aspects the knowledge of which is not a mere problem of "expertise" but also an inherent element and requirement of passing a sound judgment.[3] Namely, the administration of law has to reflect the changes undergone by the substantive law which concretely means in this instance that the competent organs have to be aware of the conditions prevailing in the enterprises between which the contested problem has arisen, as otherwise no satisfactory decision could be taken with respect to the claim at issue. This is all the more necessary while the judiciary activity based upon due professional expertise and making use of the knowledge of local conditions may affect the regulation of social conditions, that is it, may make possible the indirect influencing of the above mentioned conditions as well.

The above treated requirement has arisen more than once with respect to the judicial function of the courts dealing with labour disputes. It was in the first period of the building of socialism when scruples arose about authorizing the courts of justice to take part in the settlement of labour disputes because, on the one hand, state power was suspicious about the judiciary and did not want to charge them with the settlement of disputes arising from the labour relations of the workers and, on the second hand – what is here to be emphasized — the courts in this period would have been according to this view unable to follow the conditions prevailing in the enterprises and to settle in any satisfactory way the labour disputes. *Imre Szabó* has referred to

from a claim put forward by the employee for allowances due for him on the ground of the fulfilment a plan task, open competition, contract or innovation [Enacting Clause of the Labour Code, § 106(1)]. These cases, however, shall not be settled by the territorial arbitration committees. The competence of the courts excludes that of the territorial arbitration committees and vice versa.

[3] A similar problem has arisen as to the judicial supervision of administrative acts. Cf.: Ečtáš, J.: *Vědecka diskuse o problematice rozšíření soudní kontroly správy v ČSSR (Scientific debate about the problems raised by the extension of the judicial supervision of state administration).* Právnik, 7/1967. pp. 633–634.

the fact that it was just in course of the preparation of the introduction of the new system of economic management when the idea of the extension of the scope of authority of the courts of justice arose also with respect to labour disputes as a sympton of the sound tendency of increasing procedural guarantees. At the same time, he pointed to the fact that as compared with the proceedings of other state organs judicial procedure is the most refined one, providing the best abstract safeguards. Thus, the competence of the courts should extend in the first place to the field where the assertion of these abstract procedural guarantees is of a primary interest. Consequently judicial guarantees must be increased where a generalized abstract-equal assertion of rights, laying stress upon the legal aspects, is required by the social conditions, but at the same time, state administrational guarantees must be better worked out and asserted in every case where a predominant regard to the typical characteristics of the dispute and the personal features of the parties is required by the special character of the case to be decided.[4]

The above outlined aspects are to be taken into consideration also with regard to the settlement of labour disputes, especially in view of the prevailing relevant regulation in Hungary. The only problem is whether there is in course of the judicial proceedings any possibility of the assertion of the special requirements to be taken into consideration in the settlement of labour disputes, that is, of the principles of economy, equity and, last but not least, of the professional aspects of the problem at issue.

In this context the statutory laws of the different countries rendering the judicial procedure to be the means of the settlement of labour disputes show the ways leading to the right solution. Thus the assertion of specific aspects in the settlement of labour disputes may be ensured by the composition of the courts by means of making use of the cooperation of lay assessors also in deciding labour disputes in the second instance, even in legal systems where no lay assessors take part in other kind of proceedings in the second instance.[5] Namely, well chosen lay assessors being well versed in the special problems raised by the disputes may promote the assertion of the relevant specific aspects and thus the formulation of a judgment reflecting the objective justice. The assertion of the above mentioned requirements may also be promoted by the special rules in the various Codes of Civil Procedure providing for the settlement of labour disputes, either within a self-contained Chapter[6] or by means of codifying all the relevant provisions in a way taking into consideration also

[4] Cf. SZABÓ, I.: *A jogalkotás és jogalkalmazás feladatai az új gazdasági mechanizmusban (The problems of legislation and jurisdiction under the new system of economic management)*. A lecture at the Faculty of Law of the Eötvös Loránt University on January 19, 1968.

[5] In the GDR the Act of April 17, 1963 on the Judicial Organization includes similar provisions (GBL p. 45 I. § 24(2) and § 34(4)).

[6] Cf.: Polish Code of Civil Procedure of 1964, Title VII, Sub-title III.

the specific requirements of the labour disputes.[7] V. I. Smoliartsuk lays down as a general postulate that the courts deciding labour disputes shall take into consideration the protection of the socialist economic system and social property, the personal and property rights and legally recognized interests of the citizens, as well as, the rights and legally recognized interests of the enterprises, institutes, institutions, cooperative and social organizations.[8]

Thus it may hardly be contested that the courts should be invested with due authority to settle the labour disputes, all the more so, because neither the competence of the civil courts is confined to the decision of civil cases only but it also includes an authority of settling cases pertaining to family law, agricultural and cooperative law and certain disputes arising in the field of state administration, let alone that proceeding in certain civil cases — as e.g. on industrial law (patent law, trademark law etc.) requires at least as much professional knowledge as it is necessary to the settlement of labour disputes.[9] In our opinion, however, judicial procedure can only complete the proceedings of the arbitration committees, that is, it should only be employed in the second instance or where the proceedings of the arbitration committees would be excluded or inexpedient.

Statutory laws in various socialist countries prove indeed that the courts of justice play part in the settlement of labour disputes, in the first place, as Courts of Appeal and where this has become necessary as a consequence of other legal solutions adopted by the country in question. That is just why, in view of the topics to be analysed, in the following primarily this problem will be dealt with: what are the disputes to be settled by courts in the different countries. This topic will be dealt with by laying emphasis on certain typical categories without endeavouring to cover the entire subject.

1. One of the cases of the primary authority of the courts appears where no courts of arbitration have been organized in the enterprises and where there are no such social organs of higher instance which could revise the decision settling the employee's labour dispute or though there are such organs but owing to the quality of the employer have no authority to decide the dispute in question.

According to the general opinion the organization of arbitration commitees is only possible in such enterprises where there is a Trade Union Com-

[7] This solution was adopted e.g. by the Code of Civil Procedure of the Russian Soviet Federated Socialist Republic in 1964.

[8] SMOLIARTSUK, V. I.: *Zakonodatielstvo o trudovih sporah.* Moskva, Izd. Juridiceskaia Literatura, 1966. p. 161.

[9] In this context it is to be mentioned that also the idea of special Labour Courts may arise, since such courts of specific structure proceeding under special rules of procedure are to be found in a number of foreign (mostly Western) countries. Also the organization of such Labour Courts may be concieved that have the advantages of both the present arbitration courts and the courts of justice. For the time being, however, the system of special Labour Courts in unknown to the socialist countries.

mittee, consequently no arbitration committee can be set up in enterprises where there are no Trade Union Committees. Different conclusions have been drawn from this fact by the legislations of the various countries, namely either by way of establishing direct judicial authority or by relegating the settlement of labour disputes to the authority of social organs of higher standing. The former solution has been chosen by the Soviet Union and the German Democratic Republic whereas the latter one by Bulgaria, Czecho-Slovakia, Poland, Hungary and Roumania. A closer analysis of this problem will be given in the following.[9a]

According to the solution adopted in the Soviet Union the settlement of labour disputes falls within the authority of courts in cases where no arbitration committee can be set up.[10] In the German Democratic Republic arbitration committees can only be set up in those enterprises where there exist Trade Union Committees. In want of arbitration committees the workers may have recourse to the courts. This solution has been contested by certain lawyers on the ground that making the choice between the channels of the settlement of labour disputes dependent on the extent of the enterprise employing the worker may incidentally debar the worker the right to have recourse — in the first instance to any social organ in the election of which he too has taken part[11] and which has a better knowledge of the subject matter of the dispute and can make his judgment quicker and is nearer at hand than the court.

In most countries the function of the settlement of labour disputes is performed by the higher organs of the Trade Unions.

It may however brought into question whether this standpoint is in compliance with the fundamental principles to be applied in setting up the social organs destined to settle the labour disputes, that is, with the postulate of settling such disputes forthwith on the spot and of setting up the arbitration committees just there where the dispute has arisen, which committees are composed of the worker's fellow-workers and can get knowledge on the spot of the intricate problems arising in the enterprise, that is, has such qualities as cannot be found in any other organ outside the framework of the enterprise. Where no such committee can be set up and the labour dispute is settled by an extarnal organ to which the enterprisal conditions are unknown the question arises: would it not be more justified to relegate the settlement of labour disputes to the judicial procedure than to authorize with this function high level social organs?

[9a] As regards Roumania Act No. 59 of 1968 on the Adjucating Committees (Comisiile de judecata) differs in several respects from earlier legislation; its provisions however could not be dealt with in this paper.

[10] *Kommentarii k zakonodatielstvu o trude.* Moskva, Juridiceskaia Literatura, 1966. p. 587.

[11] PAUL, H.: *Die Rolle des Verfahrens in Arbeitsrechtssachen bei der Lösung arbeitsrechtlicher Konflikte und die durch die Spezifik dieser Konflikte bedingten verfahrensrechtlichen Besonderheiten.* A diploma work, Jena, 1967. Manuscript, p. 130.

In our opinion the investment of special external organs with the right of settling labour disputes would mean the application of a fundamentally sound approach to a field where its subjective and objective conditions could hardly be found.[12] It may be asserted that such higher social organs can have a better knowledge of the professional background of the case, but one may rightly ask, on the one hand, whether it is really so and, on the other, why cannot the necessary professional knowledge be acquired by the courts. That is just why we are rather inclined to adopt the opinion that it would be a more appropriate solution to invest the courts with the authority of settling these disputes.[13]

We have referred in the foregoing to the statutory solution establishing arbitration committees proceeding on higher level than that of the enterprise without having, however, any authority to settle the labour disputes arising in the enterprises of certain categories. This may have practical importance with respect to the settling of the labour disputes arising in the private sector, either as a result of direct statutory regulation as e.g. in Bulgaria or in Roumania or indirectly by laying down in statutes that arbitration committees can only be set up in enterprises constituting social property, or in offices or institutions as e.g. in the Soviet Union or in Poland. According to Article 140/b of the Labour Code of Bulgaria and of Article 116/c of the Labour Code of Roumania the settlement of labour disputes arising within the private sector falls within the authority of the courts of justice. The competence of the courts of justice under the Soviet law covers the labour disputes of domestic acids, chauffeurs of private cars, private secretaries etc.,[14] whereas under Czecho-

[12] KOSTEČKA, J.: *O rozhodčímu řízeni v závodech (On the procedure of the arbitration committees at the enterprises).* Pràvník, 1/1964. p. 23.

[13] We have only to touch upon the circumstance that under the Bulgarian law the arbitration committees have to be organized at the competent Association of Trade Unions of the District (Town) in the cases where there are no Trade Union Committees at the enterprise, office or local Trade Union (Order No. 30 of 1958 of the Council of Ministers Section 10. paragraph 3.). In Czecho-Slovakia labour disputes are settled by the Trade Union Committees where there are no works- (shop-) committees (Order No. 82 1965 Sb. § 2(3)). Under the Polish law the arbitration committees shall be organized within the territorial Trade Union Organs with a competence extending to all enterprises where no arbitration committees could be set up (Decree Law No. 35 of 1954 § 15(1)). In Roumania a sigle arbitration committee is organized at the community for all the enterprises having no Trade Union Committees. The labour disputes arising at the enterprises having their seat at the chief town of the District or Province are settled by the arbitration committees organized by their superior organs, provided that there is no arbitration committee at the enterprise and the seat of the enterprise's superior organ is at the chief town of the District or Province. If the seat of the enterprise's superior organ is not at the chief town of the District or Province, the labour disputes are settled by the arbitration committee organized by the competent people's committee of the district (Decision No. 1050 of 1960, §§ 1—2). In Hungary a common arbitration committee shall be set up by the district (municipal) councils for all the enterprises where no arbitration committees have been organized (Order No. 9 1967 X. 8.) MüM. of the Ministry of Labour § 3(3)).

[14] Cf. above Note *10*.

Slovak law judicial authority extends to the settlement of all the labour disputes *inter se* of private citizens.[15]

It is to be noted that in Hungary the settlement of the labour disputes of private employers falls within the competence of common arbitration committees organized by the District (Town or Borough) Councils.[16] In context of social organs deciding labour disputes in first instance on higher than enterprisal level the above outlined consideration with respect to the labour disputes of those employed in private sector must be even more emphasized.[17]

Finally the solution adopted by the Yugoslav law is also to be mentioned: The institution of arbitration committees to settle labour disputes is unknown to Yugoslav law and, instead, an attempt is to be made at the settlement of such disputes through official channels within the enterprise itself and only if this is impossible is the labour dispute to be decided by the labour law section of the municipal court in the first instance and by the same section of the district court in the second instance (Labour Conditions Act, enacted on April 7, 1965, §§ 117 and ff.).

2. The labour disputes may be relegated to the authority of the courts also in cases where the proceedings of the arbitration committees have not yielded any results. This may occur in three cases: a) the arbitration committee has passed no decision during the time limit prescribed thereto;[18] b) the arbitration committee has ommitted to take any decision because the applicant's opponent has twice failed to appear at the hearing without any justication and thus the relevant facts could not be established or because no unanimity or majority could be reached in passing the decision.[19] c) the arbitration committee has passed a decision laying down that its proceedings have been unsuccessful.[20] In these case the Czecho-Slovak, German and Polish laws authorize the applicant to have a direct recourse to the court of justice.[21]

This solution is similar to the one where the arbitration committee's

[15] Witz, K.: *Československé pracovní právo (Czecho-Slovak labour law)*. Praha, ORBIS, 1967. 380 pp.

[16] Order No. 9/1967 (X.8) MüM of the Ministry of Labour § 3(3).

[17] Labour disputes arisen in the province of cooperatives will not be dealt with here since it would transgress the scope of this paper. A reference should, all the same, be made to the fact that the labour disputes of the employees of the cooperatives may fall within the competence of the courts, as e.g. in the Soviet Union. Here the labour disputes of the employees of the kolkhozes are settled by the courts, independently of the circumstance whether or not there is a Trade Union Committee at the kolkhoz. Cf.: p. 587 of the book referred to by Note 4.

[18] In strength of § 213 of the Czecho-Slovak Labour Code the arbitration committee is bound to pass its decision within 30 days.

[19] In the GDR the Decree Law of October 4, 1968 on the Election and Function of Arbitration Committees (Gesetzblatt der Deutschen Demokratischen Republik I. No. 16.) § 30(2), 18(2) and 11(1). According to the latter the members of the arbitration committee may be of even number.

[20] Order No. 68 of 1954 of the Council of Ministers of Poland § 45(2) and 48(1).

[21] It is just to be mentioned that under the Soviet and Bulgarian laws similar cases fall within the competence of the Trade Union Committees at the enterprises.

decision can be appealed and thus the proceedings of the committe is considered by the positive law to be unsuccessful, opening thus the possibility of a judicial procedure.[22] Whereas in the above mentioned first case no decision has been taken in the merits of the case, in the latter instance such decision came into being but due to an appeal has subsequently become ineffective. There exists an opinion to the effect that the arbitration committee's decision covering only the legal title but not the amount of the claim cannot be considered as a settlement of the dispute and thus the interested party may require the remittal of the case to the competent court of justice.[23]

3. It is a further justified case of the direct judicial authority, namely where the arbitration committee, or one or more of its members, or the organ having appointed the members of the committee have earlier dealt with the same case in another capacity, thus e.g. they have taken a decision jointly with the administrative staff of the enterprise, or consented to such a decision, or expressed their opinion with regard to such decision, even if the decision passed in this way is to be considered to be taken by the administrative staff of the enterprise.[24] Certain legal systems reflect the standpoint that it would be wrong if the persons having thus dealt with the dispute could decide the same case in their capacity as the members of the arbitration committee, this being a consideration justifying the relegation of such cases to the authority of the courts. Thus the Soviet law requires to the validity of the termination of the worker's labour relation by the notice of the enterprise a preliminary consent of the Trade Union Committee in want of which the notice to quit is ineffective. Similar solutions prevail in Czecho-Slovakia and in the German Democratic Republic. This regulation may by traced back to the Trade Unions' function in safeguarding the workers' interest and is destined to provide the workers with more security. This has incited the Soviet law to authorize the worker (employee) to have a direct recourse to the court in any case where the Trade Union Committee did not consent to the termination of the worker's employment deeming it to be unlawful and the administrative staff of the enterprise has all the same given a notice to quit to the worker, violating thus the law. This is justified by the argument that where the Trade Union Committee has already expressed its opinion which is known both to the administrative staff of the enterprise and the worker, any reinvestigation of the case by the Labour Dispute Committee and then by the Trade Union Committee would be impractical. If, however, the worker (employee) has been dismissed without consulting the Trade Union Committee, the worker may have recourse at

[22] Cf.: Czecho-Slovak Labour Code § 213.

[23] Sbírka rozhodnutí soudu ČSSR, 6/1967. p. 61. and LUKÁŠ, K.: *Rozhodči řizeni v zákoniku práce a jeho důsledky pro praxi rozhodčich orgánu (The proceedings of the arbitration committee under the Labour Code and its reflection in the practice of arbitration committees).* Socialistická Zákonnost, 6/1966. p. 378.

[24] KOSTEČKA: op. cit. p. 20.

his own will – either to the Labour Dispute Committee and the Trade Union Committee or directly to the court.[25]

The problem of competent forum has not been solved in any such clear-cut manner with regard to the legal disputes involved by the changing of the legal title of a notice to quit. Namely if the legal title of the notice given by the enterprise in agreement with the Trade Union Committee has been contested by the worker (employee), the competence of the forum to settle this dispute may be a debated issue. There is a marked tendency of relegating such disputes directly to the authority of the courts, since such disputes may be considered to be of the same character as the disputes relating to the restoration of the labour relation.[26]

Under the Soviet law – in addition to the termination of labour relation – the preliminary consent of the Trade Union Committee is necessary also to the disciplinary transfer of the non fulltime Trade Union officials and to the inflictment of disciplinary punishment on such officials. In case of such consent the worker considering it to be injurious to his interests may ask directly the court for the rescission of the decision on the same grounds as in the above mentioned cases.[27] The labour disputes of the employees of the Trade Unions (book-keepers, librarians etc.) also fall within the direct authority of the courts.[28]

Finally this category of problems includes also the disputes arisen under the Soviet law between the Trade Union Organizer and the administrative staff of the enterprise where the Labour Dispute Committee is composed of the Trade Union Organizer and the manager of the enterprise. Since the Trade Union Organizer is himself an interested party in this dispute and thus he cannot represent in the Committee the Trade Union, the settlement of this dispute falls within the direct authority of the courts.

As it has been referred to in the foregoing, in Czecho-Slovakia the disputes relating to the termination of the labour relation – including also pecuniary claims connected therewith – are directly settled by the courts. (Labour Code § 209). This is here all the more justified because the same Trade Union Committees which proceed in the settlement in the first instance of the labour disputes take part in other capacity in the cancellation of the labour relation (Labour Code, § 59). In the German Democratic Republic (GDR), on the other hand, where the preliminary consent of the Trade Union is necessary to the termination of the employee's labour relation (Labour

[25] Cf. Decision no 8 of the Supreme Court of the Soviet Union of June 30, 1964 (Bulletin Verhovnovo suda SSSR, 4/1964. p. 10)

[26] Cf.: p. 588 of the work referred to by Note No. 10 and STAVCEVA, A.: *Trudovie spori neposredstvenno podvedomstvennie sudam.* Sovietskaia Justicia, 17/1965. pp. 6—7.

[27] Regulation on the authority of the Trade Union Committees § 17. Vedomsti Verhovnovo Sovieta SSSR, July 24, 1958, No. 15. pp. 649—653.

[28] Cf.: p. 587 of the work referred to by Note No. 10.

Code, § 34/2), no specific forum-system exists relating to the disputes involved by the termination of the labour relation, since the Trade Unions do not take any direct part in the settlement of labour disputes, which task falls within the authority of the Labour Dispute Committees elected by the collective of workers (employees) which despite of being in some respect under the guidance of the Trade Unions can, all the same, take their decisions in the merit of the cases brought before them independently of the Trade Unions.[29]

4. Judicial authority may depend on the scope of activity of the worker (employee) proceeding in the labour dispute as a party inasmuch that the labour disputes of certain employees holding a leading post should be primarily settled by the courts, since according to the point of view adopted by legislation, the proceeding of arbitration committees would be incompatible with the function performed by such employees. In most countries - as it will be seen in the following - such disputes are settled through official channels, but also solutions may be found where the settlement of the labour disputes of certain employees holding more important posts falls directly within the authority of courts. Thus, in Poland the Decision No. 201 of 1954 of the Council of Ministers enumerates the leading posts the holding of which precludes - as a rule - the settlement of labour disputes by the arbitration committees.[30] The labour disputes of employees specified by this decision are to be settled by the courts.[31] It is to be noted, however, that this rule does not apply to state employees whose labour disputes are settled through the official channels.

5. Also the character of certain labour disputes may justify their judicial settlement in the first instance, so as in some cases connected with certain claims for damages.[32] Legal disputes involved by claims for damages had been considered for a long while to be civil law cases and it was only the result of a later development that this problem was relegated to the domain of labour law.[33] This justifies in part that under certain laws these disputes fall even now within the direct authority of courts. In addition also the circumstance

[29] It is only to be mentioned here that in Bulgaria the consent of the Trade Union Committee is not necessary to the termination of the employee's labour relation. This organ is, in strength of § 8(2) of the Order of March 29, 1958 Part II (gazetted in Izvestia No. 27 of April 4, 1958 and supplemented by the Order gazetted in No. 74 of the Official Gazette on September 16, 1958) authorized to express its opinion about the dismissal or prolonged transfer of the employee. It is, however, laid down in § 10 of the Order of the Council of Ministers (Dörsaven Vestnik, No. 16 of June 6, 1964) that the organs of the Trade Unions shall take their decisions on the merits of the labour dispute independently of their former opinion. Under the Bulgarian law, labour disputes arising from the employee's dismissal cannot be directly brought before the court.

[30] Monitor Polski, No. 37 of April 28, 1954, p. 435.

[31] SALWA, Z.: *Prawo Pracy (Labour Law)*. Warszawa, 1963. p. 255.

[32] The assertion of claims for damages under civil law fall, as a matter of fact, within the authority of the courts, even if the dispute has arisen between the enterprise and its employee.

[33] JONCZYK, J.: *Spory ze stosunku pracy (Labour disputes)*. Warszawa, 1965. PWN. p. 158.

plays its part in choosing this solution that any inquiry into the *de facto* and legal grounds of the disputes involved by claims for damages requires a special foresight, this being in itself an argument in favour of allowing a recourse to the courts already in the first instance.

In this context reference may be made to the Polish law relegating all legal disputes relating to the workers' pecuniary liability to the authority of ordinary courts.[34] The obligation of the worker (employee) by the enterprise's unilateral decision to pay damages and the keeping back of the amount of damages directly from the workers' (employees') wages (salary) is only an exceptional possibility as e.g. in case of railway or post-office employees. Thus the enterprise has to put forward all of its claims against its workers (employees) including those arising from faulty production with the competent court of justice. As for the assertion of the worker's claim for damages there is an opinion that the settlement of these disputes should fall primarily within the authority of arbitration committees whereas there are others who take up a position in favour of the primary judicial authority.[35] Legal disputes arising from industrial accidents, however, fall undoubtedly within the authority of the courts, since according to Polish judicial practice such claims shall be based upon the responsibility for tortious acts.[36]

Direct judicial authority to settle the legal disputes arising from claims for damages is more restricted under the Soviet law where only claims based upon the workers' full responsibility for damages are to be filed directly with the people's courts.[37] Judicial authority is opened, however, in any case where it has been established in course of the proceedings that not full but only limited liability rests on the worker.[38] A similar situation arises where under statutory law the enterprise is authorized to oblige the worker to pay damages only in agreement with the worker who, on the other hand, may refuse to agree to this. There are Federal Republics where such claims can be lodged by the enterprises only with the competent courts.[39] Where, on the other hand, claims for damages based upon injury to health are asserted by the worker against the enterprise, such claims shall be decided primarily by the

[34] SALWA: op. cit. p. 255.

[35] JONCZYK: *Odpowiedzialnošč odszkodowawcza w prawie pracy (Liability for damages under labour law)*. Panstwo i Prawo, 5—6/1964. pp. 746—758.

[36] JONCZYK: a publication on September 29, 1964.

[37] Cf.: Joint Decision of the Central Executive Committee of the Soviet Union and the Council of Commissars of June 12, 1929 on the liability of the employees for damages caused to their employers (Section (2) and the Labour Code of the Russian Federated Socialist Republic (§ 83). It is further to be noted that the disputes arising from the employee's restricted liability are settled by the enterprise the decisions of which may be appealed in different ways according to the laws of the different Federal Republics.

[38] Decisions of December 18, 1961, of the Plenum of the Supreme Court of the Soviet Union, § 10. P. 588 of the work referred to by Note 10.

[39] TISCENKOV, G. A.: *Nekoterie voprosi rasmotrenia sporov o materialnoi otvetstvennosti rabotsih i slushashtshih*. Sovetskoe Gosudarstvo i Pravo, 11/1965. pp. 108—112.

administrative staff of the enterprise, from the decision of which a direct appeal may be lodged with the Trade Union Committee and then with the People's Court. From the decision of the Trade Union Committee an appeal may be lodged with the People's Court by the enterprise as well.[40]

An essentially similar regulation may be found under the Bulgarian law. According to the Labour Code, § 97, the enterprises' complaints for the refundment of full damages from their employees are to be filed directly with the court (Labour Code, § 140). Special regulation applies to the assertion of the employee's claim for damages against his employer (the enterprise) in the Bulgarian law (Labour Code, § 159). In case of the ommission of the special procedure laid down in the Labour Code, the claimant or his heirs may file with the court a complaint for a declaratory judgment. Otherwise — failing a regulation to the contrary — §§ 45 et ssq. of the Obligations and Contracts Act of 1951 are to be applied to the assertion of claims for damages put forward by the workers.

Under Roumanian legislation judicial authority asserts itself only in second instance, even in cases where a claim for full damages is put forward, that is to say, the enterprise has to file its complaint with the court only if no decision has been taken by its manager on keeping back the worker's wages (employe's salary), within 30 days reckoned from the day when the person causing the damage has come to his knowledge (Labour Code § 116), provided that the amount of the damages claimed for exceeds the net sum of wages, due — in strength of the wagetariff — to the worker for his 3 months work, and the damage was caused by a criminal offence. In the cases based upon the worker's limited liability, the enterprise has a direct recourse to the court. If, on the other hand, the claim for damages is put forward by the worker, a distinction must be made whether the damage occurred in the worker's health or in his property. In the first case the worker has to turn to the organs of the Social Insurance, if, on the other hand, the allocations got from these organs are less than the amount of the damage incurred by the worker, the worker may lodge an action against the enterprise with the competent district court for the refunding of the difference, under the rules of civil law. If, on the other hand, the damage occured in the worker's property, the claim for damages must be primarily lodged with the court under the rules of civil law.[41]

In the other socialist countries, that is, Czecho-Slovakia, Hungary and the German Democratic Republic claims for damages under the labour law shall be put forward according to the general rules, that is to say, the courts

[40] Decree Law of October 2, 1961 of the Supreme Council of the Soviet Union. Vedomstyi Verhovnovo Sovieta SSSR, 4/1961 p. 420.

[41] CAMPIANU, V.: Publication of October 24, 1964.

shall only proceed in the second instance in cases for damages, with a further restriction in Hungary, namely that this is allowed only within the scope specified by § 106 of the Enacting Clause of the Labour Code.

6. The existence or non-existence of any labour relation is, as a rule, indifferent as to the possibility of the assertion of claims under labour law but also different solutions may be found. Thus in strength of the Czecho-Slovak Labour Code the competence of the organ settling a particular labour dispute depends on the circumstance whether the claim has been asserted during the subsistance of the labour relation or only after its termination. Namely, in the latter case the settlement of the dispute does not fall within the authority of the Trade Union Committee acting as arbitration committee but the disputed claim is to be lodged with the competent court (Labour Code §§ 208 and 209). This is justified by the circumstance that the relationship between the employee and the enterprise has ceased to exist and — according to this opinion — it would be wrong to oblige the employee to submit himself to the authority of an organ of his former employer. In the German Democratic Republic this problem is not expressly solved by the written law. However, from the legal provision relegating the settlement of labour disputes to the authority of the District Court having competence at the seat of the enterprise judicial practice has drawn the conclusion that the exemption of the employee from the jurisdiction of the arbitration committee is even more justified in cases where the labour relation has ceased to exist, provided that this makes for the employee the assertion of his rights easier and there is no social interest to contraindicate it.[42] Thus in such cases the worker (employee) may lodge his claim directly with the District Court being competent to proceed at the employee's domicil or place of work.

In our opinion, in case of the termination of the worker's employment, the worker should be authorized — in compliance with our former law — to make a choice whether he wants his labour dispute to be settled by the arbitration committee organized by his former employer or by the court. Namely, the advantages of the recourse to the arbitration committee may only be felt during the subsistance of the labour relation.[43] In this context special attention should be paid to the educational effect of the proceedings which can assert itself to a lesser degree with respect to a worker being outside the collective of the enterprise than with regard to the enterprise's own employee (worker). In addition the appearance of the interested party at his former place of work may involve further difficulties for him (expenses, loss of time etc.).

The existence or non-existence of the labour relation may have an effect

[42] KELLNER—KAISER—SCHULZ: *Die Tätigkeit der Gerichte in Arbeitssachen*, Berlin, 1966. p. 113.

[43] MIKOS— NAGY—WELTNER: *A Munka Törvénykönyve és végrehajtási szabályai (The Labour Code and its Enacting Clause)*. Budapest, 1955. p. 772.

on the opening of judicial authority from another point of view as well. Namely, under certain legal systems the liquidation of the enterprise establishes the direct authority of the courts. This is in certain respect the counterpart of the former: whereas there the termination of the labour relation is caused by the quitting of the enterprise by the employee, which establishes the authority of the court, here, on the other hand, it is the enterprise which falls out of the labour relation due to its liquidation. Under the Soviet and the Bulgarian laws in this case the labour dispute must be directly settled by the court.[44] In context of this solution, the opinion asserts itself that the liquidation of the enterprise renders any proceedings by its arbitration committee impossible whereas the relegation of the case to the authority of the arbitration committee of another organ being not in labour relation with the worker would be wrong in principle.[45] Thus under these legal systems the settlement of labour disputes in such cases falls directly within judicial authority. Before the court the liquidated enterprise's superior organs, successors or liquidators are authorized to proceed as defendants.[46]

As a conclusion of this Part, it should be emphasized that though the primary authority of the arbitration committees may be desirable from several aspects, such situations may occur where this solution would not be convenient as it would not be in compliance with certain conceptions laid down in other legal rules. The application of the proper solutions to such situations shall be consistent with the entirety of the legal system concerned and that is just why no postulate of general validity can be laid down with respect to the justifiability of the establishment of primary judicial authority. There are, however, certain written laws laying down that where no arbitration committees are available, or their work has yielded no results, or the participation in passing the contested decision by the members of the arbitration committee by the organ having appointed such members would render the proceedings of the committee unsatisfactory, the relegation of the settlement of the labour dispute to a judicial authority may be justified. It is also to be noted that there are cases where under the written law of certain countries the scope of activity of the party to the labour dispute, the nature of the subject-matter of the labour dispute or the termination of the labour relation may establish the

[44] Cf.: pp. 588—589 of the work referred to by Note 10 and § 6 of the Order No. 30 of 1958 of the Council of Ministers of Bulgaria as amended by the Order No. 23 of 1964 of the Council of Ministers.

[45] STAVCEVA: op. cit. p. 8.

[46] In Hungary — in strength of § 5(3) of the Order No. 9/1967 (X.8) MüM of the Ministry of Labour — in case of the cessation of the function of the arbitration committee having been competent to settle the employee's dispute having arised at the time of his employment — the dispute shall be settled by the arbitration comittee of the enterprise's successor, superior organ or by the common arbitration committee having competence to act at the employee's place of work (Cf.: Opinion No. 261, Munkaügyi Szemle, 7/1968. p. 279.)

primary authority of the courts. These typical cases may guide through their *de lege ferenda* aspects the legislation in regulating the part to be played by judicial authority in settling the labour disputes.

II.

The settlement of labour disputes through official channels may be found either in a narrower or in a wider scope — in most socialist legal systems. This solution may essentially be justified by two circumstances: the worker's scope of activity or the nature of the labour dispute, either separately or in conjunction with each other. More concretely: either all or only some of the labour disputes of certain employees holding a leading post are, as a rule, settled through official channels. In the latter case both personal and material criteria shall be taken into consideration. It is also possible that it is solely the nature of the subject matter of the dispute which justifies the decision of the superior official organs, independently of the scope of activity of the party to the case.

1. First of all, the case shall be dealt with where all the labour disputes of the employees holding leading posts are to be settled through official channels and in this context, in the first place, the following question shall be studied: may it be justified the exclusion of the settlement of the labour disputes of certain employees holding leading posts if only in certain scope from the sphere of authority of organs dealing in general with labour disputes?

It is customary to justify the access to the official channels by alluding to the circumstance that special confidential aspects play a decisive part in filling up certain posts, the weighing of which cannot be expected of the arbitration committees or courts, in particular where the dispute affects the employee's status in labour law, as these organs are not destined to take such circumstances into consideration. In addition it is also often argued that the settlement of such labour dispute by the arbitration committee of the enterprise where the employee holds a leading post would not be proper since thus it might occur that employees holding inferior posts would decide the disputes of their superiors who are in other respects authorized to give instructions to them.[47]

In Hungary the labour disputes of employees holding higher leading posts are settled through official channels.[48] All the labour disputes of these

[47] WELTNER, A.: *A magyar munkajog (Hungarian Labour Law)*. Vol II., 1962. p. 264.

[48] Officials holding higher leading posts are the manager of the enterprise and his deputies. The scope of the expressia "officials holding higher leading posts in organs financed by state budget" is specified by the competent Minister. Enacting Clause of the Labour Code § 111(2)).

are to be settled by the superiors (superior organs) of the organ which has passed the contested decision (Enacting Clause of the Labour Code, § 115/1).

In Poland the scope of the disputes settled through official channels is more limited. This way of settlement is, however, precluded in case of the termination of the labour relation (notice to quit), disciplinary measures, punishments inflicted without disciplinary proceedings, the stopping or reduction of premium or of any other allocation paid from funds ensuring the worker's share in the revenue, provided that the decision was made by the Minister acting within his own authority or by an organ of higher standing the Minister (Enacting Clause of the Labour Code § 115/2).

In Poland the scope of the disputes to be settled through official channels is narrower inasmuch that only the labour disputes of civil servants are settled through official channels and wider inasmuch that within the above mentioned sphere not only the labour disputes of employees holding leading posts fall within this category. According to the theory and practice in Poland the difference between the service relation and labour relation has hitherto subsisted, which involves that labour disputes originating in service relation are to be settled through official channels as a result of their service characteristics.[49] Namely, in case of a service relation, according to the above mentioned point of view, the interested parties have not equal rights, which in turn precludes the settlement of the dispute by applying the rules of labour law.[50] In strength of the specific standpoint reflected by the Czecho-Slovak Labour Code the settlement of the labour disputes of the employees holding a leading post does not necessitate the laying down of any special rules and thus the eventual labour disputes of such employees fall within the authority of the Trade Union Committees or of the Courts, respectively.[51] In our view, this solution is justified in the first place by the legislative conception of the Czecho-Slovak

[49] The subsistance of "service relation" may, as a rule, be established with regard to employees who have got their employment by way of nomination or election, mostly state employees, postmen, railway-men, etc. The fact of nomination or election does not determine in itself that a legal relation should be regarded as a labour or a service-relation. Thus, for instance, a manager of a state enterprise or his deputy who has got his employment by way of nomination or election is considered by the practice to be in a labour relation and not in a service relation (JACKOWIAK, Cz.: *Zakladowe organy wymiaru sprawiedliwosci w sporach ze stosunku pracy (The organs for the settlement of labour disputes in the enterprise)*. Poznan, 1965. p. 37. Namely the application to the manager of the enterprise of the principles asserting themselves in civil service would not comply with the conditions and requirements prevailing in the economic activity of the enterprises. That is why in Poland not all the labour relations brought about by nomination can be considered service relations. (Cf.: *The legal characteristics of the managers of enterprises*, Praca i Zabezpecenie szpoleczne, 3/1967. p. 6)

[50] JONCZYK: *Spory ze stosunku pracy (Labour disputes)*. Warszawa, 1965. p. 256. The only exception is the assertion of a claim based upon the liability for damages which shall be filed with the court on account of its civil law characteristics. Cf. JACKOWIAK: op. cit. p. 37.

[51] BERNARD, F.—PAVLÁTOVA, J.: *Pracovni poměr (Labour relation)*. Praha, Prace, 1967 p. 207.

Labour Code, laying down that the labour relation of an employee holding a leading post does not cease to exist even if he has been recalled from his leading post, but in such case the employee remains to be employed by the organ where he has previously hold a leading post and thus the general rules of the termination of the labour relation brought about by a labour contract shall be applied to the termination of the labour relation of such employees as well (Labour Code § 65/2). Neither to the appelate procedure of the settlement of the labour disputes of employees holding leading posts do apply any specific legal provisions in Czecho-Slovakia.

2. The settlement of labour disputes through official channels may further be motivated by the nature of the claim put forward, that is, by its subject matter, independently of the persons taking part in the dispute. Within this scope there are essentially three categories of disputes: a) disputes affecting the employee's labour law status, b) disputes concerning the assertion of certain financial claims and finally c) disputes arising from the inflictment of some disciplinary punishments. In this context only certain typical cases will be dealt with in the following.

ad a) It is well known, that measures connected with a change (reduction) in the staff of the enterprise may involve a change in the assignment, scope of activity etc. of the employees. If the jusifiability, timeliness or extent of such measures cause a dispute, this arises, as a rule, between the Trade Union and the administrative staff of the enterprise (so called collective dispute), but such measures may raise individual disputes, as well, where measures taken by the employer have detrimental effects on the employee. Soviet law includes only a single provision to this effect laying down that disputes arising from changes in the staff do not fall within the authority of the Labour Dispute Committees.[52] According to the opinions to be found in legal literature the extension to these cases of the competence of the committees proceeding in labour disputes may be explained by the circumstance that these disputes have no individual characteristics and thus do not fall within the competence of Labour Dispute Committees, Trade Union Committees or Courts of Justice.[53]

Roumanian legislation contains more detailed directives in this context by providing that the appeals against the measures connected with personal reorganization carried out in connection with a reduction in the administrative or productive staff fall within the authority of the superior administrative organs.[54] The official channel may in this instance be justified by the fact the individual legal dispute here is, after all, the function of an organizational

[52] Cf. Regulation of 1957 on the settlement of labour disputes § 11/d.
[53] Thus ALEKSANDROW, N. G.: *Sovietskoe Trudovoie Pravo.* Moskva, 1963. pp. 366.
[54] Labour Code, § 117/b.

measure, the appropriate or inappropriate character of which is to be established — if necessary — by the competent superior organ which establishment may have decisive effect on the settlement of the individual dispute. The reason for the existence of this conception cannot be denied. At the same time, however, it is also to be pointed out, that the exemption of the settlement of individual legal disputes from the authority of the ordinary organs of the administration of justice may only be justified in the last resort and it is doubtful whether the existence of these preconditions may be established in this instance.

ad b) Similar problems arise in context of certain financial claims. Thus under Soviet law the decision on wages (salaries) and on the categories of wages are exempt from the authority of the Labour Dispute Committees. According to the opinion of legal literature in this context, this regulation does not affect the wages (salaries) or categories of wages of individual employees but here the law merely provides directives for the establishment of the wages (salaries) to be paid to the workers (employees) occupying certain posts and of the wages due for certain specified categories of works. Disputes arising about the above mentioned establishment of wages cannot be considered individual legal disputes either and thus they cannot be settled through the ordinary channels of the settlement of labour disputes. If, on the other hand, the dispute arises with respect to the application of the different wage categories, it shall be decided, according to the Soviet law, through the ordinary channels destined to the settlement of labour disputes.[55] Of the various disputes about claimes for allowances of a wage character, however, the disputes about the claims for *premia* to be paid to employees holding leading posts are to be settled through official channels, provided that the payment of premium has been approved by the competent superior organ.[56] The disputes about the payment of *premium* depending on objective indexes affecting other employees (holding no leading post) fall within the authority of Labour Dispute Committees, whereas disputes about premia paid as incitment on the ground of the general evaluation of the work performed shall be settled by the manager of the enterprise in consent with the Trade Union Committee.[57]

Under Bulgarian law it is the competent superior organ which — if contested — supervises the measure of *premia* due to the workers and employees (Labour Code § 143(e)) independently of the workers' (employee's) scope of activity or function. According to the Polish law, on the other hand, the settlement of labour disputes about the application of work standards are settled through official channels, provided that no consent has been arrived at about this issue between the manager of the enterprise and the Works

[55] ALEKSANDROW: op. cit. p. 366.
[56] SMOLIARTSUK: op. cit. p. 215.
[57] The work referred to by note No. 10, p. 592.

Council. In the latter case the dispute shall be decided by the manager of the Trust in agreement with the supreme Trade Union officers.[58]

Finally it is to be mentioned in this context that in strength of the Hungarian written law, disputes about the establishment of efficiency requirements are to be settled through official channels (Enacting Clause of the Labour Code, § 64).

ad c) Appeals against certain disciplinary punishments are settled frequently through official channels, partly independently of the employee's scope of activity and partly only where employees holding leading posts are concerned. Only the first mentioned problem will be dealt with here.

In this context, that system may be deemed generally accepted where only the appeals against lighter punishments are settled through the official channels, whereas the supervision of contested decisions inflicting heavier punishments is carried out through the ordinary channels. Thus under the Bulgarian law from disciplinary measures inflicting reprimand, admonition, severe admonition or the transfer (degradation) to an inferior post of the employee within the same enterprise for a three months period at most, an appeal may be lodged with the competent superior organs, whereas in case of disciplinary punishments inflicting a definitive transfer to an inferior post or the dismissal of the employee, the appeal is to be filed with the arbitration committees, Trade Union Committees or the Courts of Justice.[59]

Although according to the Roumanian law, the workers (employees) may have recourse to their superior organs against any disciplinary measure,[60] in case of the termination of a labour contract on the ground of the continuous violation of his contractual obligations by the employee or if the employee has committed an ofence involving the termination of his labour relation (Labour Code, § 20/e) the employee may ask the Arbitration Committee for redress except in the cases of employees holding responsible posts. Namely, under Roumanian law the summary dismissal is not to be found among the disciplinary punishments but such dismissal may be carried out, in strength of § 20 of the Labour Code, as a substitution for the above mentioned disciplinary punishment.[61]

There is an essentially similar regulation under the Polish law. Here in strength of Article 151 et ssq. of the Administrative Procedure Code of July 14, 1960 the employee may assert his complaint against disciplinary punishments through official channels, however, in strength of Article 10 of the Decree Law of January 18, 1956, in case of his dismissal without disciplinary proceed-

[58] SALWA: op. cit. p. 257 ff.

[59] Cf.: Bulgarian Labour Law § 143/b and Decision No. 30 of February 25, 1958 of the Council of Ministers Section 2/b.

[60] *Legislatia uzuala a muncii (Instruction on Issuing Internal Enterprisal Regulations)*, § 36. Bucureşti, 1961. p. 128.

[61] Cf.: § 22 of the Instruction of September 28, 1953.

ings the employee may have a recourse to the Arbitration Committee or to the Court.[62]

All these regulations are based upon the consideration that the prejudicial consequences – if any – of lesser disciplinary punishments are not so heavy that they would justify the settlement of such cases through the ordinary channels, that is, by allowing a recourse to the Arbitration Committees, but the workers' interests may be sufficiently safeguarded by a settlement through the official channels. On the other hand, in case of the employee's dismissal the settlement of the dispute can only be carried out in the ordinary way of the settlement of labour disputes.

3. Finally, such cases will be dealt with where only certain disputes of the employees holding leading posts are to be settled through the official channels. These are, in the first place, the disputes affecting the labour law status of such employees, that is, the disputes arising from the transfer of the employees, the termination and restoration of their labour relation and the employees' appeal against the infliction of disciplinary punishments.

Thus, in the Soviet Union – in strength of the Regulation No. 1. on the Settlement of Labour Disputes – the labour disputes arising from the dismissal, reinstallment and transfer of employees holding leading posts are settled by the superior organ to which they are subordinated (Section 33). The Bulgarian regulation differs from the above mentioned rules inasmuch that of the various disputes of the persons specified in the enclosed list only the ones arising from the dismissal of such persons shall be settled through the official channels, whereas disputes arising from the transfer of the formers fall within the scope of the general rules of competence.[63] As far as the disputes arising from the infliction of disciplinary punishments are concerned, not only the disputes arising from the infliction of lesser disciplinary punishments on employees holding leading posts are settled through the official channels – in the same way as in the case of the employees holding less important posts – but the employees holding leading posts have to lodge their appeals with their superior organs also in case of more serious disciplinary punishments.[64]

Under the Roumanian law the settlement of disputes arising from the termination and restoration of the labour contracts of employees holding leading posts fall also within the superior organs' authority.[65] The same organs proceed on appeal against disciplinary punishments with the exception of

[62] Dziennik Ustaw, 2/1962.

[63] Cf.: Bulgarian Labour Code § 143/a. Employees holding leading posts are specified by Appendix no 1.

[64] MILOVANOV, K.: *Disiplinarnoe uvolnenie (Dismissal as a disciplinary measure)*. Sofia, Nauka i Iskustvo, 1967. p. 149.

[65] Employees holding leading posts are specified by the Decision No. 139 of January 17, 1953 of the Council of Ministers and by its Amendments and Supplements.

the disputes arising from the disciplinary termination of the labour relation of employees holding nonleading posts which are settled — as it has been mentioned — by the Arbitration Committees.[66] By "superior organ" that organ is to be meant — either individual or collective — to which the employee is directly subordinated.[67]

Under the law of the German Democratic Republic, against the dismissal of any employee who has got his post by means of nomination, an appeal lies to the head official, whose decision is final. No appeal shall be lodged, however, by any employee who has been nominated by the People's Chamber, the Council of State Council of Ministers, by the head official of a central stateorgan or a local representative organ.[68] The appeal from a decision inflicting disciplinary punishment on an employee of state administration is to be judged through official channels. The decision of the superior organ is final. The Labour Dispute Committees and the courts are not competent to proceed in disciplinary cases of the employees of state administration.[69]

A reference is to be made to the Labour Code of the Russian Soviet Federated Republic and to that of Bulgaria which empower the Trade Union Committees to propose the termination of the employee's labour relation. If the enterprise does not agree with such proposal the Trade Union may try to enforce its will through the official channel and, on the other hand, if the enterprise has terminated the employee's labour relation at the request of the Trade Union, the employee may seek legal remedy through the official channel. These legal provisions — although this is not laid down by any statute — practically assert themselves only with respect to employees holding leading posts, thus e.g. where the manager of the enterprise has proved to be

[66] Cf.: § 20/e of the Roumanian Labour Code and § 34 of the Instruction approved on September 28, 1953 which, however, are not co-ordinated. (CAMPIANU, V.—KEREKES, J.: Reference work of October 24, 1964.)

[67] JORNESCU, G.: *Litigiile referitoare la desfacerea contractului de munca si reintegrarea angasatilor cu functii de raspundere (Actions concerning the dissolution of labour of employees holding responsible posts).* Justitia Noua, 12/1966. p. 86.

[68] Order of June 15, 1961 on the nomination and release of the employees. GBL. II, 1961, p. 235. It is further to be noted that in strength of § 38 of the Order of February 9, 1967 on the rights and duties of the workers of state owned enterprises (GBL. II. p. 121.) the manager of the enterprise shall be appointed by the head of the superior organ, except if this right has been reserved by the minister for himself. This involves that if the manager of the enterprise has been appointed by a lower organ than the minister the former may appeal to the minister if, on other hand, the appointment has been effected by the minister no appeal lies from the dismissal.

[69] Cf. § 30 of the Order of March 10, 1955 (GBL. I—1955. p. 220.). This differs from the Polish legislation inasmuch that whereas there the labour disputes of civil servants are settled without exception through the official channels, in the DDR only the appeals from disciplinary measures concerning the state employees are settled through the official channels, whereas the other labour disputes of state employees fall within the authority of the labour Dispute Committees or the Courts, except the cases where the dismissal of such employees is at issue that have not gained their employment by nomination: such disputes shall be settled — as it has been mentioned above — through the official channels.

incapable to perform his function, his behaviour has been insupportable for the collective etc. These rules shall not be applied to employees (workers) holding no leading posts.[70]

Finally, it is to be mentioned that the settlement of the labour disputes of certain categories of employees (judges procurators, the employees of the Post Office or Railways, shipping or aerial transport etc.) is regulated in different ways in various legal systems and in the settlement of the disputes arisen as a result of the appointment, dismissal or transfer of such employees, as well as, in the judgment of the appeals from the disciplinary measures taken against them, the official channels play — as a rule — a more important part.

III.

In the foregoing a survey has been offered of the common elements in the different categories of the disputes to be settled primarily by the courts or through the official channels. On the ground of certain typical cases an endeavour has been made to include the manyfold statutory material in a uniform system without, however, setting up any general patterns.

In our opinion, however, after having surveyed the picture thus provided, certain conclusions being significant for the purpose of the solution of the problems raised by the general principles of the settlement of labour disputes should be drawn.

First of all, it is to be noted that both primary judicial proceedings and the proceedings before the superior organs are special irregular categories of the settlement of labour disputes, having a subsidiary character beside the general forms of the settlement of labour disputes. In this context the two kinds of proceedings agree with each other. They come into action, when a recourse to the arbitration committees would be for some reason inexpedient.

At the same time, there is a conspicuous difference between the two categories of proceedings. Judicial procedure with its guaranties is the most reassuring way of the settlement of labour disputes, that is just why in most socialist countries appeals from the decisions of the arbitration committees passed in the first instance an appeal lies to the Courts. That is just why no objection — either in principle or for practical reasons — can be made against the judicial settlement in the first instance of the labour disputes.

An essentially different situation arises with respect to the settlement through the official channels. The settlement through the official channels — in the nature of things — cannot provide so much guaranties; subordination

[70] Cf.: § 49 of the Labour Code of the Russian Federated Soviet Republic, p. 1070 of the work referred to by Note No. 10 and PASKOV, A. S.: *Sovietskoe Trudovoie Pravo.* Leningrad, 1966. p. 295. As for the Bulgarian labour law cf. § 29 Section i of the Labour Code. It is further to be noted that also in Bulgaria the tendency prevails that this provision of law permits the dismissal of incompetent employees holding leading posts.

necessarily brings about a situation where the disputes are settled by the same organ which either directly or indirectly — exercises the employer's rights, that is, the settlement is carried out by an organ being in a superior position. Any satisfying settlement of legal disputes may only be achieved if it is carried out by an impartial organ whereupon the litigant parties are not dependent and thus the objectivity of settlement can be ensured.

That is just why in our opinion an effort is to be made to confine the settlement of labour disputes through official channels to cases where – on the ground of a careful weighing of all circumsces — this seems to be inevitable indeed. Even in such cases it would be worth considering to allow an appeal from the decision passed by the superior organ to a committee brought about for this purpose, independently of the standing of the organ passing the decision in question.

In our opinion, in this context no discrimination between the claims asserted would be justified. At most, the appeals from the decisions settling the disputes affecting the labour law status of employees holding higher leading posts should be relegated to special committees of high standing or to the Supreme Court. In our days, when the problem of the judicial control of administrative measures has more and more come into prominence, it would not be justified to preclude the possibility of judicial proceedings in the settlement of labour disputes. This is all the more so because the decisions passed by the superior organs in settling the labour disputes have the same characteristics as the decisions passed by other organs and thus a remedy against any arbitrary or unlawful decision should be ensured in this domain, as well.

Die Entscheidung von Arbeitsstreitigkeiten auf gerichtlichem oder dienstlichem Wege in den europäischen sozialistischen Ländern

L. Trócsányi

Als eine eigentümliche Form des arbeitsrechtlichen Verfahrens ist jener Fall wahrzunehmen, wo in individuellen Arbeitsstreitigkeiten in erster Instanz nicht Konfliktskommissionen bzw. Schlichtungskommissionen zu entscheiden haben, sondern der Anspruch unmittelbar vor dem Gericht geltend zu machen ist bzw. seine Geltendmachung allein auf dem Dienstwege durchgeführt werden kann.

Dementsprechend untersucht der Verfasser vorerst jene Gründe, unter deren Berücksichtigung der Gesetzgeber in den einzelnen sozialistischen Ländern die Entscheidung der Arbeitsstreitigkeiten unmittelbar in die Kompetenz der Gerichte bzw. der vorgesetzten Dienstorgane verwies.

Seine allgemeinen Konklusionen fasst der Verfasser darin zusammen, dass sowohl das primäre Gerichtsverfahren, als auch das Verfahren vor einem vorgesetzten Dienstorgan eine unregelmässige Form der Erledigung von Arbeitsstreitigkeiten darstellt; zugleich weist er auch auf die wesentlichen Unterschiede zwischen diesen beiden Verfahren hin. Seine Schlussfolgerung lautet: Im Falle eines Rechtsstreites ist eine befriedigende Rechtsprechung nur von einem unparteiischen Organ zu erwarten, zu dem die im Streit stehenden Parteien in keinem Abhängigkeitsverhältnis stehen und so die Bedingungen zu einer objektiven Entscheidung vorhanden sind.

Разрешение трудовых споров в судебном порядке и в порядке подчиненности в европейских социалистических странах

Л. ТРОЧАНИ

Об особой форме трудовоправового процесса речь идет тогда, когда трудовой спор на первой инстанции разрешет не комиссия по трудовым делам или согласительная комиссия, а с иском можно обратиться непосредственно в суд или спор разрешается в порядке подчиненности.

Соответственно этому: автор в своей статье исследует прежде всего те причины, с учетом которых в отдельных социалистических странах законодатель относит разрешение трудовых споров непосредственно к компетенции суда или вышестоящего органа.

Подытоживая свои общие выводы, автор подчеркивает, что как разрешение трудового спора на первой инстанции непосредственно в суде, так и разрешение спора в порядке подчиненности является особой формой разрешения трудовых споров; в то же время автор указывает и на разницу по существу между этими двумя видами процесса. Окончательный вывод: в случае возникновения трудового спора справодливое правосудие можно представить в руках беспристрастного органа, с которым стороны процесса не находятся в отношении зависимости, и таким образом имеются условия для вынесения объективного решения по делу.

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Suspended Sentence under Hungarian Criminal Law

by

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The paper, subsequent to an introductory historical survey, demonstrates, that the institution of the suspended sentence has been consistently built up and applied only later, in the period of socialist legislation. As a proof of this the author surveys the regulation of suspended sentence included in the Act II of 1950 and in the Act V of 1961, the new Penal Code, and then he analyses the development of the aspects of criminal policy concerning this institution of criminal law as reflected by the decisions and guiding principles issued in this context by the Supreme Court of the Hungarian People's Republic.

The author — as a result of the analysis of the legal nature of the suspended sentence and polemizing with some other opinions — arrives at the conclusion that this institution is a specific measure in the system of the inflictment of punishment.

Analysing the chances of further development of the institution of suspended sentence in view of the recent requirements of criminal policy, the author holds, that the trend and content of this assert itselves by the extension of individualization.

Suspended sentence under the former Hungarian bourgeois criminal law

1. Under bourgeois criminal law the institution of suspended sentence was the result of a new outlook having been developed at the beginning of the century, looking for new differentiated legal means to prevent crime and laying stress upon the utilitarian aspects of prevention and individualization instead of the fundamental principles of the classical school of criminal law based upon reprisal on moral grounds. It is known that the various trends of the reform period at the beginning of the century — though starting from different theoretical points of origin — arrived at the same conclusion, namely that these point of views should, in the first place, prevail with respect to the fairly large group of first offenders. It has been proved that the application of the system of short-term sentences to this category would be quite inexpedient. The institution of "probation" as having been developed under Anglo-Saxon legal systems was considered an appropriate means to replace short-term sentences and at the turn of the century quite a campaign was entered upon in legal literature for the adoption of this legal institution.

It is known that two categories of the institution of suspended sentence have been developed under the various systems of criminal law. The institution

of "probation" developed under the English and American laws at the beginning of the century was characterized by the suspension of the hearing, specifying a probation period and taking the delinquent under the protection of a probation officer. On the Continent — on the other hand the so-called Belgian-French system has gained ground according to which the enforcement of the punishment inflicted shall be suspended for a specified period and no supervision of any kind is exercised over the delinquent during the term of probation.

The introduction of whatever variant of suspended sentence has been based upon the concept of criminal policy that, from the aspect of criminal responsibility, a clear-cut differentation should be made between first-offenders, on the one hand, and recidivists, on the other.

2. Already at the turn of the century the issue of the introduction of suspended sentence became a contraversial subject. Both theoretical and practical criminal lawyers recognized within a relatively short time subsequent to the enactment of the first Hungarian Penal Code, the Act V of 1878, that this Code — owing to its theoretical bases and criminal-political objectives — became already at that time obsolete, its provisions and the institutions introduced thereby being more or less unsuitable to cope with the type of crimes having already then certain new characteristics. This recognition involved that already only twenty years after the enactment of this Code significant endeavours were made to amend it touching even upon its fundamental principles.[1]

These endeavours incited a public discussion and literary polemic in Hungarian legal circles. The adherents of the old school concentrated their attacks against the institution of suspended sentence, since it was just this solution in which the new conception of criminal law concentrated. These writers tried to prove that the introduction of the institution of suspended sentence would be incompatible in principle with the fundamental conception of the criminal responsibility and system of punishment based on the principle of moral reprisal. It was emphasized that if crime were not inevitably followed by punishment the correlation crime - punishment would be dissolved and the fundamental principles of criminal law would be abandoned. It was put forward as a practical argument that the introduction of this new institution would involve legal insecurity, jurisdiction on class basis, the undermining of judicial authority and the assertion of certain individual influences. These practical counter-arguments could hardly stand the proof, even under the conditions prevailing at the beginning of the century. The opponents of the suspended sentence were, however, right in one respect. Namely, that the introduction of this institution shattered the classical conception of criminal law

[1] As for the Bills on Criminal Law of 1898, 1901 and 1903 cf. the general remarks included in the Ministerial Motivation to the Bill XXXVI of 1908.

and amounted to the beginning of a radical reconstruction of criminal law that is of criminal responsibility and the system of punishment. On the other hand, the backers of the introduction of this institution — going beyond the starting points and conceptions concerning the reconstruction of the entire system of criminal law being adopted by the reformists — argued that the possibility of the enforcement of a suspended sentence amounts to a strong deterring force and thus an effective means of prevention; that this is the best institution to replace short-term imprisonment; that it saves the delinquent's family from hardship and spares the state budget of the expenses incurred as a consequence of the enforcement of the sentence of imprisonment.

The advocates of the introduction of this institution proposed the adoption of the Belgian-French variant of the suspended sentence alluding to practical and procedural considerations and pointing to the difficulties involved by the English-American system.

3. After these antecedents the Act XXXVI of 1908 was enacted. This was the first legal rule in Hungary introducing the system of suspended sentence under the denomination of "conditional suspension of punishment".

Under this Act the court was authorized to suspend the enforcement of an imprisonment of a term not exceeding one month and of any fine, for exceptionally significant reasons, provided that this could exert a favourable influence on the delinquent's behaviour, taking the latter's individuality, conditions of life and all the relevant circumstances into consideration. The sentence should, however, not be suspended, if the punishment was inflicted for an offence which was to be punished under the law by imprisonment in maximum security prisons or if the offence was a serious felony; further on, if the detendant was within 10 years committed to imprisonment exceeding one month or finally if the crime had an infamous, base motive.

The suspended sentence could no more be enforced if no criminal proceedings had been taken against the delinquent within three years to be reckoned from the sentence having become final. On the other hand, if criminal proceedings were taken against the delinquent for a crime committed during the term of probation and the delinquent was sentenced in course of the new proceedings for committing a felony or any wilful delict, the suspended sentence should be enforced. Suspended sentence could be imposed by the court both in the first and in the second instance and either *ex offo* or at the delinquent's request. In the motivation of the sentence all the reasons justifying the suspension had to be specified.

These provisions were in the following amended in a single respect only. The Act XXXIV of 1930 specified the upper limit of an imprisonment the enforcement of which might be suspended in 3 months as a maximum.

Thus under Hungarian bourgeois criminal law sentences imposing: 1) imprisonment not exceeding three months 2) fine either as principal or

secondary punishment 3) detention not exceeding 1 month, inflicted for a minor offence, could be suspended.

The positive preconditions of this measure were: a) the subsistence of circumstances deserving special consideration, b) the likelihood of a favourable influence on the delinquent's behaviour, taking the latter's individuality and conditions of life into consideration. In the opinion of both the literature and the judicial practice these positive preconditions had to be subsist jointly. According to the judicial practice, circumstances deserving special consideration were, among others, the delinquent's undepraved character, unimpaired record or young age, the forgivable motives of the offence, temptation caused by special circumstances, small degree of negligence, open admission, the reparation of the damages caused etc.

In the judicial practice the opinion prevailed for a long period, that because suspension did not mean the extenuation of the punishment, "reasons deserving special consideration" could not be identical with "extenuating circumstances". In the legal literature, in turn, it was emphasized that the same circumstance may be evaluated from two aspects and consequently regarded: partly, as an extenuating circumstance and partly, as a condition justifying the suspension of the sentence.[2]

The negative (preclusive) conditions of the suspension were specified by the law in a way that in case of the subsistence of any of these, the sentence could not be suspended. These were: a) recidivism b) a base motivation of the crime. The notion of recidivism was in this context exactly defined by the law. On the other hand, the notion of the other negative condition, base motivation, was only formulated later on by the judicial practice. Different categories of crimes motivated by revenge, hatred, greed, avidity etc. were drown within this province. Greed and malicious intent were not regarded as preclusive circumstances in cases where these constituted the relevant legal elements of the crime in question (theft, embezzlement, damaging of property).

The characteristic features of these provisions of law were: fixed term of probation, suspension of extremely short prison sentence only, the setting up of exceptionally significant reasons as preconditions. Thus, as contrasted with the legal development in other European countries the institution of suspended sentence was introduced in Hungary very cautiously and within a very narrow scope. This institution was considered a special eventuality, to be applied only to cases where exceptionally significant reasons justified it. From a theoretical point of view: *suspended sentence was considered by the law a mesure which could only be employed within the system of the Penal Code as a special legal provision to be applied exceptionally.* Despite all what has been

[2] Cf. ANGYAL, P.: *A magyar büntetőjog tankönyve (The text-book of Hungarian criminal law).* Budapest, 1920. Vol. I. p. 200.

set forth above the introduction of the institution of suspended sentence into the Hungarian criminal law was a qualitatively new step, which did away with principles of the classical school of criminal law and established a new legislative conception in this domain of law. The introduction of suspended sentence was the first step towards the reconstruction of criminal law which was followed by further steps thus e.g. the amendment of the legal rules relating to juvenile offenders and, in 1928, special legal provisions concerning the recidivists but the consistent reconstruction of the Hungarian criminal law itself in compliance with the reformist schools did all the same not occur. All these resulted in the fact, that though later the aversion of the courts to the institution of suspended sentence came to an end, *this institution remained a foreign body within the bourgeois Hungarian law and offered a sharp contrast to the classical conception of the Penal Code.*[3]

4. In the years following the enactment of the Act in question this new institution was only cautiously applied by the courts. In the years of 1910 - 1912 8—8.4 per cent of the sentences of imprisonment and 13 16 per cent of the sentences inflicting fines were suspended.[4] Later on, in the twenties the reluctance with respect to this institution came to an end but the number of those sentenced with suspension did not exceed the 5 7 per cent of all the sentences passed in this period. Its scope of application was extended only after the above mentioned amendment in 1930, when the upper limit of the term of an imprisonment which could be suspended was raised to three months. In the years of 1931—33 the percentage of those sentenced with suspension reached the 17 18 per cent of all the sentences passed in the period and was settled on this level. A considerable part of the suspended sentences were imposing fines and not imprisonment. About 70 85 per cent of the sentences suspended in the years of 1930 1933 inflicted fines and only 15 30 per cent thereof imprisonment. Only a fraction of the sentences of imprisonment 4.5 per cent — were suspended in 1930, which number increased by 1933 only to 12.5 per cent. Under such circumstances the introduction of the institution of suspended sentence did and could not reach its goal: the elimination of short-term imprisonment.

The cases resulting in suspended sentences were mostly brought before the court on private prosecution. The offences punished in this way were in

[3] This situation was not altered by the fact that already at the time of the enactment of this Act the Committee of Justice of the House of Representatives expressed its hope that " . . . a good judge may easily find . . . the appropriate transition from the fundamental principles of the Penal Code towards the ideological concepts adopted by its Amendment Act and can introduce these new concepts into the legal framework of the former Code until — in course of a general revision of criminal law — the scope of individualization can be extended by the legislation to all the categories of delinquents." (Cf. Ministerial Motivation attached to the introduction of the Bill).

[4] The statistical indexes shown here and elsewhere do not include any data relating to the punishments and punitive measures inflicted upon juvenile delinquents.

the first place: battery, libel, slander, embezzlement, misappropriation, theft and infringements of labour and health regulations.

In want of statistical data, the proportion of those suspended sentences which were enforced later on was estimated by legal literature to be about 10 per cent.

To sum up what has been set forth above, it should be laid down that the introduction of the institution of the suspended sentence into Hungarian criminal law had been a positive step which, however, was not followed by a reconstruction in the same spirit of the entirety of the criminal law. As a consequence of this legislation of restricted scope *this institution did not reach its goal, the replacement and elimination of short term imprisonment.* In the judicial practice this institution was distorted in a way that it resulted mostly in the suspension of fines instead of the suspension of imprisonment.

II.

Suspended sentence under Hungarian socialist criminal law, the relevant judicial practice and the efficiency of this institution

The building up and application of the institution of suspended sentence has been consistently carried out only later, in the period of socialist legislation. The development of a new conception put an end to the contradiction between the institution of the suspended sentence and the criminal-political objectives permeating the entirety of the Penal Code.

1. As a result of certain historical-social conditions the Penal Code of 1878 remained in force in the Hungarian People's Democracy even after the liberation. The Penal Code was reconstructed by Act II of 1950 on the general provisions of the Penal Code – which, through its provisions of general character changed also the conditions of the application and the contents of the Special Part of this Code. The new Act did away with the conception that crime is to be regarded as an exclusively legal phenomenon. In turn, it positively stated that crime is an action or omission which endangers the society and is to be punished under the law. At the same time in the conception of this Act punishment is not characterized by or based upon the idea of moral reprisal but upon the protection of the society, the requirements of prevention and of the delinquent's resocialization. These starting points involve that the institution of suspended sentence does not constitute any foreign body within the system of socialist Hungarian criminal law but it is an integral part of the Marxist conception of criminal law and of its system. Under such circumstances the introduction of the institution of suspended sentence into the socialist Hungarian criminal law in 1950 was only too obvious and had not been preceded by any such spectacular literary and theoretical debates as

it had been the case at the beginning of the century. There is a short reference to this in the Ministerial Motivation to the Bill laying down that ". . . in building up the system of punishment the Bill intends to avoid — as far as possible — the preservation of the institution of short-term imprisonment being in every respect harmful and instead of this creates more appropriate possibilities for the courts to reach the objectives set up by the criminal law . . . Such measure is the institution of suspended sentence which though being known to our former law — asserted itself only within a too restricted scope."

The Act II of 1950 contains in its Chapter entitled "The infliction of punishment" provisions dealing with the suspended sentence. According to this, sentences of imprisonment and fine may be conditionally suspended by the court for a term of probation of 3 years provided that this may exert a favourable effect on the delinquent's behaviour and the delinquent seems to be worthy of this favour in other respects, as well. The sentence shall not be suspended if: a) the punishment specified by the law for the offence committed by the delinquent exceeds an imprisonment of 5 years or, as amended in 1951, the punishment actually inflicted on the delinquent exceeds one year b) the sentence deprives the delinquent of his civil rights or of the right to pursue his former occupation, c) the delinquent has already obtained the favour of the suspension of a former sentence within a period of five years preceding the commission of the crime or, finally d) the delinquent has been sentenced to imprisonment within a period of 5 years preceding the commission of the offence. In case of the successful passing of the term of probation the delinquent shall be definitely released of all the discriminatory consequence of his offence, he will be rehabilitated by the law. If, in turn, during the probation period the delinquent has been committed to imprisonment also the execution of the suspended sentence shall be ordered.

The legal provisions relating to suspended sentence markedly show the legislative conception differentiating between first delinquents, on the one hand, and recidivists, on the other. For that reason the criteria delimitating these two categories have been specified in the most clear cut manner by the law. On the one hand, the favour of the suspension of the sentence cannot be obtained by those who already have benefited from this favour or have been committed to imprisonment within five years preceding the commission of the offence. On the other hand, the suspended sentence shall not be inforced in case of the commission of a new offence of any kind but only if the delinquent is committed to imprisonment for his new offence.

After the enactment of the Act II of 1950 the proportion of the application of the suspension of sentences in particular with respect to the sentences of imprisonment has abruptly increased. In addition new judicial practice regarded the extenuating circumstances as proper reasons for the suspension of the sentence. The proportion of suspended sentences inflicting

imprisonment of a term less than one year was in 1951 50 per cent, in 1952 45.9 per cent and in 1953 38.7 per cent of all the sentences of imprisonment. Only 18 – 20 per cent of the sentences of fines were suspended. This practice, however, has soon undergone a change.

2. The institution of suspended sentence was a very flexible means of legal policy in the hand of socialist jurisdiction to be applied in the struggle against crime. The Act II of 1950 introduced the suspended sentence into the socialist Hungarian criminal law in a period when socialism was built under the circumstances of an international tension and a sharpening internal class struggle. The historical experiences gained in course of the development of the socialist countries prove that in the period when the socialist state has to organize the formation of new social conditions the importance of criminal law increases considerably. In this period when, considered from a political platform, almost every kind of crime assumes the form of conscious or half-conscious protestation against the new social system being in a state of development, it is the aspect of general prevention which — of the different functions of criminal law – comes inevitably to the fore. Such situation required a differentiated analysis of the criminological relations, an analysis of the kind which was able to make a discrimination as to the class character of the crime, that is between the conscious offensive of the class-enemy or the declassed elements, on the one hand, and the offences committed by delinquents whose attack against the social order was not conscious. The organ authorized by the Constitution to make such analysis with respect to the institution of suspended sentence and to lay down the fundamental principles suitable to form the guiding principles of criminal policy was the Supreme Court. That is why through the past 15 years the Supreme Court has passed in addition to a great number of various case judgments – a number of Decisions of Principle dealing with the criminal political objectives of the suspended sentence and with its scope of application and possibilities.

The solution of the problems of criminal policy arisen as a consequence of making use of suspended sentence was not made easier by the situation that though the place of the institution of suspended sentence within the system of criminal law was clearly defined in principle and this institution did no more constitute any foreign body within this system, no consistent conclusions were drawn from these facts. This is proved also by the fact that the positive preliminary conditions of the application of the suspended sentence were specified by the new Act in the same way as they were by the Act of 1908. This formulation made the upholding of the opinion possible which considered the institution of suspended sentence to be an exceptional measure only. This opinion expressed by laying stress upon the function of general prevention and applying the tendencies of legal interpretation involved thereby, reflected the prevailing political conception of the fifties. Among the factors

of this conception — beyond the objective social conditions — also a dogmatically distorted conception of the nature of class struggle and a faith in the omnipotence of administrative measures played their part. All these resulted in a view according to which the above outlined wide scope of the application of the suspended sentence could not be made consistent with the postulates of criminal policy.

3. The Criminal Section of the Supreme Court passed in 1954 its Decision of Principle no. X relating to the suspended sentence. The Disposing Part of this Decision of Principle lays down that the suspended sentence is an *exceptional measure*. The circumstance that from the suspension of the sentence a favourable influence may be expected on the delinquent's behaviour and that the delinquent seems to be worthy of this favour can only be established if based upon *exceptional circumstances* revealed with due foresight and in compliance with the rules of evidence.

This viewpoint logically involved that the exceptional possibility of the suspension of the sentence had to be ensured by the examination of the delinquent's *worthiness* and by the *specification of the criteria of worthiness*. Indeed, it was emphasized by the motivation of the Decision of Principle that the delinquent's worthiness of the favour of the suspended sentence constitutes the objective factor, which renders it possible — according to the moral views and sense of justice of the socialist society — that the enforcement of the punishment imposed upon the delinquent could be conditionally suspended. A thoroughgoing inquiry shall be prosecuted to establish whether there exist such exceptional circumstances that would justify — in the interest of the delinquent's re-education and in compliance with the interest of general prevention — the suspension of the sentence instead of the enforcement thereof. This may only be justified — in both respects — by exceptional conditions, because the postulates of both the individual education and the general prevention necessitate, as a rule, the enforcement of the generally established legal consequence, that is, of the punishment. As far as worthiness is concerned the character of the offence committed and the dangers devolving therefrom to society — under the given general and concrete circumstances — are to be examined in the first instance. On the other hand, also the importance of the motives of the offence is emphasized by the Decision of Principle. The Decision refers to the fact, that worthiness may also be established if the motives are of such a character that the commission of the offence may be considered — in the public opinion adopted by the society — to be excusable under the given circumstances. On the other hand, the establishment of worthiness is — as a rule — precluded by an increased greed, irresponsibility or any immoral or base motives. Besides, due attention is to be paid whether only an accidental offence of petty character or a cold-blooded and deliberate crime has been committed.

Summing up: in strenghth of the Decision of Principle of the Supreme Court, the sentence may be suspended upon the ground of the delinquent's worthiness, *if the offence has been committed as a result of an exceptional, accidental fault and the motives of the commission of the offence are to a considerable extent excusable; the delinquent's personal circumstances extenuate his mistake; the delinquent's general behaviour and the manner in which the offence has been committed do not render it probable that the delinquent would be hostile to the People's Democracy or to the rules of the socialist morals.*

On the other hand, in case of the commission of an offence originating in or promoted by hostile class relations, the delinquent's worthiness of the favour of suspended sentence can – as a rule – not be established. In such cases the suspension of the sentence cannot be deemed to be an effective means of attaining the aim of the punishment.

4. The Decision of Principle no. X of the Supreme Court had a considerable influence upon the scope of the application of the suspended sentence. In 1954 already only 37.4 per cent of the sentences imposing imprisonment of a term less than one year have been suspended and this number sank in 1955 to 29.6 per cent. Also the proportion of the suspended sentences of fine – though not in such a considerable measure – decreased in this period.

Some years after, however, it became evident that this trend of criminal policy had been inconsistent with both the social conditions leading to socialism and the fundamental requirements of prevention. The developments subsequent to the defeat of the counter-revolution of 1956 involved an intensive consolidation and accomplishment of the socialist social relations. At the same time, also crime and struggle against crime underwent considerable changes. The over-all number of offenders and the proportion of imprisonment within the over-all number of punishment decreased and, in turn, the proportion of sentences which did not involve any imprisonment increased. In compliance with this, also the scope of the application of suspended sentence increased. Thus e.g. in 1959 59.7 per cent of the sentences of imprisonment less than one year were suspended. The proportion of the suspended sentences of fine increased, at the same time, from 8 per cent to 13.2 per cent. Having recognized this in its Decision of Principle no. XX the Supreme Court superseded its former Decision of Principle no. X.

In this Decision of Principle the Supreme Court pointed out that the stand taken by the Decision of Principle no. X, deeming the suspension of the sentence to be an exceptional measure, is *no more in compliance with the guiding principles of criminal policy to be observed by the courts.* Under the socialist criminal policy a fundamental and consistent differentiation is to be made between hooligans, declassed elements and delinquents committing more serious crimes, on the one hand, and working people who have accidentally

and for excusable reasons committed offences being objectively of lesser importance, on the other hand. With respect to the former category prevention should be asserted, in the first place, by passing enforceable sentences. On the other hand, in the relation of the delinquents belonging to the latter category the passing of such sentences is justifiable and expedient that do not deprive the delinquent of his personal freedom and do not remove him – even temporarily – from his usual surroundings. One of the means to arrive at his result is the suspended sentence. Thus the passing of suspended sentences is *no more considered to be an exceptional measure only.*

Over and beyond this, the Supreme Court gave in its Decision of Principle detailed directives as to the scope of application of suspended sentence. In this context it set forth that two preliminary conditions of this measure are specified by the law, that is, that a favourable influence may be expected from this measure and that the delinquent seems to be worthy of this favour. Thus, such delinquents are to be deemed — as a rule – unworthy, of the favour of the suspended sentence who have committed more serious offences involving a greater danger on the society, being in a sharp contrast with the socialist morals and of an outstanding dangerous nature from both from personal and social aspects and finally, who adhere to hostile classes and have committed the crime as a result of this class relations. *The suspension of the sentence, however, is not bound to the delinquent's special worthiness if the offence has been of lesser importance and has been committed accidentally.*

5. The new Penal Code, the Act V of 1961 – repealing the provisions of both the Act II of 1950 and the Act V of 1878 – adopted and considerably developed the institution of suspended sentence. Though there is a marked difference in the wording of this Act as compared with the former ones, the change is decisively to be found in the merits and not only in the wording of its provisions. The influence of this institution on the society was weighed by the legislation from the aspect of criminal policy and in view of to positive features its scope of application was considerably extended. As a result of this, in strength of the provisions of the new Penal Code (§§ 70 – 71), sentences of imprisonment of a term less than one year – in case of the subsistance of exceptionally significant reasons, even sentences of imprisonment which do not exceed two years – and sentences inflicting fines as a principal penalty may be suspended by the court. Also the specification of the positive preconditions of passing suspended sentences underwent a considerable change under this Act. The reference to the exceptional nature of this measure originating in the first Amendment to the Penal Code (1908) was left out from the Statute and the new Code laid down that the sentence may be suspended if the goal of the punishment can be attained — with a view to the delinquent's personality, his record, and the nature of the offence committed – without the enforcement of the sentence.

Also the provisions relating to the term of probation were modified by the new Penal Code. The term of probation is in case of sentences of fine: one year; in case of sentences of imprisonment not exceeding one year: three years and finally in case of sentences of imprisonment of more than one year: five years.

Preclusive circumstances are specified in a way, that in case of their subsistence the suspension of the sentence shall never be allowed by the court. The elimination of the possibility of the suspension of the punishment imposed on recidivists is a characteristic feature of these preclusive provisions. That is why the Code essentially adopted the relevant provisions of the former law by laying down that the punishment shall not be suspended if a) the delinquent is deprived from his civil rights, expelled or banished from the country b) the offence has been committed before the termination of the execution of a sentence of imprisonment or the expiry of the term of former probation and finally c) if the delinquent has been committed to imprisonment for a wilfully committed crime within five years preceding t he commission of the offence. At last, there are provisions in the Code specifyingthe cases where the suspended sentence shall be enforced. Such are partly the cases where it has been established during the term of probation that the suspension of the sentence was passed in spite of the subsistence of preclusive circumstances and partly the cases where the delinquent has been committed to imprisonment for an offence committed during the term of probation or a sentence of reformatory and educative work previously passed for such offence has been later on altered in a way that the delinquent has been committed to imprisonment. If, on the other hand, the term of probation has elapsed without any such incident, the suspended sentence can no more be enforced and the delinquent will be free from any discrimination (legal rehabilitation).

6. Subsequent to the enactment of the new Penal Code, in 1962 the Decision of Principle no. XXIV of the Criminal Section of the Supreme Court corroborated the guiding principles having been formerly laid down in the Decision of Principle no. XX of the Criminal Section of the Supreme Court, modifying its earlier Decision inasmuch as it was made necessary by the departures of the provisions of the new Code from the former law. It emphasized in principle that the *passing of enforceable sentences of imprisonment should not be considered a measure to be applied in general and, on the other hand, the suspension of the sentence is not an exceptional measure.* It pointed to the fact that the Decision is not to be interpreted in such a way that every first-delinquent should be granted by the court the favour of suspended sentence. It laid stress on the fact that there is closer interaction between the preconditions laid down in the Code, the subjective and objective conditions, on the one hand, and the assertion of the aims envisaged by the Penal Code on the other all of which shall be evaluated in conjunction. The court shall aim at the realization of the

entirety of the objectives set by criminal law: to protect the society and to keep back the members of society from crime. Thus the court, before allowing the suspension of the sentence – in addition to the weighing of the personal circumstances and the character and seriousness of the offence – shall thoroughly examine whether the suspension of the sentence would be in compliance with the *aim of the punishment*, whether it would serve the interests of the protection of society and promote the resocialization of the delinquent, as well, and whether it would not be inconsistent with the *postulate of general prevention.*

As for the scope of application of this institution the Decision lays down that the suspension of the sentence shall be based upon the value judgment of socialist society. Thus the sentence shall – as a rule – not be suspended if

– the delinquent's personality endangers the society to an increased extent;

– the offence committed by the delinquent is exceptionally condemnable under the socialist moral principles;

– the delinquent's personality constitutes an outstanding danger upon the society or finally the delinquent has earlier committed any offence originating in his class conditions or hostile attitude towards the society.

7. The well-balanced trend of criminal policy reflected by the Decisions of Principle no. XX and XXIV of the Criminal Section of the Supreme Court and the provisions laid down in the new Penal Code rendered the institution of the suspended sentence to be a legal means promoting the realization of the humanitarian aims set by the socialist criminal law. The judicial practice of the sixties has proved that this institution *replaces to a considerable extent the application of short-term sentences.*

The proportion of suspended sentences of imprisonment of a term less than one year was:

in 1961	57.7	per cent
in 1962	56.6	,, ,,
in 1963	40.5	,, ,,
in 1964	48.0	,, ,,
in 1965	51.6	,, ,,
in 1966	52.2	,, ,,

Subsequent to the enactment of the new Penal Code, in 1963 and 1964, the proportion of the suspended sentences of imprisonment of a term from one to two years was 1.7 and 2.0 per cent, respectively. The part played by and the significance of the institution of suspended sentence in the system of punishment has been demonstrated even more by the fact that in the years of 1959 – 1962 nearly 50 per cent of *all* the sentences of imprisonment were suspended.

This proportion sank in the years of 1963 and 1964 to 35 and 42 per cent, respectively, whereas in 1965 and 1966 it rose to 51.6 and to 52.2 per cent. On the other hand, the indexes relating to suspended sentences of fines have remained from 1959 on a nearly permanent, relatively low level: about 10 – 13 per cent of all the sentences of fines have been suspended.

The data of criminal statistics show that the institution of suspended sentence was applied to nearly all the categories of offences, including such serious crimes as the crimes against life. Perhaps the only exception was robbery, since the sentences of imprisonments imposed on the committers of which have never been suspended in the sixties. Its application to sentences passed in cases of sexual crimes has occurred only in cases of insignificant number but it is not precluded even in this field. *Offences against property and corporal integrity have constituted even in this period the typical scope of application of this measure.* It has been applied in a considerable measure to offences endangering life and health by failing to observe professional regulations. The suspension of sentences of fines have mostly occurred in the field of offences to be punished on private prosecution, such as battery, slander or libel.

As to the expediency of the suspended sentence there are no statistical data of full value available. Namely, the yearly data of criminal statistics show only how many of the suspended sentences of the period under survey were ordered to be enforced and this is compared to the overall number of suspended sentences passed in the same period. Thus e.g. in the years of 1961 1964 7.6, 7.9, 20.0 and 15 per cent of the suspended sentences were enforced, respectively. This, however, does not show how many of the suspended sentences passed in the period under surwey have been enforced due to the unsuccessful passing of the term of probation, that is owing to the commission of a new offence. Besides, it cannot be statistically demonstrated how many of those whose sentence was suspended have committed a new offence. An earlier statistical analysis based upon taking samples arrived at the conclusion that 14 per cent of the suspended sentences were ordered to be enforced by the court due to the commission of new offences within the term of probation. Until more exact data to be gained by a special statistical analysis will be available, on the ground of experiences gained by judicial practice, the number of suspended sentences which later on have been enforced may be estimated to be about 15 20 per cent. Thus, *80 –85 per cent of the suspended sentences effectively prevent the commission of new offences and protect the delinquent from the negative effects of imprisonment.*

III.

Some theoretical questions and problems of criminal policy involved by the institution of suspended sentence

1. Though the institution of suspended sentence has subsisted for 60 years in Hungarian criminal law, the analysis of the legal characteristics of this institution has in an interesting way fallen into the background.[5] This has been probably caused by the fact that this institution has been treated, critised and analysed from the aspect of criminal policy only. This is all the more conspicuous, because recently divergent opinions have been developed in socialist legal literature as to the legal character of suspended sentence. It is well-known that this problem was the subject of heated arguments in the Soviet legal literature bringing to the surface different opinions being in sharp contrast with one another. According to one of these, the suspended sentence "is a special means of an educative influencing administered by the Soviet courts",[6] that is, a measure devoid of any repressive or coercive elements, aiming solely at the elinquent's reformation. Others regard the suspended sentence as a special category of punishment,[7] the delaying of the enforcement of the sentence[8] or a specific means of the exemption from punishment.[9] On the other hand, suspended sentence is considered by M. D. Sargorodskij a special arrangement of the enforcement of sentences.[10] As a matter of fact this last view comes closest to our opinion.

The above cited Decision of Principle of the Criminal Section of the Supreme Court reveals the characteristic features of the legal nature of suspended sentence as follows: "Suspended sentence is essentially a punishment of educational character. It expresses the moral disapproval of society, at the same time, by ommitting the actual enforcement of the sentence it promotes

[5] In the former Hungarian legal literature Angyal expressed the opinion that suspended sentence is a "moral punishment". " . . . The punishment by being bound to conditions is transformed from a mere threat into a sense of psychological ill-being and during the entire term of probation the delinquent has the load of the threat on his mind" ANGYAL, P.: *A magyar büntetőjog tankönyve* (The text-book of Hungarian criminal law), Budapest, 1920, p. 198. The deficiency of this opinion is, on the one hand, that it leaves out of consideration that every punishment expresses a moral disapproval, as well, thus it cannot be considered any *differentia specifica* of the suspended sentence and, on the other hand, that it does not show the way which, starting from the threat inherent in the potential enforcement of the sentence, may lead to the attainment of the aims of punishment, that is, the reformation of the delinquent and the prevention of the commission of any new offence.

[6] KADARI, H.: *Uslovnoe osuzhdenie v sovietskom ugolovnom prave.* The Annals of the University of Tartu. Tallin, 1956. Booklet no. 44, p. 193.

[7] JAKUBOVIC, M. I.: *O pravovoy prirodye instituta uslovnogo osuzhdenia.* Sovietskoye Gosudarstvo i Pravo, 11—12/1946. p. 59.

[8] GERCENZON, A. A.: *Ugolovnoie pravo. Obshchaia chasty.* Moskva, 1948. p. 80.

[9] DURMANOV, N. D.: *Osvobozhdenie ot nakazania po sovietskomu pravu.* Moskva, 1957.

[10] SARGORODSKI, M. D.: *A büntetőjogi büntetés (Punishment under criminal law).* Budapest, 1960. Vol. II. pp. 207—208.

the delinquent's re-education and keeping back from the commission of any new offence."

Though the correctness of this opinion can be approved a further analysis of this problem is necessary. From the statutory rules of the Hungarian criminal law a definite conclusion may be drown to the effect that *suspended sentence does not constitute any self-contained category of punishment, but it is a specific measure employed in course of imposing punishment which changes the method of the enforcement of sentences.* It is not the category and character but the mode, the method of the enforcement of the punishment imposed which is modified by this measure. Thus suspended imprisonment means imprisonment and suspended fine means fine indeed. The characteristic features of the above kinds of punishment equally assert themselves, be the sentence suspended or not. Both categories of punishment — as all punishments as a rule — include certain repressive-coercive elements which remain unaltered even if the enforcement of punishment is conditionally suspended. The statement of the Supreme Court laying down that this institution is essentially a "punishment of educational character" is to be interpreted with a view what has been set forth above. No doubt, in the application of this institution the aspects of education and special prevention play a predominant part, which however does not mean any change in the specific character of the punishment including, of course, repressive-coercive elements, as well. The educational influence of the punishment asserts itself within the scope of repressive-coercive elements. This holds true not only where enforceable punishments are involved but in case of suspended sentences, as well. In the latter context, however, the repressive-coercive elements inherent in the punishment assert themselves and promote the realization of the aspects of re-education and re-socialization in a specific way.

The suspended sentence — as every sentence — expresses the moral disapproval of the society. The expression of the moral disapproval of the society, however, is a necessary element of every sentence imposing whatever kind of punishment, either enforceable or suspended, moreover in certain cases it attaches rather to the establishment of the delinquent's guiltiness than to the punishment itself: that is why it would be incorrect to consider the suspended sentence a moral punishment as contrasted with all the other kinds of punishment. Besides, the expression of the moral disapproval of the society in itself does not contain those repressive-coercive elements which are, as a rule, characteristic of any punishment. In case of a suspended sentence the repressive-coercive elements inherent in the sentences of both imprisonment and fine assert themselves in a specific manner, that is, they exert their influence on the delinquent's psyche instead of his physical existence. The awareness of the fact that in case of the commission of a new offence to be punished by imprisonment also the suspended sentence will be enforced,

renders the repressive-coercive elements potentially inherent in the suspended sentence to be a determinant element of the delinquent's future behaviour. As a consequence, the omission of the actual enforcement of the sentence brings about a situation where the abstract existence of repressive-coercive elements involving the consciousness of constant threat brings about the conditions rendering the positive expectations of society to be determinants in the delinquent's behaviour. In case of sucessful expiry of the term of probation, a mere potentiality of the assertion of the coercive elements of the punishment promotes in itself the realization of the objectives of punishment that is, the delinquent's re-education and preventing from any further commission of offences.

Summing up: suspended sentence in view of its legal character *is a specific measure asserting itself in course of the infliction of punishment, affecting the mode of the enforcement of the sentence.* Its content consists in the fact that *the coercive elements of the punishment bring about the conditions necessary to the delinquent's re-education through their influence on the delinquents psyche.*

2. As it has been shown by the above quoted statistical data, the institution of suspended sentence has played an effective part in Hungarian criminal law. The aspect of criminal policy laying stress upon prevention in this struggle against crime involves, among others, that the possibilities of the development of the institutions of criminal law must be examined from this point of view.

In this examination there are two factors to be reckoned with, which permeate the entirety of the development of socialist criminal law. One is the postulate of individualization necessitating that in the formation of the different institutions of criminal law the specific criminological features of the various types of criminals (juveniles, recidivists, first-offenders etc.) shall be taken into consideration and that an ever increasing scope of the judicial individualization shall be ensured within the institutions of criminal law. The other principal trend which is unfolding in a more and more marked way in the newer socialist acts of legislation on criminal law is the initiation of the members of society into the struggle against crime.

One of the fundamental concepts relating to the suspended sentence, from the time of its foundation, has been individualization. This has manifested itself in both the legislation and the application of this institution. It is an open question whether — in view of the future development and the above outlined requirements of criminal policy — the non available possibilities of individualization inherent in the present scope of this institution are satisfactory, or a further development of these possibilities is necessary. To the latter question not only on the ground of theoretical considerations but also backed by the experiences gained by recent Hungarian judicial practice — a positive reply may be given.

We have no reason for criticizing the fundamental construction of the institution of suspended sentence under Hungarian criminal law. In addition to its efficiency also arguments and conceptions of procedural nature speak for this solution. At the same time, the experiences gained from another types of suspended sentence should not be left out of consideration. Due to the legal provisions laid down in Hungarian statutes, we are in the favourable position of making a comparison between the experiences gained from these two types of institution. Namely at the beginning of the century as a result of practical considerations Hungarian legislation definitely adopted the Belgian-French type of the suspended sentence. At the same time, in the relation of juveniles it introduced the Anglo-American type of this institution.

Apart from procedural differences one of the characteristic features of the suspended sentences passed in the cases of juvenile delinquents is that the delinquent is obliged to observe certain specified rules of behaviour during the term of probation. These rules of behaviour are intended to actively influence and guide into a favourable direction the development of the juvenile delinquent's personality. These measures proved good with respect to juveniles. In view of these experiences it would be justified to suppose that the possibility of such measures could constitute an effective means of crime-prevention and re-education with respect to suspended sentences passed in cases of adult delinquents, as well. Namely the prevailing system of suspended sentence requires only one kind of (so called negative) honesty, that is, that the delinquent shall not commit any new offence during the term of probation. This requirement seems to be satisfactory in a part of the cases concerned. In the cases, however, where the offence committed is somehow connected with the deficiencies in the delinquent's general culture, professional knowledge or way of living, the delinquent's compelling *to observe certain specified rules of behaviour could ensure the strengthening of the positive and active characteristics of the latter's personality with respect to honesty, respect for the law and way of living.* Thus e.g. the delinquent may be sent to a professional course, obliged to obtain certain school qualification to abstain from the consumption of alcohol at public places, not to change his place of work, to observe disciplinary regulations, to refund the damages caused by him etc.

No doubt the possibility of taking such measures would raise the problem: how and by which organs would be the observance of these rules of behaviour supervised? Experiences gained in the countries where this institution has been introduced show that the supervision of the delinquents conduct during the term of probation may be carried out in two ways. One is the organization of a network of probation officers under the auspices of state organs, whereas the other consists in relegating this task to the competence of social organs. In this context, however, also the experiences gained in the practice of suspended sentences imposed upon juvenile delinquents may also

be taken into consideration. Namely actually the supervision over juvenile offenders is organized by the state and exercised by juvenile courts but it is, at the same time, promoted by the activity of social organs. In view of these experiences the idea may be brought up that *the organization of a supervisory system or network similar to the one being in force with respect to juvenile offenders might be brought into existence in the sphere of the suspended sentences passed in the cases of adults, as well.*

In this case, however, the substantial difference between the personal status of juvenile and adult offenders could not be left out of consideration. Namely, the basic pedagogical preconditions of the educational effect exerted by the suspended sentence are not identical in the relation of juveniles on the one hand and adults, on the other. The personality of a juvenile is in a state of development, the influencing of which is thus a natural requirement. On the other hand, this effect is substantially more intricate where adult offenders are concerned because, due to the established personality of an adult, this effect does not attach predominantly to his individuality but rather to the groups and collectives (family, domicile, place of work) surrounding him. The characteristics of this situation involve that *it would be justified to invest certain collectives, in the first place, the collective of the delinquent's place of work with the task of the supervision over the adult delinquent during the term of probation, which in certain scope and cases could be combined with the system of probation officers.*

Summing up: the further development of the institution of suspended sentence is justified by a *criminal policy* aiming at prevention. The trend and contents of this *would be determined by the extension of the scope of judicial individualization, the obligation of the delinquent to observe certain rules of behaviour during the term of probation and the supervision of this by way of the system of probation officers or with a combination of the above institutions with the patronizing activity of certain collectives designated for this task.* The expediency of certain elements involved by this solution have been justified by the experiences gained within the field of certain institutions of our prevailing law. The institution of suspended sentence being further developed in this way *seems to be appropriate to replace short-term prison sentences to an extent which would exceed the now prevailing situation.*

Условное осуждение в венгерском уголовном праве

Т. ХОРВАТ

Вслед за вступительной частью исторического характера статья показывает, что институт условного осуждения в венгерском уголовном праве последовательно строился и в значительной мере применялся во время социалистического правотворчества. Показывая это, автор указывает на правовое регулирование условного осуждения в законе II от 1950 года и в новом уголовном кодексе, в законе V от 1961 года, а затем анализирует

взгляд уголовной политики на этот институт и его изменения, нашедшие свое отражение в принципиальных решениях и руководящих указаниях Верховного Суда Венгерской Народной Республики, связанных с этим институтом.

Раскрывая юридическую природу института условного осуждения и вступая в дискуссию с другими взглядами, автор приходит к выводу, что условное осуждение это особое мероприятие, ос ществляемое на основе порядка назначения наказания и изменяющее метод исполнения наказания.

Наконец, автор рассматривает возможности развития института условного осуждения в свете новых требований криминальной политики. Направление и содержание этого видит в расширении возможности судебной индивидуализации.

La condamnation avec sursis dans le droit pénal hongrois

T. Horváth

Après une introduction historique l'étude démontre que c'est à l'époque de la législation socialiste que l'institution de la condamnation avec sursis a été conséquemment développée et appliquée dans le droit pénal hongrois. Pour illustrer cette constatation l'auteur fait connaître la réglementation juridique de cette institution par les lois No II de 1950 et No V de 1961, cette dernière portant nouveau Code pénal; il analyse la conception de politique criminelle relative à cette institution ainsi que les changements de cette dernière à la lumière des décisions de principe et des directives de politique criminelle de la Cour suprême de la République Populaire Hongroise prises concernant cette institution.

An analysant la nature juridique de l'institution de la condamnation avec sursis et polémisant avec plusieurs conceptions, l'auteur arrive à la conclusion que cette institution est une disposition spéciale se faisant valoir dans le système de la fixation de la peine et modifiant la pratique de l'exécution de cette dernière.

Pour finir, à la lumière des récentes exigences de la politique criminelle l'auteur examine la question de savoir quelles sont les possibilités d'un développement ultérieur de l'institution de la condamnation avec sursis. A son avis la direction et le contenu de ce développement pourraient être indiqués dans l'extension de la possibilité d'individualisation dont doit disposer le juge.

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The Main Political and Constitutional Trends in the United Nations and its Security Council

by

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The paper is intended to give a historical survey of the development of the UN. The UN is, in the central idea of the treatise, the public international law institution of an epoch characterized by the peaceful coexistence of states with different social system. Therefore the first Chapter analyses the notion and practice of this institution. Its conclusion holds that in this epoch the importance and usefulness of international bodies politic, especially that of the UN has considerably increased. The development of tentative historical periods in the past activity of the UN is the other major part of the article's analyses. The last issue in this paper is the author's tentative proposition concerning the definition of our major tasks at the UN.

Introduction

International lawyers have been increasingly interested lately in international organizations, in their definition, functions as well as the political and legal developments involved. It is well-known for the students of the subject that the term "international organization" had not been adopted and used up to the early twenties. By now, however, when nearly two-hundred intergovernmental and two thousand non-governmental organizations are known or registered there cannot be doubt that the law of international organizations has come to constitute an important part of international law. However, the term "international organization" is meant in international law to denote inter-governmental agencies. To what an extent the issue is deemed to be important is indicated by the fact that the International Law Commission has put on its agenda, years ago, the discussion of the subject "Relations between States and inter-governmental organizations" and a report prepared by a member of the Commission, Mr. El-Erian was discussed in 1968.[1]

As regards its Charter, purposes, membership and particularly its potentialities the most important international organization destined to achieve a universal appeal is the United Nations.[2] The UN is striving to attain its

[1] *Report of the International Law Commission on the work of the nineteenth session*, 8 May—14 July, 1967. p. 25.

[2] *Kurs Mezhdunarodnogo Prava*. Ed. by F. I. KOZHEVNIKOV, Moskva, 1966. p. 421.

principal objective, i.e. the maintenance of international peace and security through its duly authorized organ the Security Council.

It would be wrong to assume that the characteristic features of the United Nations are limited to achieve universality and the maintenance of international peace and security. The coming into being and the evolution of the UN in the course of historical development have been determined by the coexistence of different socio-economic systems. Peaceful coexistence, its notion and practice has come under attack from various sides. This principle was held by some representatives of the "Western World", particularly in the not too recent past as a mere tactical slogan, a Troyan horse destined to achieve "Communist world domination". It should also be borne in mind that persons of dogmatic thinking and simplifying Marxist thought alleged that the policy of peaceful coexistence in general and activities to this effect in international organizations in particular were but a deal with the class-enemy.

It follows from the above-said that this paper should deal with the following problems:

- a brief rewiev of the notion of coexistence between different socio-economic systems and the principal lessons to be drawn the practice thereof;
- an analysis of the establishment of the United Nations and, more particularly its Security Council as an institution of international law serving peaceful coexistence;
- an attempt to outline the political and constitutional trends within the UN;
- in the context as indicated to draw lines of division between the stages of development of UN activity.

I.

The principle and practice of peaceful coexistence between states of different socio-economic systems

1. The notion of peaceful coexistence

The fact and concept of peaceful coexistence between states of different socio-economic systems are rooted in historical development and apply not only to coexistence between socialist and capitalist states but have validity in respect of the whole historical course of class-societies. This fact is rooted in the differences in social and economic development as well as in the manifold conditions determining social changes. In the epoch when feudal societies were flourishing in the Middle Ages there were also existing side by side, Eastern slave societies which, while displaying the specific features of their own started on the road to develop feudal relationships still retaining certain forms of tribal society and the community of land ownership.

Starting with the beginning of the XVII[th] century, the beginnings of the early bourgeois revolution in The Netherlands up to the age of later bourgeois revolutions, bourgeois and feudal states in Europe were coexisting. This coexistence was not always peaceful if only the coalition of powers against the French Revolution is recalled. But is has also to be borne in mind that states of different socio-economic systems, like England and Russia, prompted by their national interests belonged to these alliances.

It should instantly be added that coexistence between states of differing socio-economic systems was basically different in the past from what it is in the present for previous instances of such interstate relationships were conducted between class-societies based on exploitation.

This difference in quality and novel character in respect of the coexistence between socialist and capitalist states should be pointed out for the very reason that there have been made attempts in bourgeois writings on philosophy and political sciences to blur this difference claiming that these differences are of a temporary nature and will become non-existent either through a "transformation" or the termination of socialist society.

Seemingly there is a difference between the way how Marx and Engels treated the period of transition between capitalism and socialism and how Lenin summed up the fundamental principles of the peaceful coexistence between states of different socio-economic systems.

It has never been stated either by Marx or Engels that the socialist transformation of society would be completed simultaneously all the world over. The conclusion they arrived at was, as it is well known to students of the subject that socialist revolution would be simultaneously victorious in the leading capitalist states. When Lenin concluded that as a result of the uneven development of imperialism socialist revolution could be victorious also in a single country and may survive, also involved that until socialism would triumph on a world scale an entire historical period would elapse.

Lenin was acting thus in the spirit of true Marxism: he discovered, under changed and specific conditions a principal trend of the age of socialist revolutions, i.e. the peaceful coexistence between states of different socio-economic systems.

Twice have I spoken so far about coexistence without using the epithet "peaceful". In doing so I also meant to indicate that while coexistence was an objective category, an inevitable consequence of social evolution its peaceful or not peaceful character is always determined by historical conditions, power relationships between classes and not infrequently by subjective factors.

This conclusion is substantiated by the war of intervention launched against the young Soviet State, the defeat of the Hungarian and Bavarian Republics of Councils in 1919 and the history of the cold war conducted after World War II.

Should in various historical epochs the nature of coexistence be changing or moulded and even in consequence of imperialist intervention socialist revolution is defeated in the period of transition, in some countries, still the basic characteristic of the epoch, peaceful coexistence will continue to remain. The fight between the two types of society is bound to be decided not by a final reckoning world war but by the domestic process of social transformation going on in states, promoted and made possible by the example shown by and the strength of socialist countries.

That is the reason why it was laid down in the Program of the Soviet Communist Party: "Peaceful coexistence between socialist and capitalist states is the objective necessity of the development of human society."[3]

2. *The principal lessons of the practice of peaceful coexistence in the period between World War II and the present*

Power relationships, as compared to the previously existing ones, had been basically changed by World War II even before it ended. The Soviet Union stepped out of her isolated position.

The western allies who were members of the war-time coalition came to recognize that the problems of war and of the peace subsequent upon it would be impossible to solve without the cooperation of the Soviet Union, the representative of another social system and an equal party.

This cooperation thus amounted to proving the objective necessity of peaceful coexistence and the correctness of the Soviet policy based thereon.

It would however be wrong to assume that the the road of development and particularly of international relations was "as straight as the Nevskiy Prospect". As early as hostilities came to an end and particularly in the subsequent period an increasing number of signs indicated that the policy of peaceful coexistence would face a severe test. History has it that soon after weapons had become silent in Europe and particularly in Asia the first wave of cold war ensued.

When an attempt is made, and a rather complicated and controversial one at that, to distinguish between the periods of the post-war development of international relations the following may be said:

An event of historical import in the period between 1945 and 1949 was the emergence of the socialist world system which wrought, particularly after the revolution in China had become victorious, changes in power relationships previously existing.

Under pressure from the West and especially from the United States the policy of cold war, destined to check the spreading of socialism was embark-

[3] *A SzU. Kommunista Pártjának XXII. kongresszusa (Twenty second Congress of the Communist Party of the U.S.S.R.).* Hung. edition. 1962. p. 760.

ed upon which did not refrain, from France to Japan from resorting to all means to reverse social progress to push back progressive forces and to have these dropped from governments (as was the case in France and Italy) not shirking from open intervention (as was the case in Greece). In this way the very ruling classes which had opposed the Western allies during the war had deen supported and assisted by them to survive.

Western policy of strength which allotted a particular value in its calculations to the monopoly of atomic weapons was leading to an increasing tension in international relations by the beginning of the 'fifties. Cold war turned to a real war in Korea.

Notwithstanding the increasing danger of war there were also other forces operating in another direction. Western atomic monopoly came to an end between 1949 and 1953 after the successful Soviet A-bomb then H-bomb tests. In consequence of the increasing strength of the socialist world system and particularly of the development in the Soviet Union devoting not insignificant sacrifices and amount of resources it succeeded in successfully coping with its historical task, the achieving of military balance. This period was closed and a new period was opened in 1957 of the launching of the Soviet intercontinental missiles and the launching of the first sputnik.

The failure of the forces of cold war resulted in the easing of the tension and in convening the Geneva conference in 1954. The impact of the nuclear age is best illustrated by Sir Winston Churchill who, in 1945 and particularly in his ill-famed Fulton speech in 1946 stood, relying on the atomic monopoly, for a renewed anti-communist crusade "offered" in May 11, 1954 the stopping of the cold war and was "willing" to concede "guarantees" in Eastern Europe which would serve the security of the Soviet Union.[4]

The purposeless nature of the policy of strength was admitted in more precise terms by President Eisenhower in October, 1954 who said that a nuclear war would annihilate the world and added that the possibility between victory and defat has been disappearing.

The stages of the relaxation of tension have, however, been alternating with those of mounting tension and conflicts. Within the last category come the Suez aggression, the counter-revolution in Hungary, the Cuban crisis and foremost the gravest and longest drawn aggression in South-East Asia, the armed intervention of the US in Viet-Nam.

The post-war period has witnessed, however, not only the struggle between socialist and capitalist states although no doubt this process has a decisive effect upon the trend of mankind's evolution. Also in this period events of major significance have occurred namely the colonial system has reached the stage of disintegration. The emergence of newly independent states in Asia

[4] FLEMING, D. F.: *The cold war and its origins.* Vol. II. p. 1040.

and Africa, their policy of non-alignment, the line of non-capitalist evolution, the wars of national liberation, the fight against the new forms of colonialism have been and are weakening the position of capitalist states all over the world. These states, despite temporary setbacks and inconsistencies in their policies, constitute, in the last analysis, the natural allies and friends of the socialist world system and are important members of the fight against imperialism.

Western powers who have come to recognize the uselesness of a world war have changed to a course of locally "containing" "communism" and national liberation movements through resorting to military alliances, supporting reactionary systems and through local wars.

The question then may be asked: the subject is the practice of peaceful coexistence while it appears that it is rather the practice of non-peaceful coexistence which is spoken about. The solution of this apparent contradiction may be achieved through using a dialectical approach.

A qualitative change has occurred in the practice of peaceful coexistence in the period after two world systems had emerged. The substance of this change is that to do away with socialist states through direct, military or even more "refined" means has become an impossibility. In the age of thermonuclear weapons a world war has simply become unreasonable. All this amounts to saying that the road of peaceful coexistence is undoubtedly the only way out of this situation. This recognition is expressed when "peaceful cooperation" or other ideas are voiced in the West.

All this is however only one aspect of the qualitative change which has taken place. The conditions under which peaceful coexistence can be achieved have become by now different for the international working-class movement and the socialist world system too.

It must be kept in mind that in the post-war period the forces of capitalism have become to begin stabilized again. In addition to the armaments race capitalism has proved capable to adapt itself in a flexible way to the changed conditions. The presence of socialism as a world-shaping factor and domestic social movements have contributed to evolving new patterns of state capitalism and the establishing of several facets of the "welfare state". Some of the Communist Parties in developed capitalist countries are in many instances not capable, due either to the post-war anti-communist witch-hunts, or their own errors and those of the international working-class movement, of becoming determining factors in policy-making.

The countries of the socialist world system have achieved outstanding successes in building up socialist society. But they are also faced with solving tremendous tasks. In addition to burdens they are compelled to undertake in consequence of the armaments race forced upon them, they have to expand their national economies in a more energetic and quicker way as well as the strengthening of some branches of economy which have been lagging behind.

The stage reached by now in economic expansion requires new forms and methods which involves, in turn, that a fight has to be waged against traditions and customs of old which are difficult to be discarded. In other words they have to show their superiority in the decisive field of human activity i.e. in the economic life for good over the capitalist world.

In addition to economic tasks a number of political, legal, cultural and other problems are to be solved which, while contributing to the building of socialist society will have, as they have now, a major impact on the peoples of the capitalist and non-aligned countries. The effect of making the problems, achievements and perspectives of the evolution of socialism widely known and the evolution itself is immeasurable. In this course due attention should be paid to the requirement which is in the words of Palmiro Togliatti as follows: "It would not be correct to speak of the socialist countries (and also of the Soviet Union) as if everything were in the best of order there. This mistaken attitude is discernible e.g. in the chapter of the 1960 resolution dealing with these countries. As a matter of fact difficulties, contradictions, new problems constantly arise in socialist countries and we have to deal with these in their reality."[5]

The most important field of the arguments now encountered within the international communist movement centres around the very problem of the strategy and tactics to be elaborated for the present period of peaceful coexistence. The arguments are the concern not of a single or several parties but of the entire international working-class movement. As for the present subject, the point of departure of the leading group of the Chinese leaders as of now and the groups sympathizing with them is as follows:

As the nature of imperialism has remained unchanged it is mere illusion to maintain that the principal field of peaceful coexistence and international class struggle are the competition and fight on the economic, cultural and ideological plane. From these quarters, irrespective of the given historical situation and power relations instead of peaceful economic expansion the idea and practice of "revolutionary wars" or a "revolutionary impetus" for world revolution are held desirable. The necessary and correct compromises are considered betrayal of the cause. They do not assess correctly the position and strength of the developed capitalist countries, overestimate national liberation movements and consider Africa, Asia and Latin-America the "storm centres" of the world. Such concept underestimates the opportunities afforded by peaceful coexistence, rejects alliance with non-communist forces, peace movements and does not wish to make use of international forums where imperialist influence has to be pushed back in a day-to-day struggle. Proclaiming pseudo-revolutionary slogans such a concept is intent rather on creating

[5] *Palmiro Togliatti feljegyzése (Notes of Palmiro Togliatti).* Társadalmi Szemle, 10/1964. p. 56.

new international organizations instead of strengthening the unity and consolidation of progressive anti-imperialist forces in the existing ones.

When speaking of the detrimental concept and practices of the dogmatic attitude the question may arise: before the Chinese leaders appeared with their dogmatic concepts had the international working-class movement and the socialist countries not committed mistakes after World War II in the practice of peaceful coexistence? Or as the question is put particularly by certain politicians and "Kremlinologists" in the West: were the socialist countries not guilty at least in equal measure of introducing and conducting the cold war?

The unequivocal answer to the question is that, as has been outlined above, the cold war is the direct product of the capitalist world and particularly of the leading western powers. Among the heaps of books on the "expansionist nature of communism" and its "aggressive intentions" a refreshing one is "The cold war and its origins" by D. F. Fleming. The author, a scholar far from Marxism shows in two volumes, on 1154 pages that the real roots of the cold war reach back to 1917 and traces the entire course of western hostility and misapprehension particularly in the period after World War II.

The question still has to be answered to what extent did the dogmatic attitude of J. V. Stalin and such methods of the then leadership had an impact on Soviet policy.

If western sources are made us of, leaving out of consideration the galore venomous pseudo-scientific works, it may be read even in G. F. Kennan's work that:

"under the impact of these failures (i.e. the Marshall-plan, the establishment of NATO and the war in Korea) the last years of Stalin were those of increasing madness and sterility. His thoughts on foreign policy carried him to a growing extent towards reappraising old situations and re-applying obsolete methods and means instead of recognizing the realities of the new times".[6]

Contrary to the above even several historians in capitalist countries have reached opposite conclusions. A professor of the Harvard "Russian Research Centre", while starting from sharply anti-communist concepts and interpretation comes to the conclusion that Soviet policy was based also up to 1953 on the principle of peaceful coexistence. A December, 1952 interview given by J. Stalin to James Reston of the New York Times is evoked in which Stalin pointed out the necessity of ending the war in Korea and the possibility of meeting President-elect Eisenhower.[7]

[6] KENNAN, G. F.: *Russia and the West under Lenin and Stalin.* New York, 1962. p. 361. "In the face of these frustrations, Stalin's last years were ones of increasing madness and sterility. His thought on foreign policy tended to the reliving of old situations and to the re-employment of old devices rather than to the recognition of the realities of a new day".

[7] SHULMAN, M. D.: *Stalin's foreign policy reappraised.* Harvard University Press, 1963. p. 262

Thus as far as the foreign policy of the socialist countries and the Soviet Union is concerned the fact that its main task was to preserve and strengthen the positions of socialism also prior to 1953 continues to hold ground. It would have been simply impossible to disregard this objective and to embark on adventures which would have amounted to rejecting peaceful coexistence and risking the very existence of socialism even in the period when dogmatic practices prevailed.

It must be added that it has been revealed since in the documents of the international working class movement and particularly at the XXth and XXIIth Congresses of the Soviet Communist Party that the period has not been devoid of serious mistakes. When theoretical problems are considered it will suffice to evoke certain statements voiced at the XIXth Congress or included in the work by J. Stalin on the "Economic Problems of Socialism in the Soviet Union".

It was rather in the practice and methods of peaceful coexistence that dogmatic attitudes were encountered. As symptoms of such attitudes the following can be mentioned: rigidity, the comparative restricting of maneouvreing, the use of frequently insulting but not convincing arguments in international life and relations, the relative lack of endeavours aimed at establishing mutually beneficial compromises and personal contacts.

After having outlined the practice of peaceful coexistence the following lessons may be drawn:

A qualitatively new stage has been reached in peaceful coexistence due to the strength of the socialist world system and the accumulation of thermonuclear weapons.

Under the prevailing conditions the principal efforts of the international working-class movement are directed at securing world peace thereby to attain the establishment of socialism on a world scale.

Imperialism and its leading power, the United States are capable of slowing down the pace of social progress through resorting to local wars, economic pressure and any other means. Therefore the principle of peaceful coexistence cannot be considered as absolute one and make it appear as it were susceptible of answering all questions of international class struggle in itself.

— Together with the gradual gathering of strength of the "third world" the world system of socialist states must be ready to be prepared for a relatively long period during which imperialist policy of force will be eliminated by resorting to the various means of international class struggle.

— One of the most important methods of those mentioned above is the activity carried on in international organizations and particularly in the United Nations. This organization is an important scene of solving international disputes, instead of armed conflicts, in a peaceful way, by using political and diplomatic solutions.

II.

The United Nations as the result of the anti-fascist alliance in World War II. The establishment of the Security Council as the embodiment of unanimity between the great powers

(1942–1945)

1. The Second World War even before hostilities had come an end radically changed power relations existing in the League of Nations period

The Soviet Union's isolated position was a thing of the past. The coalition forged against the Axis proved that coexistence between states of different socio-economic systems is a reality which, despite the very extraordinary circumstances in wartime, led to cooperation between the then single socialist state and an important group of capitalist countries.

The western members of this coalition of powers thereby recognized (in addition to the traditional diplomatic recognition) that the Soviet Union, a representative of a different social system was an equal partner whose cooperation would be indispensable in coping with the problems of war and the post-war period. This certainly does not amount to saying as if the leading imperialist powers had reconciled themselves to the social system and political structure of the Soviet Union. But it is also a fact that the coalition partners starting from the realities of the war had to be aware that an international organization destined to maintain international peace and security cannot be established without the participation of the Soviet Union.

It is thus obvious that the permanent participation of the great powers, their cooperation and the principle of unanimity were envisaged as a *conditio sine qua non* of the future international organization already in the initial period of establishing it.

In the first years of the war (meaning now the period between 1940 and 1942) the final pattern was far from being conceived of. Many self-contradictory, nebulous ideas were encountered at that time as regards the substantive as well as formal issues connected with the organization to be established. The most consistent representatives of imperialist projects thought of reviving the "concert of Europe" which would have been tantamount to the hegemony of a few great powers. Instead of a world organization the thoughts were directed at solutions on a regional basis in which framework the "superpowers" could have easily exercized their influence. In Prime Minister Churchill's view world should have been divided into 3 regional areas. (Europe, America and the Pacific.) According to this concept these areas should have formed regional councils and above them a "supreme world council". Although Churchill stood for the participation in this Council of the Soviet Union the

intention was that the hegemony of the "Anglo-Saxon" powers should have been retained. At first Churchill did not consider China as a participant later however he considered it as possible.[8]

Similar projects engaged at first the attention of the official US circles. Sumner Welles, then Deputy Secretary of State suggested that similar principles should serve as the foundations of the future international organization with the only difference that he proposed the formation of 5 regional councils.

On the other hand the Soviet concept was consistent from the outset both as regards the universal nature and the participation of great powers in the world organization. Very probably this was one of the reasons why President Roosevelt in the summer of 1943, approved a memorandum submitted by Secretary of State Cordell Hull which contained the outlines of a universal organization.[9]

The specific nature of the composition of the anti-fascist coalition accounts for the fact that in the communiqué issued after the Teheran conference which foretold the outlines of the future world organization only the principle of cooperation between the three great powers (Soviet Union, United Kingdom, United States) was laid down.

As to the position of the fourth great power, the Chinese Republic, no clear views were then existing. As has been mentioned Premier Churchill first did not think of having China as a party evoking the inferior Chinese military and economic potential as compared to the other three powers. It may be assumed that the real reason was that the thought that the strengthening of the Chinese position would jeopardize British interests in the Far East on the one hand and realized, on the other hand that Kuomintang China had been coming under increasing American influence.

Western sources claim that at first neither the Soviet Union thought of allotting China a special great power position. No written documents are available to substantiate this view; only a mention is made in W. Churchill's memoirs alleging that J. V. Stalin at first was sympathetic to the British view.[10]

In keeping with the further progress of war cooperation between the great powers was becoming closer.

A major role in this process was occupied by the Moscow conference. The Declaration adopted there may be regarded as the first concrete document providing clear-cut outlines on the post-war United Nations Organization. The special position allotted to the Great Powers in the new Organization was laid down at the Teheran conference in the communiqé of December 1, 1943 issued after the conference. *It was in this declaration that the principle of*

[8] GOODWIN, G. L.: *Britain and the United Nations*. London, 1957.
[9] CORDELL, H.: *The memoirs of Cordell Hull*, New York, 1948.
[10] RUSSEL, R.: *A history of the United Nations Charter*. Washington, 1958. p. 54.

unanimity between the great powers as the basis of the future organization was laid down for, failing this, no successful cooperation could be envisaged after the war.

The work and results achieved at the conferences in Moscow and Teheran serve also for the rejection of certain western claims as if the principal role in preparing the way for the UN had only been played by the two western powers. Though it would certainly erroneous to by-pass or underestimate the role of western statesmen (particularly of President Roosevelt) it can be stated that the elaboration of the principles of the United Nations, its organizational pattern was effected in a collective way, with the participation of the three leading powers of the war-time coalition and this collective activity was expanding during subsequent talks.[11]

2. *When the United Nations was established one of the most important problems was the laying down of the function, scope of authority and membership of the Security Council. The discussion therefore will be concentrated upon this topic*

Views as to the structure and composition of the Security Council became clearer by the beginning of 1944. Two issues were left for further examination: the one was France's participation in the Council in addition to the other four powers and the second was whether non-permanent members should also be members in addition to the great powers.

a) Although the great powers were, in principle, unanimous that France should enjoy identical status with them in the new organization at the time of the preparatory work there was no French government recognized by all of them. Although a Council had been active in London which was functioning as a provisional government and which was mainly concerned with military matters, Western powers were then reluctant to burn all bridges in respect of the contacts with the Vichy puppet government. As a result, it was, in a somewhat paradoxical way, that the United States protected the *status quo*, the domination of Vichy over French territories in the Western hemisphere.

The draft on the International Organization which speaks about the 11 members of what is termed the "Executive Committee" lays down in respect of France that her place should be reserved among the permanent members until a government, freely elected by the people of France will have been formed.[12] It should be added that this decision was adopted only after the Normandy landing.

b) It is clear that the participation and cooperation of great powers was to become the backbone of the new organization. It was still argued, however,

[11] FEDOROV, V. N.: *Istoriya sozdaniya sovieta bezopasnosti OON*. Published in Voprosi mezhdunarodnogo prava, 1963. pp. 162 to 164.

[12] *Postwar foreign policy. Preparations 1939—1945*. Department of State Publication 3580, Washington, 1949. p. 598.

whether there was any need for elected, non-permanent members on the Council by the side of the great powers.

American opinion first inclined to forming the Council of the representatives of the four powers only. President Roosevelt used to say that four policemen were needed. This trend of thought was reflected in the memorandum forwarded at the end of 1943, which suggested the following alternatives: to elect non-permanent members by the side of the great powers, or — to restrict the participation in the Council to the four powers only.[13]

As the outcome of the consultation among the great powers it was eventually agreed, in the summer of 1944, that non-permanent members should also be elected on the Security Council. The draft charter, submitted to the Conference at Dumbarton Oaks, contained already a provision to this end.

3. The Dumbarton Oaks Conference

The Conference passed off in two phases. Between July 12 and September 28, 1944 the delegates of the United Kingdom, the United States and the Soviet Union met. The proposals agreed upon in the meetings of the three were then forwarded by the two Western powers to China (between September 29 and October 7, 1944).

The Conference had an important part in shaping the world organization as a whole and the structure of the Security Council in particular. The four great powers attending the Conference confirmed their full agreement with the creation of permanent memberships expressive of their specific responsibilities, as one of the most characteristic structural features of the Security Council.

A remarkable change was the replacement of the term Executive Committee by the term Security Council. The newly chosen designation was a more adequate expression of the primary functions of the organ, i.e. the maintenance of international peace and security.

Notwithstanding the adoption of the principle of unanimity the Conference failed to agree upon an appropriate method of voting to express this principal idea. Eventually the Yalta Conference decided that for a decision in all non-procedural matters the concurring vote of the permanent members was required, and that for passing a resolution at least two "eyes" of the non-permanent members were needed. This problem, seemingly one of the technicality of voting, also confirmed how closely the procedure of voting was associated with the problem of the composition and membership of the Security Council.

[13] *Memorandum of the President, 29th December, 1943.* See Postwar Foreign Policy etc.

As regards the fifth permanent member, namely France, the closing document pointed out only that France will be entitled to permanent membership within a certain time.[14]

As regards the non-permanent seats on the Council the participants of the Conference were in agreement on the principal points. It was understood that six non-permanent members would be elected. Those put up as candidates would have to be elected by a two-third majority, i.e. the election for the Security Council was declared to be an important matter. The non-permanent members would be elected for a term of two years. At the same time a ban was proclaimed on immediate re-election.

This rule guaranteed a quicker rotation of the membership on the Council among the states members. Consideration had also been given to the principle of the representation on a regional basis. On the other hand the Conference prevented so-called "quasi-permanent" places from being created. The system of quasi-permanent places to which some of the states laid claim, was reminiscent of League of Nations practice.

The agreement on the establishment of six permanent seats was at the same time a demonstration of the readiness on the part of the great powers to draw other states members into the highly responsible work of the Security Council. This fact refutes those charges which were, and are still being, voiced by certain representatives of the western literature on the subject matter. In their opinion the only thought of the great powers was to promote their own interests.[15]

Some of them would like to discover in the practice of the League of Nations the precedent which prompted the great powers to this step. It was said that had logic continued to dominate the drafting of the Charter, only the great powers would have constituted the Security Council. Why was a different course taken? The short reply is, that the precedent of the League of Nations stood before the powers. Consequently ". . .A concession had to be made to the idea of democracy and the principle of representativity".[16]

This school of thought is in the first place displeased with the institution of a permanent membership guaranteeing the participation of, and granting a specific role to, the Soviet Union. This is the reason why these writers launch their attacks against the principle of unanimity of the great powers. Secondly, it is exactly the group of these authors which believes that the participation of the small countries in the operations of this important international organ is merely "sham democracy".

[14] *Dumbarton Oaks proposals for the establishment of a general international organization.* Chapter VI

[15] KAUFMAN, W.: *The organization of responsibility.* New York, 1949. p. 523.

[16] NICHOLAS, H.: *The United Nations as a political institution.* New York, 1959. p.65.

The participation of the small and medium states cannot be explained either by the example of the League of Nations or some sort of a concession. This is confirmed most conclusively by the agreement reached in Yalta, according to which for a valid decision in addition to the concurring vote of the five powers the positive votes of two non-permanent members of the Council are also required. The Yalta Conference took place between February 3 and 11, 1945, and was attended by the heads of states or governments of the Soviet Union, the United States and the United Kingdom. From the point of view of the world organization the most important resolution was that on the voting-system of the Security Council. Here the convening of the San Francisco Conference was also decided.

4. The San Francisco Conference, April 25 to June 26, 1945 (United Nations Conference on International Organization)

In the following a brief survey will be given of some of the important resolutions passed in the Conference.

a) According to the Charter of the United Nations approved in the San Francisco Conference the Security Council has been vested with special functions and competence: In conformity with paragraph 1 of Article 24: "In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this reponsibility the Security Council acts on their behalf."

The founding fathers, i.e. the statesmen who cooperated in the creation of the United Nations and in the formulation of the Charter, conferred powers on the Security Council so far without example or precedent in international law. In fact the Security Council has been vested with authority to enforce its resolutions by applying sanctions, including the use of armed forces too.

Above all it should be made clear that the Council is not an organization above the states, it is not the executive of some sort of a world state. There are two essential limitations of the activities of the Council. According to paragraph 2 of Article 24: "In discharging these duties the Security Council shall act in accordance with the purposes and principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII." As is known one of the most important of these principles is that of the sovereign equality which together with the well-known rule of non-intervention in domestic affairs safeguards the sovereignty of the states members entering the United Nations of their own free will.

Notwithstanding these limitations of its competence and powers the Security Council stands for something qualitatively new in international law:

it is an agency entrusted with specific duties and vested with specific powers. It is beyond doubt that this specific legal position is the direct outcome of the radical changes which have taken place in international relations and in world politics, and before all, of the coexistence of the two world systems.

In conformity with the Charter the specific competence of the Security Council has been defined in Chapters VI, VII, VIII and XII.

Chapter VI on the peaceful settlement of conflicts in the first place emphasizes that the parties as far as possible have to find a solution by way off direct negotiations, inquiries, mediation, conciliation, arbitration, or by making use of the services of regional organs or other peaceful means (Paragraph 1, Article 33). At the same time the Security Council is authorized in the event of a conflict of whatever nature to recommend appropriate methods of procedure or settlement. If the Security Council shall find that peace cannot be restored by mere recommendations or appeals then under Chapter VII, and in the first place in conformity with Articles 41 and 42 the Council may take action, first such as does not involve the use of armed force (Article 41). If these measures shall prove inadequate, then the Security Council "may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security" (Article 42).

Hence in modern international law the right of having recourse to armed forces is vested exclusively in the Security Council, except, however, cases when the states act on individual or collective selfdefence.

Chapter VIII deals with regional agreements. It should, however, be pointed out that the states members have undertaken that "no enforcement action shall be taken under regional agencies without the authorization of the Security Council" (Article 53).

Although Chapter IV of the Charter in the first place deals with the General Assembly, and the Security Council is only dealt with in Chapter V, nevertheless the latter is the most important organ of the United Nations for the maintenance of international peace and security.

Hans Kelsen, this generally recognized authority of western literature on the subject also recognizes: "The competence of the Security Council coincides to a great extent with the competence of the entire Organization; for the performance of almost all legally important functions of the United Nations is conferred upon the Security Council either exclusively or together with the General Assembly."[17]

As regards its character the General Assembly is before all a consulting, debating and negotiating body. Unlike the resolutions of the Security Council, those of the General Assembly are not enforceable. As the forum of sovereign states of equal rights the General Assembly cannot be considered a "world

[17] KELSEN, H.: *The law of the United Nations*, London, 1951. p. 219.

parliament" raised above the sovereign states. The General Assembly has no powers to initiate actions, or to carry them out.

In conformity with paragraph 2 of Article 11: "The General Assembly may discuss any questions relating to the maintenance of international peace and security . . . and . . . may make recommendations with regard to any such questions to the State or States concerned, or to the Security Council." . . .This is followed by the most important statement on the matter, namely that "Any such question *on which action is necessary* shall be referred to the Security Council by the General Assembly either before or after discussion" (italics added).

According to Article 24 already quoted above the maintenance of international peace and security is the function of the Security Council. The statement may therefore be ventured that the division of labour between these two principal agencies is on what the activities of the world Organization based.

b) *As regards the permanent members* the proposals submitted by the Dumbarton Oaks Conference were approved. However, certain Latin American delegations were intent to obtain a permanent seat for a Latin American country on the Security Council (Brazil, Costa Rica, the Dominican Republic, Mexico and Paraguay). Brazil withdrew her motion on the 14th May, because by then the negative position of the great powers and also of states of other continents was well defined.

In the same way a Mexican motion for the creation of quasi permanent seats was denied, as well as a motion of Australia and New Zealand for immediate re-election. The permanent membership of France on the Security Council was made definitive and formal, when Committee III unanimously approved the report of the technical sub-committee III.1. However, it should be remembered what bourgeois literature "bashfully" ignores, i.e. that in this matter the Arab states abstained from voting in protest against the French armed intervention in Syria and Lebanon.[18]

In connexion with the non-permanent seats a number of amendments were moved in the committee debate. Most of these amendments aimed at the increase of the number of non-permanent seats. Here too the Latin American states took the lead, so Cuba, Chile, Ecuador, Venezuela, etc. Their purpose was first of all to extend the possibility of their own participation.

The committee rejected the proposals for an increase of the number of non-permanent seats, and approved the original ones on May 10, 1945. However, a change took place in a rather important matter. The committee approved the suggestion of the United Kingdom on the criteria of the election of non-permanent members.

[18] KRYLOV, S. B.: *Istoriya Obedinyonnih Natsij*, Moskva, 1960. p. 180.

This problem already emerged in Dumbarton Oaks. On the present occasion further opinions were brought forward. Mexico, Urugay and the Philippines insisted on a general regional distribution of the non-permanent seats. France, Canada and Australia, in conformity with the earlier British proposals, wanted to discover the principal criterion for an election on the Security Council in the degree of the "contribution" of the state in question to international security. The Netherlands thought that a seat should in all cases be guaranteed for the "Middle Powers", whereas India fought for the taking into account of the number of the inhabitants and the economic potentialities. On the other hand Liberia insisted energetically on a rotational system based on the alphabetic order of the states.

With the preliminary knowledge of the opposing views the foreign ministers of the four great powers were looking for a compromise before the opening of the conference. So a British motion was tabled on the part of the "hosts" of the conference which combined the two, so often voiced criteria, i.e. the contribution to the ends of the world organization and the principle of the geographical distribution. This motion was then defended against any other attempts, and eventually taken up in the Charter in its Article 23.

c) *In examining the final form of Article 23, i.e. the article defining the organization of the Security Council, the following conclusions may be drawn:*

The members of the Security Council are states, and not persons (as e.g. in the case of the International Court of Justice). The states are acting through their delegates appointed by them in accordance with their domestic law. Hans Kelsen holds the view that Article IV/I of the League of Nations Covenant was more properly worded as it spoke of representatives.[19] On the other hand this author believes that Professor Krylov is right in maintaining that there was a certain progress in the San Francisco Conference in comparison to Dumbarton Oaks, when in the final wording the term "representative" was replaced by "states". (This change puts a yet greater stress on the specific responsibility and the exclusive rights of the states.)

The non-permanent members are not re-eligible. So the risk of the creation of "de facto" permanent members has been excluded.

The General Assembly of the United Nations is bound by the general criteria to be observed at the election of the non-permanent members. At the same time it has a complete freedom in the interpretation of these criteria. None of the States may object to the decision of the General Assembly. In other words, the states members have no *ipso iure* claims to the non-permanent seats, they may merely serve in this function if elected.

d) In summing up the following should be stressed. By creating the Security Council the Charter of the United Nations, in conformity with the intention of the Founding Fathers:

[19] KELSEN: op. cit. p. 279.

— Has taken into account the real balance of power as they existed in the world. Unlike in the case of the Council of the League of Nations, it drew a clearcut line between the permanent and non-permanent members;

Has introduced a qualitatively new solution in the theory and practice of international organizations in that the Soviet Union, as the representative of a new, socialist society, had been vested together with the other powers with authority which provided guarantees for preventing the misuse of the world organization against the socialist countries, at least not without an infringement of the Charter.[20]

For passing a resolution a qualified majority is needed. This provision confers real weight on the votes of the non-permanent members putting obstacles in the way of an arbitrary increase of the number of non-permanent seats, as such an increase would necessarily entail a change of the voting system.

The election of the non-permanent members has been entrusted to the General Assembly, and so has been made a question of political struggle within the organization. Thus the election of the non-permanent members more or less reflects the power relations as they exist within the United Nations.

In a rather realistic way the solution of the extremely difficult problem of future structural changes in the Security Council, so as to adjust to actual conditions, has been left to posterity. A problem of this sort would as a matter of course also imply that of the permanent memberships. Here in particular we have to remember the changes in the position of some of the permanent members, former representatives of the golden age of colonialism, as well as the question of representing the developing, newly liberated countries.

III.

The United Nations as the scene of imperialist influence and of the political-diplomatic cold war

(1946 to 1960)

The processus of high complexity taking place in international life can hardly be attached to definite periods or years. If we ignore problems of minor importance, turning up on the surface only, the history of the second phase of the life of the United Nations can nevertheless be associated with the two dates quoted in the heading. *As a matter of fact in this phase of fifteen years contrary to the optimistic expectations, the cooperation of the victorious powers was superseded by the cold war launched by imperialism. Simultaneously also in the world organization instead of a cooperation of all the great powers the influence*

[20] FEDOROV: *Pravovoe polozhenie Sovieta Bezopasnosti OON*. Published in Utchonye Zapiski, izd. IMO, 1963, pp. 207 to 210.

of the capitalist powers, in the first place that of the United States, prevailed. The United States by relying on her undisputed military and economic superiority could easily persuade her allies to exploit the United Nations for their own political ends.

Imperialist predominance and the cold war manifested themselves mainly in the following way:

- by preventing to achieve universality of the world organization by the exclusion of the People's Republic of China and of the other socialist countries;

on the political plane, either by direct confrontation, or by subtle pressure;

in the constitutional field, by the curtailment of the competence of the Security Council, by way of an artificial expansion of the functions of the General Assembly, as well as the monopolization of the Secretariat and the specialized agencies of the United Nations.

1. The prevention of the universality of the world organization

At the creation of the United Nations universality was a self-evident aim. It is true though that within the general principle there was a restriction implied, namely that a member state of the United Nations had to be a peace-loving country. Indirectly this restriction served as a barrier to the admission of fascist, or aggressor countries, without, however, barring any state from the membership of the United Nations from the very outset.

Since the victorious powers were unable to sign the peace treaties jointly, this failure to come to an understanding determined from the very beginning, the tendency in the formation of the membership. Even in cases like that of Hungary, when a peace treaty was signed, in Paris, in 1947, the Western powers vetoed her admission, and also that of the other East European countries entertaining friendly relations to the Soviet Union.

When now the statistics of the admission of members to the United Nations of the first years is made subject to a scrutiny, then it will be found that in 1945 there were altogether 51 founding members; in 1946 four new members were admitted, namely Afghanistan, Iceland, Sweden und Thailand; in 1947 the new members were Pakistan and Yemen; in 1948 a single new member, viz. Burma, was admitted; in 1949 again a single new member, Israel, and so also in 1950 Indonesia.

Not a single member was admitted between 1950 and 1955. The Western powers would like to blame the Soviet Union for this deadlock, although it was exactly the action of the Western powers which thwarted a sound development in the membership. It was due to the fifty-one vetoes of the Soviet Union that through "package deals" sixteen new members, among them Hun-

gary, were finally admitted to the United Nations in 1955. In 1961 also the Mongolian People's Republic, and with her Mauritania, Sierra Leone and Tanganyika were admitted.

The year 1955 was, to some extent, a dividing line in the question of the admission of new members. Partly the socialist countries, such as Albania, Bulgaria, Hungary and Rumania were admitted, together with countries like Portugal and Spain, partly the large portion of the newly admitted countries were such as had become independent during the previous years. The wave of this new tendency in admissions stopped in 1960.

There remained, however, the problem of the divided states, such as that of the two German states, and in the first place the problem of the representation of the Chinese People's Republic in the UN.

As regards the restoration of the lawful rights of the People's Republic of China in the United Nations, any lengthy discussion may be dispensed with. The exclusion of the PRC is one of the principal obstacles to the enforcement of universality. This is recognized even by those who are otherwise opposed to the restoration of the lawful rights of China. It stands to reason also that actually this is a political question rather than an argument on points of principle of international law. So far the negative solution of the problem is mainly due to the unreasonable and reactionary position the United States has taken.

Nevertheless, for the sake of completeness it will perhaps be worth while to review the arguments in favour of the restoration of the lawful rights of the People's Republic of China in a nutshell:

The revolution has not changed the status of China as subject of international law. Any judgement of the domestic affairs or events of a state, especially before an international forum, is in conflict with the principle of non-intervention; it is not the governments that are subjects of international law, and so members of the United Nations. After the fall of the government of Chiang-Kai-shek the central government of the people's China wielded full authority in China.

The question of representation is a matter of procedure. Essentially it is one of the acceptance of the credentials issued by the competent organ of the state, the decision on which is a procedural matter in the UN; the non-recognition of a state by another cannot be considered an impediment to the acceptance of the credentials.[21]

2. Western influence in the scene of the direct political struggle

The political preponderance of the imperialist powers prevailed in almost all fields of activity of the United Nations. In a few problems this preponder-

[21] MODZHORYAN, L. A.: *K voprosu o vostanovlenii zakonnykh prav Kitaya v OON.* Sovietskiy Yezhegodnik Mezhdunarodnogo Prava, 1959.
BRIGGS, H.: *Chinese representation in the United Nations.* International Organization, VI. 1952.

ance manifested itself directly and in a rather keen form. The process was not a street with "one-way traffic". In the meanwhile the socialist countries also took the initiative, so in matters of disarmament, decolonization etc. which were meant to form an important basis for future action. Whereas at that time the Western powers turned a deaf ear to objections raised by the socialist countries against numerous UN resolutions, the proposals brought forward by the Soviet Union and other socialist countries were in most of the instances bogged down by the majority organized by the leading capitalist powers.

In the following some of the questions of the first category are reviewed in chronological order:

a) *The Iranian question.* Already in the first meetings of the Security Council in London the Iranian problem came up in response to a complaint of the Iranian government. The government demanded the withdrawal of Soviet troops stationed in Iran under valid international agreements signed before and during the Second World War. In May 1946 the Iranian government disclosed that the Soviet troops had been withdrawn from Iranian territory so that the question was taken off from the agenda of the Security Council. Notwithstanding the matter was already an indication of the decay of the harmony of the great powers.

b) *The Czechoslovak situation.* After the events in Czechoslovakia in February 1948 the United States, with the complicity of the permanent delegate of the bourgeois government of Czechoslovakia and upon request of Chile, attempted to institute an investigation of these events by the Security Council. Naturally the Czechoslovak government objected to the interference in the domestic affairs of the country, and the appointment of a subcommittee was not adopted by the negative vote of the Soviet Union.

c) *The violation of "fundamental human rights" in Bulgaria, Hungary and Rumania.* First Bolivia at the instigation of the United States lodged a complaint in the General Assembly on the 16th March, 1949 requesting an inquiry into the trial of Cardinal Mindszenty. Later on Australia asked the General Assembly to investigate the state of fundamental human rights in Hungary and in Bulgaria with special regard to religious and civic freedoms. On April 30, the General Assembly passed a resolution expressing its deep concern on account of the events. In October 1949 Australia brought a similar charge against Rumania. Then by forwanding a request to the International Court the Fifth Session of the General Assembly condemned the three governments for their refusal to take part in an inquiry into the violation of the peace treaties. This action of the Western powers was the more hypocritic because at the same time they frustrated the admission of the countries in question to the United Nations.

d) *The Korean question.* Since the joint American-Soviet Commission

was sitting without producing any results in 1946/1947, the United States made use of the assistance of the United Nations already at that time, when in the Second Session of the General Assembly, on November 14, 1947, the United States insisted on sending a UN Temporary Commission to Korea. This was the beginning of the use of the United Nations for ends conflicting with the UN Charter.

Along the 38th parallel, after a series of earlier frontier skirmishes, on June 25, 1950 operations on a major scale were launched. The UN Temporary Commission reported that the Korean People's Republic began the operations and was still continuing them. On the ground of this report the Security Council in the absence of the Soviet Union and at the motion of the United States passed a resolution on the same day. The motion was carried by a majority of nine votes against an abstention (Yugoslavia).

In a characteristic manner President Truman as early as June 26, 1950 ordered the United States air and naval forces to back South Korea, although the Security Council passed its second resolution only on the following day. By this resolution the Security Council appealed to the members of the United Nations to extend the assistance needed for the repulsion of an armed attack. This resolution too was unlawful, because a permanent member, the Soviet Union, was absent. Yugoslavia voted against the resolution, whereas India and Egypt abstained from voting.

Adhering fully to the thesis that for a valid resolution the unanimity of the votes of the permanent members of the Council is required, we have to admit that interpretation to the contrary may also be given to this provision, among others on the ground that abstention from voting essentially equals the absence from voting. On the other hand it is also true that had not the Soviet Union been absent at the meeting of the Security Council in protest against the presence of the delegate of the Kuo-Min-tang, from January 1950, then in case of a "nay" it would have been easier to fight against the utilization of the United Nations for imperialist ends.

When the Geneva Conference of 1954 on the Korean question ended in a failure owing to the attitude of the sixteen member states of the United Nations which took part in the war, the Western powers again wanted to make use of the United Nations for their designs. Already at the beginning of the armed conflict in Korea the United Nations Commission for the Unification and Rehabilitation of Korea was called to life (UNCUR K). The intervention of the United Nations conflicted also with the armistic agreement which had left the settlement of the Korean question to a political conference.

The actual use of the authority of the United Nations, the continuance of the United Nations Commission for the Unification and Rehabilitation of Korea, the annually repeated debate in the UN and the though gradually declining majority support for the Western position, all indicate that *the*

Korean question was the gravest crisis in the history of the United Nations, when so-called UN forces were used against the socialist countries.

e) *The so-called Hungarian question.* By the side of the Korean question the political and ideological preponderance and the influence of the Western capitalist world manifested themselves within the United Nations most clearly in the Hungarian question. It was exactly owing to this question that after the hope inspiring events of 1954/1955 leading to a *détente* of the international tension the United Nations relapsed into the chasm of the cold war. Although the Suez crisis afforded an opportunity to the Soviet Union and the socialist countries in general to reinforce their position, it merely mitigated the renewed cold war tensions, but did not alter the facts. That is why, in the view of this author, this period in the history of the United Nations now under discussion dragged on until 1959/1960, i.e. the years while the "Hungarian question" placed a heavy burden on the socialist countries. Although the "Hungarian question" remained on the agenda of the General Assembly until 1962, owing mainly to the changes in the international situation, and the growing prestige of Hungary, it became a merely formal matter, until it passed away completely. Nevertheless the "Hungarian question" should remain a warning example even today: when class struggle in international life reaches its keenest phase, like what happened in the case of a given member state, the majority of the member states of the United Nations will hardly be able to disown their class allegiances.

3. *Manifestation of Western influence in the constitutional field. Organizational arrangements brought about by the violation of the UN Charter*

Western political preponderances has been accompanied by the violation of the spirit and the letter of the Charter, by the deformation of the agencies of the United Nations. The exploitation of the United Nations by the Western powers for their ends in the first place infringed upon the competence and the rules of the Security Council. Therefore in the period under review every effort was made to paralyze the operations of the Security Council, and instead of the Council the General Assembly with its safe majority was vested with an authority which was beyond its competence. At the same time attempts were made to wield influence on the Secretariat and the person of the Secretary General, by unduly extending their functions.

a) *Paralyzing the Security Council.* When the United Nations was called to life, there were definite ideas to make the Security Council the supreme guardian of international peace and security. In the years of the cold war this policy was doomed to failure, mainly owing to the rigidly opposing positions taken by the powers. The Western powers confronting the Soviet Union could in addition to the votes of the other four permanent members of the Council

reckon with two Latin-American votes, further with the votes of a Western state, or two, belonging to a military alliance, whenever it came to decide on important matters. It was due to this overwhelming majority that a recourse to the so-called individual veto became superfluous for the Western powers and in the first place for the United States. Even American authors on international law recognize that it is but sheer hypocrisy when the United States boasts of never having had recourse to interposing a veto. In fact the use of the "hidden veto" was always within reach. Often it was more convenient to abstain from voting, after the allies voted against an unwelcome motion or also abstained from voting.[22]

On the other hand often the Soviet Union remained by itself with her position, since by ignoring the "gentlemen's agreement" entered upon in London, in 1946, in a number of occasions East European socialist countries were prevented from occupying the non-permanent seat to which they were otherwise entitled. So between 1950 and 1960 there was hardly an East European non-permanent member on the Security Council, whereas during the same period Turkey was elected twice and Japan once. The situation remained unchanged until of late when the seat of Czechoslovakia was taken by Malaysia for the term of one year.

Under such and similar circumstances the resort to the right of veto by the Soviet Union was wholly logical. So between 1946 and 1959 the Soviet-Union was forced to cast a veto on 88 occasions. It has to be pointed out, however, that about one half of the vetoes was cast in connexion with the admission of members. One third of the balance was the outcome of a direct confrontation with the imperialist powers, another third was cast in the interest of the other socialist countries, so e.g. on account of the "Hungarian question" the Soviet Union had to resort to veto on six occasions. The remaining part was made up of vetoes in the interest of the developing countries, in matters of decolonization.[23]

The paralyzing effect of Western policy can be also assessed on the ground of the number of meetings. Whereas until 1948 there was a rising trend in the number of meetings of the Security Council (there were altogether 168 in 1948), in 1955 the Security Council was convened only on 23 occasions, in 1958 on 36 occasions, while the bedrock was touched in 1959 with bare five meetings.[24]

Although an analysis of the votes and the number of meetings merely

[22] GOODSPEED, S.: *The nature and function of international organization.* New York, 1959. p. 153.
[23] STOESSINGER, J. G.: *The United Nations and the superpowers.* New York, 1965.
[24] MORGENTHAU, H. J.: *Politics among nations.* 3rd ed. 1960.

expose the *symptoms* of the disease, still the results of this analysis must be accepted as the *indication of a decline of the authority of the Security Council till the very last years of the fifties.* This decline was accompanied also by other similar symptoms, such as e.g. the atrophy of the general staff committee of the Security Council, the total abandonment of dealing with disarmament questions etc.

b) *Unconstitutional extension of the competence of the General Assembly.* Simultaneously with paralyzing the activities of the Security Council the competence of the General Assembly was extended. The method followed here was to take off from the agenda of the Security Council by procedural way and by simple majority items where in the Western view no progress could be expected, and transfer them to the agenda of the General Assembly. Further by giving erroneous interpretation to paragraph 1 of Article 12 of the Charter the General Assembly approved recommendations even in matters which earlier were before the Security Council (e.g. in the Palestinian question, the Korean dispute and later in the Congolese affair).

It was in connexion with the Korean war that a resolution illegally extending the competence of the General Assembly, and perhaps most conflicting with the Charter, was born. This was Resolution 377/V. passed by the Fifth Session of the General Assembly in November 1950, the notorious resolution of Uniting for Peace. The principal points of the resolution may be summed up as follows:

When owing to a veto the Security Council is unable to initiate an action, then in case of need the General Assembly may be convened within twenty four hours.

In this case the General Assembly may approve recommendations, here included the use of armed forces.

— The General Assembly may suggest to the states members to keep in readiness armed forces, which in case of emergency would be placed at the disposal of the United Nations.

The General Assembly created a Peace Observation Commission whose function was to forward reports on the actual trends in the international tension.

— The General Assembly further organized a Collective Measures Committee, which also had to forward reports on its activities.

Obviously these provisions claimed to transfer to the General Assembly competences which otherwise would have been those of the Security Council in accordance of Articles 12, 25, 41 and 43 of the Charter.

The resolution of "Uniting for Peace" was in addition to the Korean War invoked also at the time of the Suez and Near East crises, when the United Nations Emergency Force was called into existence. However, at the same time it was evident that many of the provisions of the resolution remained

a dead letter, in the same way as the committees mentioned earlier, although officially these committees were never dissolved.

c) *Western influence within the Secretariat and the extension of the competence of the Secretary General.* In conformity with Chapter XV (Articles 97 to 101) of the Charter the Secretariat is composed of the Secretary General and his staff. The Secretary General is the principal administrative and executive officer of the Organization. As is known the function of the Secretary General and the Secretariat essentially in his service, is to carry through the duties devolving on him of the resolutions in a manner independent of all other member states. The term "international civil servant" insists on an impartiality posutlating ideal conditions on the part of UN employees.

According to the Charter the authority of the Secretary General is fairly extensive. In conformity with Article 98 wide discretionary powers are vested in the Secretary General in the course of the implementation of the resolutions of the United Nations agencies. In conformity with Article 99 the Secretary General has extensive initiative functions in that he may call forth the attention of the Security Council to situations jeopardizing peace and security.

To avoid any misunderstanding here the problem is not one of depriving the Secretary General or the Secretariat of any of their law ful competences. What is considered a negative symptom is partly that the first persons filling the post of a Secretary General were rather inclined to respect the intentions of the Western powers, partly the leading positions on the staff of the Secretariat were filled with Western nationals.

The first Secretary General of the United Nations was the Norwegian Trygve Lie. In his Memorandum of 1946 he defended the position that the Security Council should keep on its agenda the question of the withdrawal of the Soviet troops from Iran. Two years later he sponsored the European reconstruction programme, the Marshall Plan. On the other hand we have to admit that in the beginning of 1950 in the known Memorandum of the Secretariat Trygve Lie took a stand for the recognition of the United Nations membership of the People's Republic of China. The "political death" of Trygve Lie came about, however, when he gave his wholehearted support to the Korean War. Then at the end of 1950 under American pressure and by violating the Charter the General Assembly extended his office term by another three years. The Soviet Union and the socialist countries refused to recognize him as the Secretary General of the United Nations and henceforth addressed their correspondence to the Secretariat.

The submissive attitude of Trygve Lie became even more accentuated at the time of the US attacks against the integrity of the Secretariat of the United Nations. In 1952, in the period of McCarthyism, a witch-hunt began against staff members suspected of communist sympathies, or American nationals on the staff with an alleged communist past. Trygve Lie without

waiting for the result of an inquiry instituted by the United States Government dismissed altogether twenty temporary and permanent members of the Secretariat. He argued that an American communist could not be a representative American national because the party had been declared a subversive group in the United States. Since the UN Secretariat was in the territory of the United States, reason dictated that there should be no American communist on the staff.

Later the administrative tribunal of the United Nations adjudged an indemnity to eleven dismissed persons. First some of these were recommended for reinstatement, under Western pressure, however, the first decision was finally upheld. What was even more revolting that no indemnity could be paid from the ordinary budget of the United Nations as this was vetoed by the United States.[25]

As regards Dag Hammarskjöld the first impression was as if he had drawn the necessary conclusions and would discharge his functions accordingly. This was confirmed by his unanimous election for another term on the expiry of his first term. Yet during his office term it was evident already from the very beginning that with tacit Western encouragement he was steadily stricing for securing an ever more independent role for the Secretary General. This policy eventually led to the role he had in the Congo crisis, when he provokingly remarked in the Security Council that if he would not be given definite instructions he would proceed on his own judgement. This attitude led to the formation of the "Congo Club" in 1960 within the Secretariat, which under the leadership of the deputy Secretaries-General, Mr. Ralph Bunche and Mr. Andrew Cordier, enforced Western influence. It was in this period that the process which had set in earlier, that key and executive positions in the United Nations Organization should preferably be filled by Americans, British, or other Western nationals, reached its very peak. The preponderance of a staff composed of nationals of the Western countries influenced to a great extent the organization of certain actions of the United Nations.

The reaction of the socialist countries and the withdrawal of their confidence was a natural outcome. In the changed situation in fact new methods and new solutions were needed in order to put an end to the one-sided activities of the pro-Western secretaries-general. Although the Soviet proposals for the appointment of the Secretary General, the so-called "troyka" principle, and its variants, failed to mature to the letter, still after the death of Hammarskjöld in 1961 an evolution set in whose consequences will be discussed later.

To sum up: After the three principal institutions (Security Council, General Assembly, Secretary-General) have been reviewed the statement may be made that the *principal feature* of the period under discussion was the

[25] STOESSINGER: op. cit. pp. 40 to 48.

prevailing influence of the Western powers. The designation of 1960 as the last year of this influence is justified by the circumstance that

it was in that year that the pro-Western activities of the Secretary-General and the Secretariat was at its zenith; – the role the United Nations played in the Congo affair meant a relapse in the struggle against colonialism under the circumstances;

the Hungarian question was still the cause of relatively more difficulties up to the beginning of the sixties.

On perusing this chapter the reader may have the impression as if this author had presented the events in a too biased manner and in a too sombre light. The United Nations would appear as a wholly negative institution, not worth the exertion of efforts of its Members displayed within its framework.

We have set out from the assumption that under the conditions of peaceful coexistence the United Nations is an international forum of outstanding importance, where states belonging to different political systems may cooperate. In the beginning this fundamental trend of the world organization could hardly prevail and it was rather the negative traits that manifested themselves. Still even at that time the United Nations was a *useful international platform* for the Soviet Union and other socialist countries too, a platform where opportunity afforded itself to unveil imperialist tendencies and to popularize socialist achievements. In this period the socialist countries took the initiative and assumed the principal role in the fight for the liquidation of colonialism. *This was the most positive trait in the history of the United Nations. This struggle culminated in the approval of the Declaration on Decolonization in 1960.* The Declaration became a milestone of a new era in the history of the United Nations.

The year 1960 expressed only roughly the change in the power relations and the stage the evolution of the United Nations had reached. This evolution may in fact be traced back to the years before. Apart from the liquidation of colonialism a number of positive signs could be discovered in several other problems earlier, such as initiatives in the matter of disarmament, in the fight against war propaganda, in the definition of aggression, etc.

The isolation of the socialist countries was to a high degree due to the dogmatic, rigid foreign policy, mainly up to the middle of the fifties. Although the scope of the present study does not permit a too detailed discussion, still it is beyond doubt that in the otherwise brilliant oratory of V. M. Molotov and A. J. Vishinski, the United Nations was conceived as a more or less static institution where in a hostile atmosphere there was little hope for a change in the power relations and so for brighter vistas. This basically defensive approach was in close relationship to an underestimation of the potentials and importance of the newly independent countries and so also of their value as allies. The problems and errors which cropped up in the international and domestic

relations of the socialist countries offered further targets for the attacks launched against them in the United Nations.

IV.

The United Nations and the Security Council in the state of change and transition. 1960 to 1967

1. The end of the fifties and the opening years of the sixties were a turning point in the history of the United Nations

The earlier character of the Organization underwent a change: imperialist influence slowly yielded to the growing influence of the socialist countries and the countries of the "third world".

The United Nations Organization does not live in a vacuum: it is an organic part of the totality of international life. Consequently the changes in international life, the shift of the power relations in favour of the socialist countries in the second half of the fifties, of necessity made their effect felt also in the life of the world organization. However, the shift in power relations manifested itself not at a single stroke and directly in the United Nations: the consequences were felt later only and through transposition.

The quantitative growth of membership was accompanied by qualitative changes in these years. The admission of sixteen African states in 1960 was responsible for shifts in the distribution of votes by the particular groups of states. The growth of the number of Afro-Asian states was a natural outcome of the growing strength and the success of the struggle for freedom of the colonial territories. The successful struggle for independence at the same time reinforced the anti-colonialist front within and without the United Nations. The number of socialist countries also increased from five to twelve, although this increase was still far from being expressive of the true weight of the socialist countries in world politics. *Still what was of even greater importance was the formation of a united front of the socialist countries and the non-aligned countries in some of the essential problems, in the first place in the colonial problem.* The first great victory of this united front was the approval of the Declaration on Decolonization.

In the chapter before we have already spoken of the change in the person and the methods of performing the functions of the Secretary-General, after the death of Dag Hammarskjöld. It would be incorrect to attribute the change exclusively to subjective circumstances, i.e. the person of Secretary-General U Thant. The objective condition of a change had matured by that time. At the same time the person of U Thant was a highly fortunate choice. In fact a progressive politician of a non-aligned state with a sense for reality was elected

in his person. A sign of the recognition he met with was his re-election in 1966, by unanimous vote.

The election of a new person to the high post of a Secretary-General did not, and even could not, mean a radical change as far as the Secretariat as a whole was concerned. However, a slow change has started in the implementation of resolutions, in filling certain posts, and in particular those of the deputy and assistant Secretaries-General, as greater attention is given to an equitable geographical distribution.

Also the policy of the socialist countries has undergone a change in its relations to the United Nations. The attendance of the Heads of State of the socialist countries in the Fifteenth Session of the General Assembly, and in the Special Emergency Session convened in the summer of 1967 on account of the Middle East situation was of importance not only because of its formalities. It was an expression of the high esteem the United Nations enjoyed in the socialist world and also of the determination to continue its struggle within the United Nations for building up an international organization conforming to the objectives defined in the Charter. Nor could the personal impression and experience be ignored which the United Nations at work presented to the statesmen on visit notwithstanding the many definciencies of the Organization.

2. *The results of the transition*

The results may be ascribed in particular to two factors. Partly the alliance of the socialist and the newly independent countries forced the Western world to concessions. Partly, the change in the power relations brought about a certain cooperation between the two super powers, viz. the Soviet Union and the United States, if even with hitches and relapses (e.g. the Berlin, the Cuban crisis or the US aggression in Viet-Nam).

a) *Declaration on the Granting of independence to the Colonial Countries and Peoples.* The assistance given to the liquidation of the colonial system was perhaps the most outstanding of all action of the United Nations.

The Resolution 1514/XV of the United Nations, briefly called Declaration on Colonialism, which was adopted by the General Assembly on December 15, 1960, became a landmark in the history of the United Nations. To assess the effects and the significance of this declaration a few words have to be said on the relations of the United Nations, to the problem of the liquidation of the Colonial system.

The Charter of the United Nations devotes a significant part to the colonial problem. Chapter XI includes the declaration regarding non-self-governing territories, Chapter XII discusses international trusteeship system (which

superseded the system of mandates of the League of Nations), Chapter XIII deals with the Trusteeship Council.

Chapter XI defines the principles of the liquidation of the colonial system, when Article 73 declares that "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples *have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount . . .*" (italics added).

Article 76 of Chapter XII reads as follows: "The basic objectives of the trusteeship system ... shall be: ...b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories *and their progressive development towards self-government or independence . . .*" (italics added).

The principles inspired by the Soviet Union brought about momentous changes already during the first fifteen years of the United Nations. Still it took many years until the colonial powers could be forced in addition to forwarding information of the situation in colonial territories and to working out recommendations based on such information to recognize the competence of the General Assembly in studying the colonial problem as a whole and in taking appropriate measures.

By 1960/1961 more than thirty territories, among them seven (out of eleven) trust territories attained statehood and full, or occasionally limited, independence. The change in the number of members smoothed the path in 1960 to a frontal attack with the target to approve a document which for the essence of its content meant something qualitatively new in respect of the interpretation of the Charter.

The declaration based on Soviet initiative and finally worked out and worded by the Afro-Asian countries proclaims:

– The peoples of the world are desirous to put an end to colonialism, in all its form.

Foreign suppression, domination and exploitation amount to a denial of the fundamental human rights, run counter the Charter and obstruct world peace.

All peoples have the right to self-determination. Inadequacy of political, economic and social preparadness cannot be an excuse for a delay in granting independence.

– Immediate measures have to be taken in order that peoples of non-self-governing and the trust territories might attain the full measure of independence and freedom.

However, the words of the declaration have been, and are being carried into effect, with difficulties only. In order to speed up the process of decolonization in 1961 the General Assembly approved a further resolution on the

enforcement of the declaration. On the ground of this resolution a special commission has been organized whose function is to study experience gained with the enforcement of the declaration and to submit recommendations to the General Assembly. The resolution also emphasized that a further delay in the enforcement of the declaration might become responsible for international clashes and the source of misunderstandings.

The commission was originally formed of seventeen members. Later the number of members was increased to twenty four. It can be said without exaggeration that the commission is one of the most important elected organ of the Assembly. During the last years it studied the conditions of seventy colonial territories. A number of them have already achieved its independence, and become members of the United Nations. In fact the committee of twenty four and main committee IV of the General Assembly are the most important organs in the fight against colonialism. To appear as petitioner before these bodies, or to appeal to them, inspires the colonial movements of liberation with hope and self-confidence.

b) *The relaxation of the international tension, the temporary* "détente" *have proved that an efficient operation of the United Nations depends on the degree of cooperation of the great powers.* The United Nations has been able to produce a few modest, tentative steps mainly in the problem of disarmament after the hopeless failures of the first years of the Cold War. As early as 1952 a resolution was passed by which the Assembly created a Disarmament Commission, but which still remained paralyzed in its work for general and complete disarmament in spite of its enlargement in 1958 to include all members of the UN. Under more propitious augury a new Ten-Nation Disarmament Committee was formed in 1960. At the end of 1961 by enlisting the cooperation of eight non-aligned and neutral states, the number of states represented on the committee was raised to eighteen, which is now known as the Eighteen-Nation Disarmament Committee (ENDC).

Although organizational provisions, resolutions, memoranda, etc. have not much advanced the cause of disarmament, still all these have contributed to the creation of a certain atmosphere of confidence. In 1963 the first symbolic agreement was reached by the establishment between Moscow and Washington of the "hot line" (on the initiative of the ENDC). Then an agreement was reached on a partial test ban treaty which, notwithstanding its many shortcomings, has remained an example of the efforts made in disarmament. Results in a positive sense have been achieved also *in the field of peaceful exploration of outer space.* Although at the beginning of 1959 no agreement was reached for the creation of a so-called "*ad hoc*" committee, by the end of the year a committee was appointed of which Hungary is also a member. The committee size of which later on was extended in 1962 sent out a legal and a technical sub-committee. Simultaneously with the organizational progress certain

results could be recorded in the resolutions of the years 1960 to 1968 dealing with the principles of peaceful exploitation of outer space and particularly the agreement on the rescue of astronauts and return of space objects.

c) New symptoms may be discovered in one of the most important fields of the activities of the United Nations, namely *in the maintenance of international peace and security.*

Even before the Security Council could produce a few modest results. When in the earlier chapters negative examples were quoted to illustrate the period between 1946 and 1960, this was done merely to demonstrate the principal trend of the period, i.e. the use of the United Nations for imperialist ends. However, even before there were actions of the Security Council, which inspired with hope and which confirmed that the United Nations, if on a limited scale only, could be used with success for the maintenance of international peace and security. Such actions were e.g. those launched to settle the Palestinian problem, the Indonesian and the Kashmir questions. Except the second question, which was a colonial one, in the other two only temporary results were born. The United Nations Organization was unable to find a final solution. In the following phase the observation could be made that there were fewer and fewer "great questions" which the United Nations tried to tackle. Simultaneously the number of special actions with a variety of backgrounds was steadily growing. For want of a better and more accurate term these received the name of "peacekeeping operations". This expression should, however, be used only in lack of a better one, and with quoting marks. The term cannot be found in the Charter, nor is there a generally accepted definition for it.

A common criterion of United Nations peace-keeping operations is that they are not actions of enforcement directed against some sort of an aggressor as foreseen as the time of the formulation of the Charter, especially of its Chapter VII, but have as their end the liquidation of local conflicts, in the majority of cases under circumstances where the direct confrontation of the two super powers could be averted. The thesis may be demonstrated on hand of three examples:

The question of West Irian

After the disintegration of the Dutch colonial empire West Irian remained under Dutch administration. Since the negotiations between the Netherlands and Indonesia failed to produce the desired result, through the mediation of the United Nations again direct negotiations were taken up in December 1961, which were terminated on August 15, 1962. Accordingly the Netherlands transferred the administration of the territory to Indonesia, on the understanding that with the assistance of the United Nations this country would

take care of a settlement by respecting the right of self-determination. The XVIIth Session of the General Assembly of the United Nations took note of the agreement and authorized the Secretary General to discharge the functions entrusted to him with the assistance of the United Nations Temporary Executive Authority UNTEA. After a successful discharge of the duties in connexion with the armistice the Dutch administration officially transferred its powers to UNTEA, on October 1, 1962, and on May 1, 1963 the territory was transferred to Indonesia. It was for the first time that a certain territory was under the direct administration of the United Nations. According to Secretary-General U Thant UNTEA was a unique experience which repeatedly demonstrated the capacity of the United Nations to perform a variety of functions provided it received the necessary support from the member organizations.

The question of Yemen

The Yemen revolution began with the military revolt of September 26, 1962. After the spread of the civil war and owing to the interference of extraneous forces eventually the parties, and so the Yemen Arab Republic, accepted the mediation of the United Nations and the sending of observers. The Security Council by resolution of June 11, 1963, requested the Secretary-General to send out a group of observers, the United Nations Yemen Observation Mission, UNYOM. Saudi Arabia and the United Arab Republic jointly undertook the defray of the expenses of the Mission. The Mission was composed of Canadian and Yougoslav units. Since the operations of the Mission, from July 1963 till September, 1964, failed to bring about a cessation of warfare, the Secretary-General recalled the Mission. The Security Council took note of the action of the Secretary-General. He emphasized that only negotiations of the parties concerned in a high level would produce a solution.

The question of Cyprus

United Nations forces are in Cyprus since 1964. The United Nations Force in Cyprus, UNFICYP, is one of the most important United Nations ventures of the latter years.

Behind the unanimously accepted resolutions the fact lies hidden that the NATO countries, in the first place the United States and the United Kingdom, failed to settle the problem within the NATO. As a matter of course, their "solution" would have meant an end to the independence and sovereignty of Cyprus (e.g. the Acheson plan). The socialist countries also sponsor the Cyprus action of the United Nations, though not without reservations. It was thought, however, that this action would guarantee a more or less satisfactory

solution. Although the United Nations did not advance the settlement of the problem to a solution, still the presence of the United Nations forces and the mediation of the Organization prevented further yet graver clashes. The repeated debates and discussions in the Security Council and in the plenary sessions of the General Assembly, and even the efforts of the mediator, were not quite in vain. The experiences gained with United Nations "presence" are rather instructive for the future. Here in particular the mediatory role of the Secretary-General and his representatives Mr. Tuomioja, who meanwhile died, and Mr. Galo Plaza (who resigned on account of adverse Turkish criticisms), should be mentioned. For the last time the Security Council extended the mandate of UNFICYP until June 15, 1969.

d) *Growth of the role and weight of the Security Council.* It is by no means an exaggeration to state that we are witnessing a certain revival of the authority of the Security Council after the discouraging experiences of the fifties. At the first glance this revival manifests itself in external symptoms, e.g. the growth of the number of sessions of the Security Council be leaps and bounds. Whereas in 1960 the Council met on seven occasions only there were 104 sessions in 1964, 81 in 1965, and 46 in the first half of 1968.

However, the qualitative change is of even greater importance. Here changes may be recorded mainly in the categories of questions which are referred to the Security Council. *More and more problems begin to dominate which are associated with the disintegration of the colonial system or with the principal fields of the fight against imperialism.* This will hold even in considering that during the latter years numerically many of the debates in the Security Council concentrated on the Middle East crisis, the Kashmir question, or the dispute between India and Pakistan, and the Cyprus dispute. Apart from the fact that essentially these problems have been left over from the colonial past, a growing number of topics is brought before the Council such as the fight against Apartheid, the problem of the Portuguese colonies, the recent interference of the imperialist powers in Congolese affaires (the Stanleyville operation), the aggression of the United States against the Dominican Republic (29 sessions), the Yemen question, the Southern Rhodesian question, the complaint of Senegal against Portugal etc.

On these occasions the Western powers in the first place the United States and the United Kingdom are put to a permanent defensive position, whereas the Soviet Union and the non-permanent socialist member of the Security Council in a close co-operation with the Afro-Asian countries, even in the Dominican crisis occasionally with cautious Latin American support, could play a leading role in anti-colonialism and anti-imperialism.

Often the question may be asked, in the last resort what is the result of the many sessions of the Council? For practical purposes little has been achieved. In the South African Republic the policy of Apartheid is followed

as before, in Southern Rhodesia the white minority has taken over power, in the Dominican Republic behind the the scene of the Organization of American States the United States has achieved its aims.

All this is true. Yet it would be a mistake to ignore the principal trend. Actually it is the Western world that is in a defensive position, and not the socialist countries. In front of the majority aligning in the debates the Western powers have to withdraw on more and more occasions, or to explore the chances of a compromise.

Apart from the moral effect, also palpable results may be recorded. Both the United Kingdom and the United States have been forced to agree to an embargo against the Republic of South Africa, although earlier they would turn a deaf ear to proposals to this end. The same measures had to be agreed to in the case of Southern Rhodesia. A few years before the United States would have simply ignored protests of world opinion against interventions in Latin America. Here the example of Guatemala may be mentioned. Actually the United Nations sent its representative to the Dominican Republic, though on account of the opposition of the United States only with limited powers, and the Secretary-General forwarded regularly reports on the development to the Security Council.

This process has become even more accentuated with the enlargement of the Security Council by the four new non-permanent Afro-Asian members.

Here a word has to be said of the increase of the number of members of the councils, i.e. the Security Council and the Economic and Social Council. As is known in 1963 the socialist countries in order to safeguard the rights of the People's Republic of China abstained from action on this question. The socialist countries did not want to take a stand unless in full knowledge of the position of the People's Republic of China in the matter. Since no clear-cut answer was given, eventually the socialist countries were in the same boat with the Western powers (which wisely left the reasoning to the socialist countries) against the Afro-Asian and Latin-American countries (Yugoslavia supported the latter). On the following day the declaration of the Peking government was received, which charged the Soviet Union of taking a position against the interests of the Afro-Asian countries merely for alleged selfish ends. Still it was the Soviet Union in association with the other socialist members of the Security Council and the General Assembly which was the first to ratify the new amendment of the Charter. When the enlargement of the Security Council the same applies also to the ECOSOC bringing about a change in the power relations in favour of the socialist world has to be greeted sincerely, the assumption may be proper that the reserved attitude of the socialist countries was mainly responsible for the failure to increase the number of socialist countries in either organ.

e) *Growth of the role of the United Nations in the promotion of the economic development of the developing countries and in international economic cooperation.* In conformity with the Charter the economic functions of the United Nations are by no means a novelty. According to the Preamble of the Charter the United Nations has been created ". . .to promote social progress and better standards of life in larger freedom" and ". . .to employ international machinery for the promotion of the economic and social advancement of all peoples".

Chapter IX of the Charter speaks of international economic and social cooperation, and in particular Article 55 emphasizes the improvement of the standards of life and international cooperation together with a number of other tasks. Chapter X has created the organ whose function is to translate these ends into reality, namely the Economic and Social Council.

At the end of the fifties these functions formulated in rather generalized terms received a new content, mainly owing to the changed circumstances.

With the disintegration of the colonial system and the "influx" of new members new claims were brought forward. Essentially the problem was, and has remained to these days, whether the countries recently liberated from under colonial dominion and enjoying political independence would be able to prop up this independence also in the economic field.[26] The fight against economic dependence and neo-colonialism is going on not only within the framework of the United Nations. However, by the side of the traditional bilateral economic relations, which for both the socialist and the Western world represent the most important and also in its volume overwhelming form of trade with the developing countries, also the function and weight of the United Nations and other international organizations are showing an expanding tendency. By the side of the Expanded Program of Technical Assistance, EPTA, operating since 1950, in 1959 the Special Fund was formed. Whereas the trends of the latter years tended towards a coordination and merger of the two programmes and the economic activities of the United Nations as a whole, evolution in other spheres was perhaps even more marked in testing new forms.

In 1961 the General Assembly passed a resolution on the Development Decade of the United Nations. The summer session of ECOSOC in 1962 laid down the most important items of the programme as follows: Industrial development, development of the export trade of the developing countries, international raw or prime material prices, long-term loans, exploitation of manpower resources, etc. In addition an economic growth of 5 per cent was set as a target.

Between 1957 and 1961 the General Assembly and the Economic and Social Council on several occasions discussed the new organizational forms

[26] *World Trade Conference of Geneva.* Hung. report, Budapest, 1964.

of the economic objects of the United Nations. In this connexion the Soviet draft of a Declaration of International Economic Cooperation brought forward in 1960 had an important role. By this iniative the path was thrown open to the preparation (through three preparatory conferences attended also by the Hungarian delegation) and finally to the convention in the spring of 1964 of the United Nations Conference for Trade and Development (UNCTAD). Since then UNCTAD is one of the most important agencies of the UN. With its promising outlook this agency gave cause to much hard thinking, as the Geneva Conference of 1964, and the New Delhi Conference of 1968 showed.

3. The outwards forms of the period of transition the political crisis of the United Nations

Obviously western influence did not yield, and is not yielding its position of its own accord. The developments in the United Nations, viewed together with what was characteristic of international life as a whole gave cause to deep concern on-the part of Western powers and forced them to a revaluation of their relations to the United Nations.

In the beginning of the sixties the strategy of the Western powers and particularly of the United States in the United Nations may be outlined as follows: The increasing activities of the Soviet Union and the socialist countries, the growth of their authority, had to be contained. The most appropriate method seemed to be to bring about a clash in a sphere where the support of the third world could be enlisted. Such spheres were the Congo and the Near-East actions of the UNO, where the Afro-Asian countries were directly concerned. Since the actions had financial repercussions there was hope to get the support of the Afro-Asian countries which were concerned with their own economic difficulties and could not afford to contribute only in a negligible way to the financing of these actions.

a) *The so-called "financial crisis", The XIXth "abortive" session of the General Assembly.* American foreign policy made careful preparations for a "showdown". The Soviet Union and several other countries declared already at the creation of the United Nations Emergency Force and on the occasion of the Congo adventure which finally miscarried, that they were not willing to undertake financial responsibility for actions launched by a violation of the Charter and the circumvention of the Security Council. The United States and her allies set out therefore for a campaign with the end to turn the expenses into such of the Organization, and hold the Soviet Union and the other socialist countries responsible for them in the first place. This end was served by consulting the International Court of Justice and by aligning the XVIIth Session of the General Assembly against the socialist position on the basis of the advis-

ory opinion of the Court. The pressure was even increased by convening the Fourth Extraordinary Session of the General Assembly in the spring of 1963.

In the autumn of 1963 there were indications as if the spirit of a "*détente*" would finally prevail, still American foreign policy in the hope of success continued its attack in the XIXth Session of the General Assembly.

Meanwhile it has been found out, however, that the United States could not reckon with the Afro-Asian support. There were mainly two reasons for this attitude of the Afro-Asian world, i.e. First, the non-aligned countries recognized that there would be no United Nations without one of the world powers and the socialist system. And the application of the sanctions under Article 19 against "defaulters" could have resulted in the walk out of the socialist states from the Organization. Secondly, the growing aggressiveness of American politics (in Viet-Nam and the Congo) decreased the sympathy even of the "moderate" countries for the United States.

So the XIXth Session of the General Assembly could not pass off in the normal way. The great powers and the non-aligned states abode by looking for a compromise. These tactics led to the rather interesting situation that in the last days of the Assembly owing to the Albanian action the socialist countries tacitly supported the maintenance of procedure without voting, at the same time the United States had to accept that vote should be taken to maintain the "no-voting" procedure.

It should be remembered that a confrontation could be avoided was also due to the circumstance that France, though not for always identical reasons, adopted a position very much similar to that of the socialist countries.

b) *Solution of the crisis by a compromise.* The road to a way out of the crisis was paved by Resolution 2006 of the XIXth Session of the General Assembly. By virtue of this resolution a special committee was delegated with powers to study all problems implied in the activities of the United Nations for the maintenance of peace. The committee of thirty three members, including the Hungarian delegate, continued its work with shorter or longer interruptions from 1965 until of late. It was evident that without an agreement of the powers no solution could be found. On the other hand the chances of a compromise were greatly advanced by an informal suggestion of the Afro-Asian states worked out in December 1964 which tied the normalization of the course of the General Assembly essentially to two conditions. First, by maintaining the positions of principle, taken by the parties in the dispute but at the same time stating that Article 19 of the Charter could not be applied (i.e. concerning the alleged arrears). Secondly, the members of the United Nations should be called upon to help the rehabilitation of the finances of the world organization by voluntary contributions.

With slight amendments this suggestion was adopted before the 1st

August, 1965. The decision made possible the normal work of the 20th Session of the Assembly.

The agreement was in all events a compromise. In fact both side had to admit that neither position could have received full support in the General Assembly. However, irrespective of the compromise the action ended with a setback for the American delegation, since the whole venture was launched by the United States, and eventually the United States had to reconcile themselves to the fact that the XXth Session of the General Assembly took up work as usual, even before voluntary contributions had been made.

However, with the solution of this crisis, which was created artificially and was meant to cloak a political crisis as a financial one, the principal cause, i.e. the political crisis was still far from being solved. In the following we attempt to discuss the prospects and the ways of its solution.

V.

The principal trend of the present phase

The political and constitutional change in the United Nations has reached a stage where the building up of a universal and effective international organization is the principal objective.

Although a splitting up of a continuous process into periods will always imply risks, as has already been pointed out in the introduction, in the author's opinion after the XIXth and XXth Sessions of the General Assembly we have to face a new situation. The earlier attempts of the United States, the leading power of the Western world, to force on the world organization its interpretation of the Charter have failed. An equilibrium was brought about in the power relations which opened the path to the achievement of the objectives set in the heading. Naturally the process is not a mechanical one, as the opposition of the states representing the negative tendency has to be reckoned with. In addition problems have cropped up in the course of the cooperation with the third world, which again insist on the application of entirely novel methods. Even in this phase the dilemma of the United Nations has remained: how and to what extent the world organization will be capable of performing its functions with success in periods of the gathering intensity of imperialist aggression, e.g. of the United States in Viet-Nam since, in the last analysis, the fate of the United Nations depends on the cooperation of the powers.

1. For a universal world organization

Without the participation of the People's Republic of China the deep-seated political crisis of the world organization cannot be solved. As a matter

of fact the presence of the People's Republic of China in the United Nations would mean not only a formal being-together of the five powers in the Security Council, but at the same time a modicum at least of a cooperation The restoration of the rights of the PR of China in the United Nations would at the same time indicate that the United States has been forced to a thorough-going revision of its attitude to China. This would also open the path to the liquidation of the threat of war now concentrated in Asia. As for the Security Council the change brought about by the presence of the PR of China would be of immense significance. The change for the better would not of course take place automatically. On the assumption of China's persistence in her present policy allowance will have to be made for certain problems, still in the long run a positive effect is beyond doubt.

The restoration of China' rights in the United Nations, and in particular its date, depends of course also on the cooperation of the government of the PR of China. Obviously the Chinese declarations and political actions of the recent years, in general always before or during the United Nations debate on the restoration of its rights have done much harms to the cause of the real interests of the PR of China.

Essentially the United Nations has not even begun to deal with the problems of the divided states. The repercussions of the memorandum of the German Democratic Republic in the matter of her admission to the United Nations are indications of a continued preponderance of the forces of cold war and their sufficiency for if only a temporary obstruction of the admission of both German States. Undoubtedly an initial step in the matter would be to grant an observer's status also to the German Democratic Republic, to which Secretary-General U Thant has already referred. This would eliminate the discrimination which is apparent in the fact that the Federal Republic of Germany is enjoying the observer status without any constitutional ground in the Charter. Apart from an observer's status the immediate objective is the discontinuance of a discrimination in the specialized agencies of the United Nations, i.e. the agencies into which the German Federal Republic wriggled herself gradually ever since 1952.

Whereas as regards the two German states Hungary is with one accord for the admission of both, the same cannot be said of the other two divided states, where the situation is by far more complicated.

The Viet-Namese Democratic Republic applied for admission to the United States for the first time in 1948, and then again in 1951. The same step was taken by the Korean People's Democratic Republic in 1949. The "Republic of Viet-Nam" applied for admission in 1951, and the "Republic of Korea" in 1948. None of these applications have been withdrawn.

In both cases the goal is the creation of united democratic states, and their admission to the United Nations. The immediate objective is before all

the suppression of the discriminative observer's status granted to the Southern puppet governments. Such a status is not authorized by either the Charter or any other resolution of the United Nations. It is merely a preferential treatment of the two governments following from the role of the United States as the host country to the Headquarters of the UN.

2. The effectiveness of the activities of the Security Council has of course been improved with the enlargement of this organ. This is confirmed by the developments in the Near East crisis and the situation brought about by the capture of the spy-vessel Pueblo, in 1967/1968, when the Afro-Asian group was particularly active. The position of the Western powers, in the first place that of the United States and the United Kingdom, has weakened, and is more and more threatened by the necessity to resort to cast a veto.

In this connexion within the United Nations the opinion has been voiced with growing intensity. Whether it can be tolerated that owing to the position taken by a great power or to the United Nations as a whole should be doomed to inactivity in the settlement of the colonial problems and in the maintenance of international peace and security. Essentially this amounts to an appeal for the abolition of the so-called veto, or its by-passing, and at the same time to a demand for the corresponding extension of the competence of the General Assembly. This position is backed mainly by the states of the Third World, which, referring mainly to colonial problems appeal to the socialist countries for their support. (Times have changed . . . When the United Nations Organization was called to life, and in particular in the beginning of the fifties, the Western powers were the loudest against the veto, and the United States, which made the veto a condition of her entry into the United Nations, in a hypocritic manner condemned the "unbridled" recours to it.

The gist of the problem is one of the most essential questions of the international organizations: Can a coercive action on an international scale be initiated and carried through without the agreement of the great powers? The question has to be answered in the negative. However, the non-aligned states, and in general a large section of the small countries disagree with this answer, and although in words they admit that the revision of the United Nations Charter is out of the question, still by adducing the evolution during the twenty years as an argument they are looking for loop-holes. During the coming years this pressure is likely to become even more emphatic. The socialist countries adhering to the letter and spirit of the Charter have to make preparations for explaining patiently to their friends, and for demonstrating to them on practical examples that with individual and concerted actions of the states concerned, and by making use of regional and bilateral agreements, much more can be done in the way of a solution than by bringing the matter to a head by an insistence on unrealizable resolutions, or such as would be apt to increase the tension.

Earlier mention has been made of small states. In the statements of the recent years, and in particular in the debates on peace-keeping the appearance of a demagogic tone may be discovered. This is the artificial confrontation of the great powers and the small states. Characteristically here certain Western countries, e.g. Ireland, have taken the lead, and unfortunately some of the Afro-Asian countries have followed suit. It is the primordial duty of the small socialist countries, and so also of Hungary to unveil this fallacious argument. The dividing line has to be drawn between imperialist, aggressive states and the antiimperialist front rather than between the large and small countries.

It is beyond doubt that in the near future in the General Assembly the developing countries relying on their mechanical majority of votes will try to remedy their legitimate or alleged grievances sometimes without patiently looking for reasonable compromises. The Western powers will on certain occasions make attempts to conclude alliances with the socialist countries by appealing to joint interests, or at least by creating the impression as if the interests of the two worlds were identical. Therefore it is in all circumstances essential that the socialist countries show greater flexibility in both political and economic matters, and try to appreciate the trend of thought and the ideas of the non-aligned world.

On the peace-keeping activities of the United Nations: This problem is in the focal point of interest, and even beyond it, even if the not too grave financial problems of the Organization will be solved.

The committee of 33 continues its work. However, no progress has as yet been made. The majority of the committee is mainly making efforts to define the methods of covering the expenses of the peace-keeping activities. The Secretary-General joins the majority in these efforts.

Conciliatory solutions have to be found too for the event when owing to changed circumstances some of the provisions of the Charter defy an application to the word. One of the solutions which has been suggested is to shift the responsibility of the expenses on the General Assembly whenever the financial means has to be found for peace-keeping operations established by a resolution of the Security Council, provided the Council does not decide otherwise. Here the members would have to bear the expenses by the ratios established for their normal contributions to the Organization. Essentially this method has been followed in a few cases in practice (e.g. Kashmir).

3. Questions of decolonization

Opinions have been voiced that at least as far the United Nations are concerned the struggle against colonialism may be considered essentially terminated. The large colonial empires have fallen to pieces and actually only a fraction of mankind is living under colonial rule.

This assumption will hardly stand the test for two reasons. Firstly, the various forms of colonization still extend to more than eighty territories with a population of about thirty seven million, or when the South African living under the Apartheid system are included, to a population of about fifty million.

Secondly, the struggle against colonialism meets with difficulties increasing in their intensity with the growing perfection of the methods of neo-colonialism, and the spread of the refined forms of economic penetration.

The situation as regards the territories of the first group is becoming even more entangled owing to the fascist dictatorship wielded by the extreme forms of colonialism. This is what Majid Rahnema, the Iranian chairman of committee IV of the XXth session of the General Assembly in his closing address called ultra-colonialism.[27] Obviously the case is that of Southern Rhodesia, Portugal and South Africa. Both militarily and economically the African states are too weak to reckon with certainty on a success without the support of the great powers. On the other hand led by selfish political and economic interests the Western powers will hardly extend their assistance to these countries.

Nevertheless the United Nations has made remarkable progress also in the struggle against colonialism. A new element in this struggle is the now approved position that the conditions in the colonial territories constitute a jeopardy to international peace and security. Furthermore the struggle of the colonial peoples for independence is now recognized as lawful.

In the struggle against neo-colonialism the great international monopolies are condemned for their policy with growing emphasis, and also the efforts to liquidate the bases in the dependent territories have gained in vigour.

As compared to the political and economic arena the position of the socialist countries is perhaps the strongest here. However, as the natural outcome of evolution the African countries have taken over the lead from the socialist world in these questions.

4. Financial and administrative problems of the United Nations

The volume of the annual budgets shows a growing tendency. The budget for 1967 reckoned with over 128 million dollars, when the voluntary contribution of the appropriation conference for the benefit of the technical assistance and the special fund are ignored. These contributions amount to more than 160 million dollars. Not only the volume of expenditure, but also the rate of increase has grown. Whereas in the beginning the rate of increase of expenditure was on average 7 to 8 per cent, actually this rate is more than 14 per cent.

[27] UN Document A/C. 4/664

What is disquieting is not only the rise in the expenditure of the Organization. The main reason of this rise is a dual one: first, the growth of the number of conferences and meetings, and, secondly, the growth of the administrative staff. This was the circumstance which prompted the Secretary-General in his report on the character of the conferences to the statement that the programme (the execution of the conferences) had taken on unmanageable proportions. On the other hand the standard of the reports, or the expert's opinions is continually declining. In addition these reports flood the member states in quantities rendering them useless.

The increase of the number of employees in the Secretariat and the specialized agencies is not responsible merely for the development of a "bureaucratic hydrocephaly", but contributes appreciably to the otherwise existing duplication of work. The management of the United Nations has become an immense maze and acts as an obstacle to an efficient operation of the international organs.

The then French Foreign Minister Couve de Murville as leader of the French delegation to the XXth Session of the GA brought up a problem mature for a solution, when he insisted on a study of the financial matters of the United Nations. The resolution passed in response to the French proposal established a committee of experts of fourteen members to inquire into the finances of the United Nations and, under paragraph 3, Article 17 of the Charter, into those of the specialized agencies.

Still even after the report of the committee and the relevant resolutions of two sessions, if not the financial, so the political and constitutional problem remains: What is the upper limit of the expenditure of the United Nations, and to what extent the member states may be called upon for contributions to the costs of committees and to actions suggested by the whim of certain delegates and often taken merely by random? Here a long and consistent struggle will have to be carried often at the expense of unpopularity. It is only to be greeted that by the side of the socialist countries France too has taken up a position in this sense. Moreover several Western countries also warn to economy, although this might expand the misleading optical delusion of "North-South" antagonism.

VI.

Conclusions

1. On the role and function of the international organizations in general

a) International organizations are the natural products of social and political evolution. In the period of the singularity of capitalism the principal trend of these organizations was the service of the interests of the leading

capitalist powers. Organizations of an economic and administrative type at the same time served progressive ends by promoting international division of labour, and scientific and technical progress.

With the birth of the first socialist state the class character of the international organizations became even more distinct. The idea was to isolate the Soviet republic not only politically (e.g. in the League of Nations), but to "outlaw" it also in other international organizations.

Soviet foreign policy recognized the significance of the international organizations already during the first years of the life of the Soviet state *and was prepared to cooperate with them even on unequal and prejudicial terms.* It was thought that international organizations were an important battleground for the class struggle.

b) In the new age of the peaceful coexistence of states of different social systems, when there are a socialist world system and nuclear weapons, international organizations have gained a particular importance. The dual, intertwining ends of socialism, now a world power, and of the prevention of thermonuclear warfare can be served by the international organizations to a yet higher degree. These organizations open the path to a concentration of the anti-imperialist and anti-war forces, further to the promotion of the discharge of economic functions.

The fundamental form of interstate relations are the bilateral agreements. Bilateralism is the principal scope of activities of socialist foreign policy and also its method. Still the work done in international organizations is a vital and organic part of socialist foreign policy.

International organizations are useful also for the establishment of relations to non-socialist countries. *Experiences and impressions accumulated in these organizations promote a more realistic outlook, a better assessment of international power relations, the improvement of economic and technical knowledge and know-how, and the training of experts.*

Among the international organizations there are such as for their character are negative or reactionary. Such are in the first place the military alliances, NATO, SEATO, ANZUS, etc. In the economic field the role of the closed capitalist economic-trading organizations such as the Common Market, EFTA, etc. has a negative impact on international economic cooperation.

c) International organizations are useful also for the Western world, not only for the socialist countries. This use of the international organizations has since been recognized by them and knowingly turned to good account. Mainly owing to their earlier monopolistic position, more extensive practice, their relations to the developing countries, the larger number of well-trained experts, the Western countries have a considerable advantage over the others.

Apart from the socialist and the Western world the "third world" attributes special significance to the United Nations. To counterbalance their

relative military weakness these states have great need for the support of the United Nations in both the political and diplomatic fields. At the same time these states expect aid from the United Nation for the promotion of their economic development.

d) The expansion of Hungary's activities in the international organizations, and her entry into new ones, are actually hampered mainly by economic and financial factors.

It is due to the peculiar trends in the evolution of socialist economy, the priorities charging investment and budget policy, the flaws in economic development, the embargo and discriminative policy applied by the imperialist countries that the socialist countries have difficulties in their foreign exchange operations and with the exception of Yugoslavia did not so far introduce a free, convertible currency system. So even if the political difficulties are ignored, a potential cooperation with certain international economic organizations is limited from the very outset. This applies in the first place to the financial organizations, e.g. the World Bank, still problems emerge also in others of the specialized agencies of the United Nations.

The limited financial capacity of Hungary prevent her from contributing to the multilateral economic aids and loans advanced by the international organization in accordance with her weight in international politics. The growing amount of contributions to the budget of the United Nations represent a burden on Hungarian economy and therefore Hungary cannot take the initiative for entering organizations where she was not member before unless with proper caution and in cases of absolute necessity. It is only welcomed that notwithstanding this handicap Hungary has become member of a number of important agencies during recent years, such as e.g. Food and Agricultural Organization and General Agreement on Tariffs and Trade.

2. *The United Nations in the service of peaceful coexistence and the policy of non-interference*

a) The United Nations Organization is the most important and relatively the most universal of all. *It is the organization where the necessary and useful cooperation of the states of the two world systems and of the "third world" takes place.*

The United Nations is a new and important factor of international life also from qualitative aspects, and not only for the number of members.

"The Organization is based on the principle of the sovereign equality of all its members." (Paragraph 1, Article 2 of the Charter.) This fundamental principle of modern international law underlines that the Organization provides an anti-imperialist platform, and has provided it ever since its existence, sovereign equality being in direct opposition to the policy of intervention.

The defence of a policy of non-intervention follows from the basic principles of the United Nations. Paragraph 4, Article 2 of the Charter puts up the following categorical prohibition to non-interference: "All Members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." Hence the prohibition of intervention has become a generally recognized principle of positive international law. During the latter years apart from unique confirmations in connexion with certain actual cases, the principle of non-intervention, has been postulated on a number of occasions, and also appropriate resolutions have been passed. In particular two resolutions deserve special mention. The one is on the "Inadmissibility of intervention in the domestic affairs of states and the protection of their independence and sovereignty," which was passed by the General Assembly on Soviet initiative after a prolongued debate, in a wording agreed upon by way of a compromise, with a single abstention. The other resolution was born a year afterwards. It deals with the enforcement of the earlier declaration and for future purposes once again underlines the importance of the principle of non-intervention.[28] We may add that in November 1966 a separate resolution was passed "on the strict observance of the prohibition of the threat or use of force and of the right of self-determination". The XVIIIth Sestion of the General Assembly delegated a special committee to study "The principles of international law concerning friendly relations and co-operation among States", where again the most important of the principles concerned was the one of non-intervention.[29]

It may be stressed therefore that for the enforcement of the policy of non-intervention continually growing forces come forward in the United Nations, and also outside them. The process may safely be assigned to the principal factors which determine and shape the present and future of the United Nations.

b) In both the past and present of the United Nations the organization is far from being a perfect one. Its potentialities are limited even in the sphere where it is called to advance international peace and security. Therefore the United Nations Organization is essentially condemned to impotence in problems like Viet-Nam and Berlin. The impotence of the United Nations is not "an organic disease" and it is not the Organization that has to be blamed. Like in all other cases, here too the United Nations merely reflects the actual international relations, often in a rather inadequate form.

c) The task the socialist countries have to tackle in the United Nations is the further forcing back of the influence of negative forces and its liquidation.

[28] A/RES/2131/XX; A/RES/2225/XXI
[29] A/RES/2160/XXI; A/RES/1966/XVIII

Before all the membership of the People's Republic of China has to be restored, and then the Korean question has to be taken off from the agenda. The time and method of a settlement in these two problems depend to a great extent on the initiatives of the socialist states concerned and also on their willingness to assimilate elastically to the established tactics, or "parlance" of the United Nations and to the trend of thought of the "third world".

d) In the same way as the cooperation and alliance of the socialist countries and those of the "third world" determine the future of world politics, so this cooperation and alliance are the key issues of further progress in the United Nations.

However, the United Nations cannot be a world organization unless all three groupings of states participate in it. Without a modicum of cooperation in the beginning, and then an ever improving one later on, between the socialist and capitalist states, the United Nations cannot become an effective organization. Cooperation is possible and also necessary. By forcing back the aggressive quarters of the capitalist states, and mainly those of the United States, by unveiling the background of the catchword of anti-communism a normalization of international political and economic relations can be achieved. Experiences gathered in the United Nations will help us to a better understanding for the social and political changes on the world over and to examine the wide spectrum of this metamorphosis produced by the unequal development of the various countries with greater patiance.

e) The development of the United Nations into an efficient and successful organization is hampered in particular by two attitudes.

Imperialist, and especially American power politics refuse to lay down the arms of political, economic and ideological intervention. By appraising anew their relations to the United Nations the a number of western states are eager to keep up their acquired positions, even if they have lost their monopolistic position. For the United Nations, the end laid down in the Charter, and the efficiency of the operations of the Organization this constitutes the principal menace.

The dogmatic, leftist adventurism, which disparages the United Nations, at the same time makes light of the activities of the socialist countries and values them as cooperation with imperialism. This policy insists on unfounded, exorbitant conditions (public withdrawal of earlier resolutions, etc.) as the price for its cooperation. It is a misconception of the power relations and a depreciation of the own revolutionary forces. Essentially it is a policy of capitulation and retreat, which conforms to revisionist opinion.

3. Peculiarities of the activities and the methods of operation of the Security Council

a) With the regulation of the Security Council as laid down in the Charter the United Nations has undertaken momentous responsibilities. Practice has proved that the United Nations could come up to these responsibilities to a slight extent only. The causes of this weakness have to be looked for in the political developments of the world and in the first place in an attitude relying on a policy of force and offending the principle of non-intervention rather than in the organic weakness of the institution itself, or in the principles and rules governing the Security Council. Successful work of the Security Council is therefore a function of the general tendencies prevailing in the international situation. One may even say that the Security Council as the institution of peaceful coexistence as established in international law, serves as a standard for the assessment of the growing strength or relaxation of international tension.

b) Although the Security Council has failed to discharge its principal function, i.e. the settlement of the principal conflicts and the maintenance of international peace and security during the past twenty and odd years, in some of the cases it may nevertheless present certain partial results. The Security Council took action successfully in particular when local problems had to be settled which constituted no direct threat to the interests of the two world powers. Conflicts of this type were e.g. those of Kashmir, Cyprus, Yemen and West Irian. In these instances the United Nations did not always proceed in conformity with the provisions implied in the Charter. The exigencies of everyday life shaped new methods which permitted the United Nations to act with proper flexibility and proceed in the direction of the least resistance in the settlement of the conflict.

c) An extension of the competences of the Security Council and the improvement of its efficiency are hampered by a number of factors. The question of the representation of the People's Republic of China is by no means the least which is waiting for a solution. In point of fact until under United States pressure the delegation of Chiang-Kai-shek usurps the seat of China there can be no talk of a truly universal organization. The competence of the Security Council has to be defended also against the attacks which by extending the competence of the General Assembly and the abolition of the principle of a unanimity of the powers drive the United Nations to doubtful adventures.

d) Actually we may witness a certain "revival" in the activities of the Security Council. This is in the first place due to the active cooperation of the socialist and non-aligned countries, and to some extent, of the Latin American countries. So even when it cannot take effective measures, the Security Council can with its political and moral weight influence a number of phenomena of

international life in a positive sense. The symptom in the activities of the Security Council to bring about unanimous, consensus resolution or often in a non-official form agreements among the members, deserves special attention. This recent tendency strengthens the role of the Security Council, as one of the prominent means of multilateral diplomacy. So even in the event the Council fails to come to a decision a multilateral consultation of the members may nevertheless be useful. Direct contact, informal meetings, etc. are helpful in finding compromises and in eliminating the direct threat of war. The non-permanent members, among them in the first place the socialist and the non-aligned Afro-Asian delegations have a chance of taking a greater share in the peaceful settlement of conflicts, than otherwise their economic and military weight would justify. Essentially this is a wholesome process and tends to reinforce the principle of sovereign equality.

Since January 1968 Hungary is non-permanent member of the Security Council.

e) The non-permanent socialist members of the Security Council have to discharge a dual function, viz. in the spirit of internationalism they have to safeguard the general interests of the socialist world system, in harmony with the Soviet Union, the permanent member representing this system. Secondly, they have to act in this sense in a way to build up most extensive cooperation with the other members of the Council, in the first place with the delegations of the Third World. The membership representing a dignified position in international life has to be exploited so as to serve specific national interests, the expansion of the international relations of the country and at the same time to increase its prestige.

Основные политсческие и конституциональные направления в организации Объединенных наций и Совете безопасности

А. ПРАНДЛЕР

Цель статьи дать исторический обзор политического развития Организации Объединенных Наций. Основная мысль заключается в том, что ООН является международно-правовым институтом эпохи мирного сосуществования государств с различным общественным строем. Поэтому первая глава занимается оценкой понятия и практики мирного сосуществования. Приходит к заключению, что на нынешней стадии мирного сосуществования возросло значение и полезность международных организаций и в особенности Организации Объединенных Наций. Вслед за исторической частью, связанной с возникновением Организации Объединенных Наций и в первую очередь Совета Безопасности автор пытается выделить стадии развития ООН. Первая стадия, 1946—1960 годы, период империалистического влияния и преобладания. 1960—65 годы — годы преобразования, когда укрепляются позиции социалистических стран и стран третьего мира. Наконец, автор делает попытку определить стоящие перед нами в Организации Объединенных Наций задачи. В заключение подытоживает свои взгляды на международные организации вообще, затем ООН и Совет Безопасности.

Les principales tendances politiques et constitutionnelles dans l'Organisation des Nations Unies et dans le Conseil de Sécurité

Á. PRANDLER

L'étude se propose de donner un aperçu historique du développement politique des Nations Unies. L'idée maîtresse de l'étude est que les Nations Unies sont une institution du droit international de l'ère de la coexistence pacifique des Etats de différents systèmes sociaux. Dans cet ordre d'idées, le premier chapitre de l'étude s'occupe de l'appréciation de la notion et de la mise en oeuvre de la coexistence pacifique. Selon les conclusions de ce chapitre dans la période actuelle de la coexistence pacifique l'importance et l'utilité des Nations Unies se sont accrues. — Après une partie historique ayant trait à la création des Nations Unies et en premier lieu du Conseil de Sécurité l'auteur essaie de diviser le développement des Nations Unies en plusieurs périodes. La première période, allant de 1946 à 1960, est celle de l'influence et de la domination impérialistes. La seconde, allant de 1960 à 1965, comprend les années d'une transformation, pendant lesquelles se renforcent les positions des pays socialistes et des pays du troisième monde. Enfin, l'auteur fait une tentative de définir les principales tâches que nous devons encore affronter au sein des Nations Unies. Dans ses conclusions l'auteur résume ses opinions ayant trait aux organisations internationales en général, puis à l'Organisation des Nations Unies et enfin au Conseil de Sécurité.

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Significance, Method and System of Roman Law[1]

by

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The paper in the first place offers a survey of some of the characteristics of Roman private law, from a new aspect. It continues with a discussion of the historical role of private Roman Law from the socialist approach to law. The gist of the study is an analysis of the methods of instruction and the system of Roman Law. In this sense the author has made a valuable contribution to the development of the study of Roman Law in Hungary. Besides legal historians and Romanists, also those interested in other branches of law, in general, will find many points of interest in this paper.

I. Some characteristic features of Roman private law[2]

1. Research work into the history of law will gain considerable profit from an acquaintance with the slave-holder polities of the Antiquity and their legal systems.

[1] The following works may be quoted from an abundance of writings on Roman Law: ANDREEV, M.: *Rimsko tchastno pravo (Roman private law)* Sofia, 1958. Chapter I. (2nd edition, Sofia, 1962; HORVAT, M.: *Rimsko pravo (Roman Law)*. 4th edition, Zagreb, 1962. § 1; NOVITSKI I. B.: *Osnovy rimskovo grazhdanskovo prava.* Moskva, 1960. Introduction, § 1—2; OSUCHOWSKI, W.: *Zarys rzymskiego prawa prywatnego (Outlines of Roman private law).* Warszawa, 1962. pp. 19—26; NOVITSKI, I. B.—PERETERSKI, I. S.: *Rimskoe tchastnoe pravo.* Moskva, 1948. § 1—2; MARTON, G.: *A római magánjog elemeinek tankönyve, Institúciók (Textbook of the elements of Roman private law, Institutions).* 4th unchanged edition, Budapest, 1963. § 1; TURECEK, J. and a collective: *Světové dejiny státu a prava ve staroveku (Universal political and legal history of Antiquity).* pp. 242 et ssq., pp. 252 et ssq.; HANGA, V.—JACOTA, M.: *Drept privat roman (Roman private law)* Bucureşti, 1964. Chapter I; SZEMÉLYI, K.: *Római jog (Roman Law).* Nyíregyháza, 1932. § 1, 3.; *Institutiók és Pandekták (Institutions and Pandects)* on the ground of the lectures of Professor SCHWARZ G., compiled by BESNYŐ, B. Budapest, 1900. § 1—2; KASER, M.: *Römisches Privatrecht.* 4th edition, München, Berlin, 1965. § 1—2; VILÁGHY, M.—MARTON, G.: *A római magánjog elemeinek tankönyve. Institúciók (Textbook of Roman private law, Institutions).* Budapest, 1957.; *Megjegyzések a római jog tudományának egyes elvi kérdéseihez (Notes to some of the problems of the discipline of Roman Law).* Jogtudományi Közlöny, 4—6/1957. pp. 216 et ssq., German translation in Acta Juridica, 12/1960. pp. 169 et ssq.; MÓRA, M.: *Bemerkungen zu der historischen Betrachtungsweise im römischen Recht.* Acta Juridica, 1—2/1965. pp. 1 et ssq.; BARTOSEK, M.: *Come si dovrebbe studiare attualmente il diritto romano.* Studi in onore di Arangio-Ruiz. Napoli, 1953. I. pp. 317 et ssq. and *Metodo tradizionale e materialismo storico nella metodologia del diritto romano. La storia del diritto nel quadro delle scienze storiche.* Atti del I. Congresso Internazionale della Società Italiana di Storia del Diritto. Firenze, 1966. pp. 93 et ssq.; HORVAT, M.: *Rimsko pravo u nasem pravnom studiju (Roman Law in our legal instruction).* Zbornik pravnog fakulteta u Zagrebu, 1951. pp. 97 et ssq.; TARELLO, G.: *Storiografia marxista, studi romanistici e crisi del diritto romano in una recente indagine.* Rivista Internazionale di Filosofia del Diritto, 3—4/1958. pp. 457 et ssq.

[2] STEINWENTER, A.: *Utilitas publica — utilitas singulorum, in memoriam Paul*

The study of the legal systems of ancient Greece of the pre-Alexandrian period, and of those of the ancient Oriental civilizations, which, however, presupposes a certain familiarity with the various languages of the ancient Orient, during the latter half century has been promoted by the discovery of an abundance of inscriptions, papyri, clay tablets with cuneiform writing, etc. Still these studies have not brought about any autonomous and homogeneous "history of the law of Antiquity" *(Antike Rechtsgeschichte)* emphasizing by an exaggerated abstraction the community of ancient peoples segregated in both time and space as some of the bourgeois legal historians have been inclined to think.[3] It is another question that by surpassing the earlier, slightly one-sided approach, an expansion of the horizon of legal history, the extension of research work to earlier ignored, or inadequately studied, legal systems have led to the discovery of a number of hitherto unnoticed effects and interesting parallelism.[4] However, in the last resort, this has made it even more clear to what extent Roman Law surpassed all other legal systems of the Antiquity, not only by the wealth of its subject-matter, but also by the lasting influence it later exercised on European legal culture.

Roman state was one of the slave-holder societies of the Antiquity, which being the strongest state of this age amounted to the culmination of ancient slave-holding. Simple commodity production reached its highest level in the Roman Empire. Consequently the law of Roman society, (or as we shall see, the part of it bringing under regulation property relations) was the most highly developed legal system of slave-holder societies.

Roman Law was not merely one among the other legal systems of Antiquity: it was characterized by features which raised it high above all others.

Babylonian, Assyrian, Hettite, Hurrita, Elamite, Ugarit and ancient Egyptian laws as well as other laws of the Orient, represented a true value for the epochs in which they flourished. Still in none of these legal systems were a) the legal rules formulated with the precision, in a manner expressing

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Koschaker. Weimar, 1939. I. pp. 84 et ssq.; GAUDEMET, J.: *Utilitas publica*. Revue historique de Droit français et étranger, 1951. pp. 465 et ssq.; KASER, M.: *Ius publicum — ius privatum*. Studia et Documenta Historiae et Iuris, 1951. pp. 267 et ssq.; HANGA, V.: *Ius publicum — ius privatum*. Studia Universitatis Babeș-Bolyai, Series iurisprudentia, 1963. Cluj, reprint; VOLTERRA, E.: *Diritto romano e diritti orientali*. Bologna, 1937. p. 66.

[3] WENGER: *Die Quellen des Römischen Rechts*. Wien, 1953. pp. 27 et ssq., and earlier: *Römische und antike Rechtsgeschichte*. Graz, 1905.

[4] DULCKEIT, G.: *Römische Rechtsgeschichte*. 2. Aufl. München, Berlin, pp. 2 et ssq. (3. Aufl. DULCKEIT und SCHWARZ, München, 1963); SEIDL, E.: *Römische Rechtsgeschichte und römisches Zivilprozessrecht*. Köln, Berlin, Bonn, München, 1962. pp. 7 et ssq.; KASER, M.: *Das römische Privatrecht*. I. München, 1955. pp. 7 et ssq.; KOROŠEC: *Keilschriftrecht. Handbuch der Orientalistik*. Hrsg. B. Spieler, I. Abt. Erg. Bd. III, Leiden, Köln, 1964. pp. 51 et ssq. In Hungary recently FERENCZY, E.: *Az ékírásos jogtörténet mint tudományos kutatás területe, módszerei, kapcsolata a rokontudományokkal. (Legal history of cuneiform writing as a scope of scientific research, its methods and relations to allied disciplines)*. Századok, 4/1964. pp. 760 et ssq., and FERENCZY, E.: *Bevezetés az ékírásos jogtörténetbe (Introduction into legal history of cuneiform writing)*. Budapest, Library of the Hungarian Academy of Sciences, 1962.

minute differences and shaping the institutions of law in such detailed form as they were in Roman Law; b) none of these systems could bring about a jurisprudence comparable to Roman Law which could be considered very advanced not only by the standards of Antiquity. The theses of Roman lawyers formulated in Latin were deemed worthy of being collected and published by the Emperor *Justinian* in his empire, speaking another language, namely the Greek. Roman jurisprudence became one of the mainstays of European jurisprudence. Last but not least c) none of the other legal systems of the Antiquity were more than six hundred years after the collapse of the state (in 476 A. D.) whose lawyers had created it — revived again in *another social formation* in the midst of the feudal age and have been taught at the universities of Europe, for almost nine centuries unto this day; d) about thousand years after the fall of the Western Roman Empire Roman Law was received by a society whose lands North of the Rhine had never been under the dominion of the Roman Empire of Antiquity.

As a result of all these Roman law stood pre-eminent among all other ancient legal systems for the very reason that e) it was the only legal system which exercised an appreciable influence on the legal development under both Feudalism and Capitalism. Without the science of Roman law European jurisprudence would have never developed to what it is. *Engels* was right to point out that ". . .without the foundations provided by the Roman Empire . . . there would be no modern Europe either",[5] which is even more so in respect to Roman law. This achievement of Roman law, asserting itself all over Europe, can only be compared to the extremely important influence exerted by the ancient Greek philosophy and art on European philosophy and art. And this itself justifies that Roman Law be taught at the universities as a self-contained branch of science to be studied in a relatively detailed manner.

Hence Roman law is not simply the law of one of the many peoples of the Antiquity, but also the law of commodity turnover accepted all over the world *which owing to its technical standards exercised a remarkable influence on the development of legal theory and practice in Europe* (and to a lesser extent also on extra-European jurisdictions where European legal systems had an influence).

Although Roman Law is part and parcel of the entire legal development, still it excels among other legal systems to a degree which is quite unique. Universal political and legal history has as its subject-matter the political and legal systems of a number of states of Antiquity, the Middle Ages and the modern age, hence its principal feature is universality. Thus history describes development aiming at universality, however, not on the level of certain specific institutions of law. Since universal history also embraces the *history*

[5] ENGELS, F.: *How has Herr Eugen Dühring revolutionized sciences (Anti-Dühring)*. Hung. Translat. Budapest, Szikra, 1948. p. 171.

of the state, and since within the scope of legal history it does not focus its attention on the law bringing under regulation property relations, it would not be expedient to integrate Roman private law as a universal and at the same time specific subject of law in its framework, for the treatment of Roman Law could distort the approach of universal political and legal history. In this historical approach stress is laid on universality, whereas in Roman private law this stress is shifted to particularity, i.e. to private law. Roman private law is connected with universal political and legal history through the approach of legal history and the contact points of the subject-matter under discussion.

2. The subject-matter of Roman law as it is taught at the universities is *Roman private law*. Roman law proper embraces a wider scope than private Roman Law. Roman private law is only a part of Roman law, however, *its most developed part*.

By Roman law the legal material is understood which was valid on Roman territory, from the days of the foundation of Rome lying in Latium on the banks of the River Tiber (in about the 8th century B. C.), up to the epoch of Emperor *Justinian* (from 527 to 565 A. D.). The period of the history of the Roman law of Antiquity thus covered about thirteen centuries.

During this period the primitive law of a small city state in changing over from a pastoral life into an agricultural community developed into the legal system of a powerful slave-holder empire with an advanced economy. In the years of its greatest expansion this empire of a universal character included the largest part of the then known world: from Scotland of today down to Egypt, from Gibraltar to Armenia and held sway over Europe from the Mediterranean to the Rhine, over the Balkan Peninsula, Dacia, the major part of Asia Minor, and Northern Africa. Its fortified frontiers, (limes) ran across Hungary along the frontiers of Pannonia, including now Transdanubia.

Roman Law expanded not only in time and in space. As a summarizing expression it applied to a wide range of the conditions of life. Roman law regulated various conditions of life and institutions. It incorporated the legal material which brought under regulations the structure of the Roman Empire the legal status of functions and operations of state organs, and also governed the property-and family-relations of citizens.

The Romans themselves had long ago drawn a line between private and public law.

A Roman historian of the 1st century B. C. *Livy*, wrote that the Law of the Twelve Tables having been compiled about a half a millennium earlier, was the source of all public and private law. If we now open the compilation made by Justinian of the works of classical Roman law, the Digests, published in 533 A. D., in the very beginning we may read the definition of *Ulpian*, a name of great repute in jurisprudence of the 3rd century, in the *Institutiones*, a manual destined for the students of law:

Huius (iuris) studii duae sunt positiones, publicum et privatum, publicum ius est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem. [This science (i.e. law) falls within two branches: public law and private law. Public law concerns the structure (institutions) of *Roman state* whereas private law takes the *interests of citizens* into consideration.][6]

Hence the provisions applying to the State, its institutions, offices, religious cult having importance on political considerations (briefly: applying to the political organization and the governmental system of the ruling class) belonged to public law, whereas private law consisted of the provisions which protected — against everybody else — the private interests of the citizens with regard to their property and family relations.[7]

To understand why *Ulpian* based his division on the differences in the interests protected by the law, it should be remembered that public interest could only be the joint interest of the slave-holder ruling class as a whole, whereas private interests meant the variegated, often conflicting individual interests of the particular slave-holders. Ulpian of course made no mention of the class-division on account of which there existed no common interests between the slave-holder and the slave, deprived of all rights, nor of the fact that equality was out of question even in the relations of free citizens.

Within the framework of Roman Law private law stood highest in value, it was the most developed and most elaborate of the whole legal system. Roman private law was the branch which had the most marked effect on the surrounding world and posterity. The classics of Marxism were right when they thought that Roman Law ". . .was the most perfect creation so far known of law based on private property"[8]. "In point of fact the Romans were the first who formed the law of private property, the abstract law, the private law, the law of the abstract person."[9] Roman private law shaped the fundamental institutions of private law of a society based on means of production in private ownership (e.g. the law of property, the institutions

[6] D. 1. 1. 2 (ULPIANUS). Since the term "*utilitas*" occurs only in the second part of the sentence, the wording is not sufficiently precise.

[7] In another sense *ius publicum* denotes such generally compulsory rules of private law defined by the State as the citizens cannot change by their agreement rather than a definite scope of law. So e.g. the sources prove that the capacity to make a will belongs to the *ius publicum* in this sense (Testamenti factio non privati sed publici iuris est. D. 28. 1. 3 Papinianus), or a Roman citizen is *iure publico* authorized to bequeath a legacy *(legatum)* D. 35. 2. 1. pr. 7. (PAULUS). Other sources speak in the same sense: D. 2. 14. 38 (PAPINIANUS), D. 50. 17. 45. 1 (ULPIANUS), D. 50. 17. 27 (POMPONIUS).

[8] ENGELS: *Anti-Dühring.* Hung. translat. p. 99.

[9] MARX: *On the criticism of Hegelian philosophy. Criticism of Hegelian political law.* §§ 261—313. MARX—ENGELS: *Works.* Hung. translat. Budapest, Kossuth, 1957. p. 317. "Die Römer haben eigentlich erst das Recht des *Privateigentums*, das abstrakte Recht, das Privatrecht, das Recht der abstrakten Person ausgebildet. Das *römische Privatrecht* ist das Privatrecht in seiner *klassischen Ausbildung.* MARX, K.—ENGELS, F.: *Werke*; Bd. 1. Institut für Marxismus—Leninismus beim CK der SED. Berlin, Dietz Verlag, 1958. p. 315.

of the law of contracts governing commodity turnover) on a level that even after the fall of the Roman Empire it became the basis of a theory and practice of private law under feudalism, and in particular in bourgeois society based upon private ownership all over Europe.

The *technically less developed public law* controlling the governmental and administrative system of the Roman Empire could not compete with private law. The rules of Roman public law *overwhelmingly attached to the life and epoch of the slave-holder society of Antiquity*, so that it could not influence future development to the same extent as private law could exert its influence even after the disintegration of the Empire.

In Rome private law had a by far wider scope of assertion than in the subsequent societies. E.g. nowadays larceny comes within the rule of criminal law, which in modern bourgeois states is part of public law. On the other hand, in the Roman mind larceny, and besides it a number of other acts now qualified as criminal offences, were considered torts, under private law *delicta privata*. In the course of a discussion of Roman private law several institutions will have to be analysed which a student of law will now find in *criminal law*. The same applies also to the law of procedure. Roman private law incorporated also the law procedure, i.e. the material which in modern times turns up as the self-contained subject of instruction, the law of civil procedure.

In our universities Roman private law of the Antiquity is taught together with the elements of the law of procedure. All other parts of Roman law, e.g. constitutional and administrative law, criminal law, etc. are studied only insofar as their knowledge is necessary to the understanding of the development of Roman private law. From the aspect of the survival of Roman Law in the Middle Ages and in modern times these parts of Roman Law are by far less significant than private law is.

II. The significance of Roman private law[10]

1. The historical significance of Roman private law has to be studied separately with respect to the *Antiquity* on the one hand and to the period following the *fall of the Empire*, although there exists a close interdependence between these.

a) Roman private law of the Antiquity *would be worth of to be studied even if it had not survived the Roman Empire.* Roman private law clearly displays how within thirteen centuries the legal system of a small city-state in

[10] ANDREEV: op. cit. 1st Chapt.; HANGA—JACOTA: op. cit. Chapt. 1.; HORVAT: op. cit. § 1; NOVITSKI: op. cit. § 2; VILÁGHY: op. cit.; TOMASHEVSKI, M. P.—NOVITSKI, I. B.: *Fundamentals of Roman Law.* Reviewed in Sovietskoe Gosudarstvo i Pravo, 11/1958. pp. 137 et ssq.

Central Italy rose from the historically most developed law of simple commodity turnover of the Antiquity, and how the *simple* legal forms were superseded by forms of greater complexity as the legal reflection of the social conditions. The rich historical material of Roman Law lends itself readily for making tangible the *important features of legal development.*

In this sufficiently long period *we may trace the origin and development* of certain institutions of law together with the social-economic conditions influencing them. We may study how elastic new legal solutions were brought about by social needs within an essentially conservative legal system clinging to solutions of the earliest days of its existence. (See: e.g. the law-making function of the praetor.)

The study of this evolution in a highly important field will make it clear that the development of Roman private law was subject to definite causes, of which according to the Marxist doctrine — in the last resort the economic conditions played a decisive part. The ruling classes of Roman society were interested in the consolidation of the slave-holder system of production (as a basis), — at least in a later stage of development — in the shaping of commodity production and its corresponding legal forms. What was needed was that the rules of Roman private law should on the whole be such as could appropriately be adapted to the needs of the existing social order (where some of the rules *directly* expressed and protected the interests of the ruling classes, whereas others operated *indirectly* only). As for its contents the importance of a study of Roman private law from the point of view of a general history of civilization consists in the circumstance that in Roman private law a *momentous phase of the history of human culture* was reflected in its full display.

The significance of this would stand high even if Roman private law were studied only as the law of one — though the largest — of the slave-holder communities of the Antiquity *irrespective of the influence* it had on the *further development* of European legal thinking and practice.[11]

b) However, the Roman private law of the Antiquity *survived* the fall of the Roman Empire, and many centuries after the fall of Rome it *came to life again.* This is the *particular historical significance* of Roman Law.

Since the opening years of the 12th century, the primitive legal system of feudalism could no more meet the requirements of a well developed commodity production and commerce. Society tending for centuries towards Capitalism was in need for a more elaborate legal system, and for this purpose Roman private law proved excellent. In the Middle Ages and in modern times with the appearance of the corresponding conditions of production the principles of "pure" Roman Law, i.e. the law of Antiquity, were adapted to the new conditions of life. Roman private law characterized by extreme vigour

[11] TOMASHEVSKI: op. cit. pp. 139 et ssq.

and showing a high degree of vital power, though in a form to some extent modified, was revived by mediaeval scholars, and was made not only *part and parcel of the curriculum of the universities*, but was *applied also in practice.*

The rising bourgeoisie, later on coming into power, more and more adapted Roman Law to its actual needs. Capitalism insisted on a legal system which expressed the needs of Capitalism and of the capitalistic system of commodity production. Roman Law was the proper starting point for the very reason because it expressed the conditions of simple commodity production in the most appropriate form. Roman private law was at that time taught practically in all universities. Its effects prevailed within a wide scope in Europe. In a number of countries Roman Law was raised to the rank of statute, whereas in other countries it permeated municipal law through the mediation of jurisprudence. Roman Law became the most important source of the *Civil Codes* compiled in the 18th and 19th centuries. Modern bourgeois Civil Codes inherited mostly their legal concepts, principles and a number of statutes — in the first place in the field of the refined and complicated law of contracts — from the Roman private law reframed and adapted to meet the requirements of bourgeois conditions of life, that is, from the so-called *Pandects.*[12]

It stands to reason that the classics of Marxism were familiar with this historical importance of Roman private law. *Marx* pointed out that Roman private law was a classic expression of social conditions governed by private law.[13] According to *Engels* "Roman Law was the first universal law of a commodity producing society, a law which with unique precision worked out all

[12] This must not be regarded as if Roman Law in the Antiquity had transmitted solutions of absolute value to posterity. Obviously a substantial portion of the law relating to the *Latini*, the position of the slaves, legal material relating to the law of persons became as a rule inapplicable under capitalist conditions. It is inconceivable that a slave-holder society should even guess all economic and legal needs of a developed capitalist society. However, the acuteness of analysis a legal intuition were characteristic of the Roman jurists, so that many of the principles of private law they had moulded, satisfied the practical needs of a later social order based upon private property, due to their appropriateness.

The modern Civil Codes did not in all cases take over the solutions and detailed rules of Roman private law as far as certain institutions e.g. ownership, sale, lease, etc. were concerned. Often only the legal problems were taken over in the same sense as formulated by Roman lawyers of Antiquity or the cultivators of Roman Law in the Middle Ages and in the modern era, i.e. at least the problems as they had been raised in the Antiquity. And even when there was no uniformity of the solutions adopted by one Code or the other, still all of them adopted the foundations of a common legal technique and the scientific method of raising the problems of law. Since the jurists of the various countries speak the same legal language, they understand one another even when there are discrepancies in the legal provisions. Essentially this means that these modern Codes, in addition to incorporating a number of uniform or at least similar provisions have Roman private law, or the law of pandects based on it, as their foundation. Cf. HORVAT: op. cit. p. 2; WIEACKER, F.: *Europa und das römische Recht.* 2nd edition, Stuttgart, 1961, pp. 303—304.

[13] "Roman private law as the classical formulation of private law", MARX: *On the ciriticism of Hegelian philosophy*; op. cit. p. 317.

essential legal relations of simple owners of commodities (buyer and seller, creditor and debtor, contract, commitment, etc.)"[14] which was the almost perfect reflection of the legal relations that fitted into the phase of economy which *Marx* called the phase of commodity production.[15]

2. After what has been set forth the question what is the *purpose* of the study of Roman private law may easily be answered.

a) In private Roman law, incorporating the still effective elements of universal Roman legal culture, the *legal forms of simple commodity production took shape in the historically most perfect manner.*[16] These rules are analysed in a study of Roman Law not only in their final form, as summarized by *Justinian*, but, with a critical mind, in the course of their evolution through thirteen centuries, in order to explore the social-economic conditions needed for the development of the institutions of private law in Roman society, further to establish the new legal forms required by changes in these conditions, and how the simple legal forms were superseded by forms of a higher standard. Since it is a historical necessity that the present emerges from the past, the great historical significance of Roman private law represents a high practical value for the present.

Unlike legal systems still in the phase of evolution Roman private law of Antiquity may historically be regarded as closed. This feature of Roman private law permits to show the laws of the development of private law to the student of law in a simplified form. To use a vulgarized comparison: this is similar to the method how in anatomy the organism of a man being no more alive is revealed to the medical student. It is not the living human body which is to be studied by him first but it is through anatomy, through the study of a non-living human organism by which he becomes familiar with the structure of the human body.

b) The Roman scholars of private law achieved remarkable successes in *legal technique*. The study of their accurate, well-defined legal parlance clear to all – amounts to an important *didactic* aid. Roman private law teaches the law-student of today a clear-cut delimitation and formulation of legal categories and a readiness to discover the differences between the various categories of law. It is Roman private law that opens the path to the law-student to acquire a basic legal erudition by embracing the for him still strange, or at least novel, legal cast of mind. As a matter of course, here we have to remember the historical fetters clogging on the legal categories of Roman Law,

[14] ENGELS: *Ludwig Feuerbach and the disintegration of the classical German philosophy*, Hung. translat. Budapest, Kossuth, 1963. II. p. 359.

[15] ENGELS: *The growth of socialism from utopia to science.* Introduction to the English edition of 1892, Hung. translat. Budapest, Kossuth, 1963. II. p. 94.

[16] "Commodity production is the economic phase where commodities are produced not only for the use by the producers, but also for barter, i.e. as *goods* and not as use values." ENGELS, FEUERBACH, etc., Hung. translat. II. p. 359

and the fact that in the formulation of the categories formal logic played a decisive part. A modern student of law has to get over all these.

In this sense Roman private law is the "international language" the *lingua franca*, of the students of law, the international terminology of the lawyers of all civilized nations. The technical terms denoting the most important concepts of law are still current among the lawyers of all nations.

The Roman students of law of the Antiquity laid down the first foundations of jurisprudence.

It was on these foundations that the glossators of Italy relied from the 12th century onwards to be followed by the commentators, then the French lawyers of the Middle Ages, and from the 16th century onwards the Dutch, German, Italian, etc. jurists. Thus it is Roman Law on which the legal concepts, the classification of the fundamental institutions, etc. of the jurisprudence of all European nations rests. Roman Law as the "law of scholars", the "law of jurisprudents", exercises an influence on modern legal systems by the fact that it has become the *foundation of the science of civil law* of all European continental countries.

c) Without a grasp of Roman private law *the history of capitalist private law could hardly be understood* properly, and to this not even the history of the capitalist private law of Hungary is an exception. Thus Roman private law has become the gateway through which there is access to a study to a sufficient depth of the history of Hungarian bourgeois private law and that of the actual systems of bourgeois private law of other countries.

Since to the systems of contemporary bourgeois private law the knowledge of their historical growth provides the key, the study of Roman private law is essential for an acquaintance with the institutions, structure, principle and *system of capitalist private law being still in force abroad.* And such an acquaintance with the different systems of private law is of even greater practical importance in the epoch of peaceful coexistence, when commercial, economic, financial, and legal connections are being formed with the capitalist world.

d) Of the branches of the *socialist* legal systems it is *civil law* which as regards its subject-matter – is the opposite number of the private law of the capitalist countries. The (overwhelmingly) property relations brought under regulation by socialist civil law, naturally on the ground of the fundamentally different social-economic order of the socialist state, on the whole are congruous with the sphere which bourgeois private law (not including family law) embraces, and which the actual private law of the capitalist countries, in like way, incorporates. Thus Roman private law will, through the private laws of the antagonistic social formations — in particular through the latest of these i.e. bourgeois private law - - permit access to a better understanding of socialist civil law.

As a matter of fact Roman private law has forms which are bound *to private ownership*. These forms surviving the Antiquity and the Middle Ages, are living even today in social orders which are based upon private ownership. However, Roman private law has a feature which is bound to commodity production. As a matter of fact Roman private law was not merely a classical means of the regulation of private ownership, but to a certain extent it combined the general and abstract features of commodity production throughout its entire development, as "the first universal law of a commodity producing society" *(Engels)*.[17] These features may preserve their significance even in spheres outside the framework of antagonistic class formations insofar as commodity production is going on.

There is commodity production even under socialist conditions and even legal forms have developed for its regulation. However, there is the essential difference that a socialist legal system brings under regulation commodity production based upon social ownership. Socialist commodity production *fundamentally differs* from commodity production serving private property, in the same way as its underlying economic system differs from the basis determining Roman private law. In point of fact the character of these legal forms has changed owing to the transformation of the character of the underlying political power so that in a socialist system these forms serve the new socialist foundations of society. Since, however, Hungarian law brings under regulation *commodity production*, it *makes use also of the legal forms of commodity production*.[18] So even in a socialist legal system *legal institutions which took their shape earlier* and which properly manifest the economic ends in question, *may survive*. In other words in the Hungary of today within the sphere of a regulation of commodity production also the forms derived from Roman Law are applied, although in their details often of different content. All these are closely connected with the fact "that for example in the interest of the regulation of commodity production also a socialist legal system adopts the legal forms, the legal systems of earlier social forms have developed, purging them at the same time of private property trends and raising them to higher standards".[19]

However, if it is true that in contemporary socialist law the forms of commodity production of Roman origin are applied, then it will be clear why *a socialist student of law should investigate the institutions of Roman private law*.

"Roman law is the historical antecedent of all European legal systems. As a matter of fact, Roman Law is the most perfect historically established

[17] ENGELS: *The Growth of socialism*, etc. Hung. Translat. II. p. 82.

[18] MARTON: op. cit. p. 6. — In the socialist law contracts are the legal expressions of commodity relations. Commodity relations may be discovered also in a socialist society, however, in a form appreciably different from those of Capitalism. One of the differences is that anarchy of production according to plan, another is that the law of value does not act spontaneously. The commodity relations are not universal. The contracting parties must not be owners, financial independence being sufficient.

[19] VILÁGHY: op. cit. p. 218.

law of simple commodity production. This explains why it has a theoretical and practical significance for the study of the legal forms of commodity production . . . it is just because the institutions of Roman Law in their entirety embody the conditions of a historically established first form of commodity production with a perfection of a high degree that they have a highly important function in the endeavour to introduce the students of law into the general theory of the legal forms of commodity production through the subject-matter of Roman Law."[20]

This agrees with what a famous Soviet scholar pointed out as early as in 1949: "*Soviet law* embraces not merely a single *legal concept* or a *single method of legal analysis* whose roots could be traced back to Roman Law. Our lawyers are wont to use a notion like e.g. '*novatio*' day after day, although it was formulated in the Roman age and was associated with '*stipulatio*' and had a special significance there. It is in the interest of the Soviet students of law of the future to become acquainted with the methods applied by Roman lawyers though departing from those of Soviet jurisprudence."[21]

To sum up: in Hungary *the purpose of the teaching of Roman private law* is to offer a historical criticism of the legal forms of commodity production — thus an introduction into *civil law, bringing under regulation property relations.*

III. Method and system of the instruction in Roman private law[22]

1. Historical criticism requires a study of bygone ages as embedded in the underlying social and economic relations within their own intellectual framework, or to use an anachronistically sounding term, through their own "spectacles". This also means that we should not transplant notions into the past alien to it, or attribute ideas to ancient legal systems which were non-existent in the phase of development, or look for institutions in Antiquity for which there was not even a proper term, or which were not wanted by social development.

For a long time in the instruction and in cultivation of Roman Law ideas running counter this opinion prevailed. The consequences are felt even today. These ideas go back to the time when Roman Law was taught within the frame-

[20] MARTON: op. cit. p. 3.

[21] MASHKIN, N. A.: in his review of the textbook, of Roman private law of NOVITSKI, PERETERSKI, Vestnik Drevnei Istorii, 2/1949. p. 164, quoted by OSUCHOWSKI: op. cit. pp. 19 et ssq.

[22] TARELLO, G.: *Storiografia marxista,* op. cit., pp. 457 et ssq.; RAGGI: *Materialismo storico e studi del diritto romano.* Reprint of Rivista Italiana per le Scienze Giuridiche, 1955. Milano, 1957. pp. 1 to 47; BARTOŠEK, M.: *Metodo tradizionale e materialismo storico nella metodologia del diritto romano,* op. cit. pp. 93 et ssq.; MÓRA, M.: *Megjegyzések a római jog oktatásának néhány kérdéséhez (Remarks to some of the problems of the instruction of Roman Law),* Jogtudományi Közlöny, 8/1962. pp. 419 et ssq. and *A történeti és jogászi szemlélet kérdése a római jogban (Problem of the historian's and the lawyer's approach in Roman Law).* ibid., 3/1963. pp. 135 et ssq.

work of prevailing law, or as a general theory of modern law *(modern law of pandects)*.

The *modern theory of the law of pandects* of the past century professed that it studied Roman private law "in its validity of today", to a great extent it considered Roman law to be *its starting point.* It did not even deny that in its results it had widened to the general theory of modern private law. Hence the law of pandects was in general the *dogmatical fundament of modern private law based on Roman Law*, and not that of the Roman Law of the Antiquity. The modern law of pandects does not reflect the theory of the Romans, but what the modern theory of private law has built up of the remnants of Roman Law, so that as a prominent Hungarian scholar of Roman Law pointed out "if *Ulpian* rose from his grave he would turn the pages of the general part of a manual compiled by a modern student of the law of pandects dumbfounded and would perhaps understand less of it than a modern novice in the study of law".[23] Today as commanded by the historical approach, the opposite of all that has been said before appears to be expedient: we want to reproduce the law of the ancient Romans so that "*Ulpian* could easily recognize it".

The tendency that the modern law of pandects should turn out a theory where the Romans of Antiquity "forgot" it, is outdated. The avoidance of an anachronistic presentation and modernization is an indispensable precondition of being introduced into historical reality. The ignorance of real history would result in a distorted picture of the true past of Roman Law, and thus even the true history of its development would remain unknown. The excessively "normative-juristic" approach carrying back modern notions into the past has *made the categories of a later development the standards of an earlier growth.*

Historical approach requires a presentation of the development of Roman Law as it existed in reality, on the ground of its sources.

The scholars of Roman Law in the socialist countries — not by mere chance — decidedly declare the need for historicity.

This is by no means astonishing, because the Hegelian-Marxist approach, we may say, spread all over Europe conceives history as a progressive and rational process. According to his opinion unless we want to falsify historical truth, we have to adhere to the notions of Antiquity to the facts as they really existed and waive any arbitrary interpretation of the Middle Ages and modern times. The fact that the Romans were not acquainted with or had only hazy ideas about one legal institution or the other being only in an embryonary state, has to be presented in a way true to history.[24] Hence it is *incorrect to portray a notion or an institution of law in an*

[23] Szászy, G.—Schwarz: *Rendszer és kommentár (System and Commentary;* Parerga: *Vegyes jogi dolgozatok (Miscellaneous papers on law).* Budapest, Publishing House of the Hungarian Association of Lawyers, Vol. 5. I. 1912. pp. 416 et ssq.

[24] Bartošek: Labeo, 1956. pp. 212 et ssq.

unhistorical, idealized, perennial form, or, by ignoring their origin in a later phase, regard certain general notions as originating in the Antiquity, when even their technical terms were unknown to the Romans, to say nothing of their uderlying theory (e.g. juristic persons, legal transactions, the general rules of tortious acts, the abstract concept of subjects at law etc.).

Historicity in the cultivation of and instruction in Roman Law cannot amount to a one-sided collection of information but it has to be brought into harmony *with a juristic approach*, and *with the considerations of didactics.*

Historical and juristic approach to instruction in Roman Law are depending on each other rather than running in opposite directions. A socialist scholar of Roman Law will have to apply both approaches in conjunction with the Marxist theory of the superstructure character of law and jurisprudence. Consequently in opposition to the idea which considers law a self-contained category, beyond the ways of the development of a legal institution, also the objective social-economic conditions which in the last resort, have determined the development of the very institution of law, how this institution, directly or indirectly, expresses class interest, and its bearing on the objective social-historical evolution are to be demonstrated.

The historical and juristic approaches are not mutually excluding one another but, in the field of Roman law and in general in legal history they are, *mutually complementary. Dialectic* unity between these two conceptions is exactly what the *historical approach to law means.* The historical approach of law is historical just for the reason because it inseparably combines the juristic and historical approaches.

This concept is in harmony with the Marxist theory of a unity between historical and logical elements. The essence of the doctrine is that the historical and the logical elements do not conflict with each other, but that the historical and the logical characters at the same time are mutually excluded and are depending on each other: the historical being but an element, or a phase of the logical, and the logical a historical accumulation and qualitative transformation of the former. There is no contradiction between the historical and logical sequences or exposition, the unity of the historical and logical elements is a reflection of the historical process, however, in a manner which through a logical summarization explores historical development in a systematized form. This dialectical unity expresses appropriately the cognition of reality and the requirement of true representation of it and thus the expansion of reality and the creation of a new reality may also take place. The summarized and generalized expression of historical development so as to suit the ruling class proceeds on this ground. Hence the legal abstraction summarizing historical succession is of a class character.[25]

[25] MARX for the purpose of writing his political economy chose the logical exposition, which in fact was the corrected reflection of the true course of history. MARX:

Briefly, *Roman Law is studied by applying a historical-critical method and an approach to legal history which is based on a historical and logical dialectic unity.*

2. Basically we study Roman Law in a *system* which does not transplant modern concepts into the past, but which rests on Antiquity and is therefore *historical* in its character.[26]

Putting it in another way this means that in our opinion historical approach is to be applied also in the field of systematization.

To discover a system which is *equally characteristic of the development of Roman Law as a whole and of all of its phases*, and which lends itself for the compilation of a modern textbook, is a task extremely difficult, or even impossible, to tackle. One of the reasons of this is that the casuistically minded Romans, with their attention focused on discrete cases, had a poor sense for framing systems. The division of the Law of the Twelve Tables might have been influenced by some sort of an association. We know the Trichotomy of Gaius, viz. *personae*, *res*, *actiones*, however, it is more or less doubtful whether this trichotomy was applicable to earlier phases of Roman Law at all. Our knowledge of the origins and development of the system of *Gaius*, a Roman lawyer of the 2nd century, is fairly vague. There could have hardly been any closer association between the sources of the textbook, of Gaius, the *Institutiones*, and the systematizing tendencies of the Roman lawyers of the late Empire. *Q. Mucius Scaevola* (in the 1st century A. D.) in their summaries discussed the *ius civile* in another order of sequence. They began with wills and statutory succession, which was followed by fragments of the law of persons and in an alternating sequence by other parts. The system of Edicts incorporating Praetorian Law, insofar this method of discussion deserves to be called a system at all, was built up on *procedural* considerations. To the modern man it may appear somewhat mysterious, how the Romans could find their way in this maze. However, they were used to it for centuries. Through the ages a number of lawyers had a hand in the formation of the

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Introduction into the Criticism of Political Economy. Hung. translat. Budapest, Szikra, 1951. pp. 25 to 35.; Cf. the review of ENGELS of MARX's: *To the Criticism of Political Economy, (1859)* " . . . only the logical treatment was proper. However, in fact this was but the historical treatment, eliminating at the same time the historical form and the disturbing contingencies." MARX: *Contribution to the Criticism of Political Economy*. Hung. translat. Budapest, Szikra, 1953. p. 176.

[26] NOVITSKI—PERETERSKI: op. cit. pp. 9 et ssq. In WARKALLO, W.'s review (Bibliotheca Classica Orientalis, 4/1961, columns 250 et ssq.) and in his criticism (Helikon, Rivista de Tradizione e Cultura Classica dell'Università di Messina, 1—4/1964, pp. 679 et ssq.); KASER: op. cit. I. pp. 167, 170; COING, H.: *Zur Geschichte des Privatrechtssystems*. Frankfurt a/M. 1962; FUHRMANN, M.: *Das systematische Lehrbuch. Ein Beitrag zur Geschichte der Wissenschaften in der Antike*. Göttingen, 1960. pp. 183 et ssq.; MÓRA, M.: *Über das System des römischen Rechts in den vorklassischen und klassischen Zeiten* (Lecture read in the International Congress on the study of Antiquity sponsored by the Hungarian Academy of Sciences, on November 4, 1965).

more elastic praetorian law, which served the needs of an expanding society and its economy better than the rigid ancient *ius civile*, without, however, bringing about an appreciable change in the system of the legal material. In this system the rules governing the institution of an action at law, (Part I) were followed by Part II dealing with the "regular" judicial assistance and then by Part III on the enforcement of decisions. Part IV was some sort of an appendix on interdicts, estoppels, praetorian stipulations. Classical jurisprudence mostly followed the system of either of the *ius civile*, or of the Edicts completing the latter by the treatment of *leges*, *senatusconsulta*, etc. in the form of an appendix. As a matter of fact since the lawyers *Celsus* and *Iulianus* the "*System of the Digests*" became current. Here, the first part followed the division of the collections of edicts, the second part incorporated the *leges*, *senatusconsulta*, and the imperial constitutions. Gaius developed further the system of *ius civile*. Earlier he transferred the legal matter on succession from the first part to follow the part later given the name of *ius in rem*, or the law of things, and before the part on contracts, *obligationes*. Then he merged these three parts into the unity called *ius quod ad res pertinet*. Following the example of the Greek philosophers and grammarians *Gaius* created the trichotomy *personae-res-actiones*. This system of Gaius had an influence on both the mediaeval and the modern systems. The French *Code civil* of the early years of the19th century and the Austrian Civil Code are examples of this. The "five books" system of the German Civil Code was based upon the Pentateuchical System of Heise, a student of the pandects teaching at the end of the 18th century. However, in the last resort even this division into five parts may be traced back to *Gaius*.

For the purpose of studying Roman Law in the form as it existed and was current in the Antiquity it would be impossible to include the former in the modern system of the pandects (making to a high degree, use of abstractions because this would not be in harmony with its source-material and would therefore be in conflict with the postulate of historicity. This holds true even if the system of pandects by transferring the general part incorporating abstract common and general theses of law to the beginning of the system, and separating the *ius in rem* from the *obligationes* meant in its time a progress as compared with the *Institutiones*. This pentateuchical system consisted of the following five parts: 1. General Rules, 2. Persons, 3. Law of things *(ius in re)*, 4. Obligations, 5. Family and succession.

The didactic *Institutiones* of Gaius, a lawyer who lived in the 2nd century A. D. were meant for instruction. This system belonged to the period when he lived but, of course, it cannot be considered contemporary as far as earlier centuries are concerned. (The same applies also to the other systems, which all bore the stamp of their age.) The division of the Law of the Twelve Tables, the systems of Scaevola, Sabinus, that of the edicts, and of the Digests,

which was spreading since Celsus and Iulianus are also to be considered contemporary. However, for pedagogical reasons these systems cannot be used by the modern instruction in law. The spread of the system of Gaius was advanced and its authority enhanced, by the fact that Emperor *Justinian* himself followed it. This trichotomical system was split up into Part One on *personae*, to be followed by Part Two on *res*, and then with Part Three on *actiones*. In my opinion in preparing the textbook of Roman Law, — when it comes to discuss the institutions of Roman Law, and the genesis of its system, due attention should be given to the system of Gaius without, however, following it in a servile manner. When it comes to lay out a system to serve the needs of the modern student of law didactic considerations should be taken into consideration to the greatest possible extent which also necessitate the knowledge of other notions, as well.

Thus, first of all in *Part One* under the heading "*Introduction*" a summary should be given of the elements of the subject-matter, the object, method and didactical system of Roman Law. *Part Two* should deal with "*The history of the development and the sources of Roman Law*". *Part Three* should embrace "*The system of Roman private law*". This Part Three should then be subdivided into the Sections *I*. Safeguards and enforcement of rights, *II* On persons, *III* On things or chattels, *IV* On succession, *V* On obligations.

The system of Gaius permeates this system insofar as Section I. The safeguard and enforcement of rights applies to "*actions*", Section II to the "*personae*", and Sections III IV V to "*res*".

Unlike the *Institutiones* of Gaius this new textbook should discuss procedural law applying to *actiones* in Section 1 of Part Three (Safeguards and enforcement of rights). This is justified by the significance lawsuits or *actiones* had in the course of the development of Roman private law.

The elements to be studied here apply to all parts of Roman private law to be discussed subsequently since these could not even be understood properly before the first elements have been grasped. It is not wholly unjustified to call Roman private law the "law of actions". Its development took place mostly through the means of *actiones*, in the field of legal procedure.

Die Bedeutung des Römischen Rechts, seine Methode und sein System

M. MÓRA

Aus der Einleitung des Aufsatzes gewinnt der Leser einen historischen Überblick aus neuartiger Sicht über einige Charakteristika des römischen Privatrechts. Im Anschluss bewertet der Verfasser, aufgrund der sozialistischen Rechtsauffassung, die historische Rolle des römischen Privatrechts. Als Hauptfrage seiner Abhandlung behandelt er die im Unterricht des römischen Privatrechts verfolgte Methode bzw. System. Insofern stellt der Aufsatz einen hervorragenden Beitrag zur ungarischen Romanistik dar. Die

Erörterungen des Authors können auf das Interesse nicht allein der Rechtshistoriker und der Spezialisten des Römischen Rechts, sondern im allgemeinen der gebildeten Juristen zählen.

Значение, метод и система римского права

М. МОРА

Статья сначала при новом подходе дает исторический обзор некоторых особенностей римского частного права. Затем показывает историческую роль римского частного права со стороны социалистической теории права. Костяк статьи занимается системой и методами преподавания римского частного права. В этом отношении означает выдающийся вклад в венгерскую романистику. Её выводы вызывают интерес не только у историков права и занимающихся римским правом, но и у образованных юристов вообще.

Discussio

Struggle with Reality in Private International Law

Evolution of the Theory of Private International Law and its Current Trends

F. MÁDL

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I. New trends and aims in private international law. — II. Theoreticism and its criticism. — III. A realistic expedient: *Ehrenzweig*'s theory 1. What is new and what is old in the "revolution" of the theory of private international law? 2. How far can theory go? 3. The theory: all roads lead through the forum. — IV. What may be said of these theories? — V. *Ehrenzweig* v. *Rabel* in private international law. Requirements of reality in the second epoch: a few examples (Western appraisal of certain theses of socialist law of ownership and succession).

What is the reality with which private international law is at loggerheads? And what does its struggle consist in? Obviously these are the first questions the reader is likely to put. However, for a reply a few introductory words will hardly be sufficient. This study will tell of some of the possible replies, sufficient to become the subject-matter of a study. Here the author would like to confine himself merely to two preliminary remarks. Firstly, in this study the notion or concept of private international law is used in its conventional meaning, *i.e.* that private international law is the same as conflicts law. Secondly, in this study mostly those trends of theory will be discussed which have developed in Western countries. The story of the struggle of socialist theoretical constructions with reality, and so the basic problem how the theoretical boundaries of private international law could be extended, possibly beyond the totality of conflict rules, provide ample material for another study.[1]

I. New Trends and Aims in Private International Law

1. Everybody, or almost everybody, who so far has approached the discipline of private international law (let alone comparative law) with a creative mind, inevitably goes back to *Rabel* as his primary source. Ever since

[1] In his study *Új szakasz a magyar nemzetközi magánjogban? (Hungarian Private International Law on New Pathways?)*, this author — MÁDL (2), pp. 298 et ssq. — has made only a few theoretical remarks referring to socialist private international law.

Rabel compiled his *The Conflicts of Laws*[1a] in four volumes, he has become the Omega to whom even those return, who have not made him their starting point. His work has somehow become the landmark of modern comparative law and private international law. History has made it so. Amidst the turmoil of a world war, when the mutual respect and the recognition of the values of nations was anything but reality, *Rabel* began to write his *oeuvre sine ira et studio*. He pleaded for the integration of the legal and scientific values of all countries and has become the most prominent designer of that circuit whence institutes and periodicals of comparative and private international law were to spring forth. In 1927 he launched the *Zeitschrift für ausländisches und internationales Privatrecht*, which since 1961 has been published as *Rabels Zeitschrift*. It has earned unqestioned authority in the field of comparative and private international law. *Rabel* himself wrote the opening announcement *(Zur Einführung)* to it. Already in these inaugural words his scientific and human-political creed of an understanding of the law of other peoples and of the solution of common problems in cooperation of the nations manifests itself. He closes his modest, and yet forcefully and sympathetically worded Introduction with the following words: "May this periodical, also beyond the German frontiers, satisfy many of the demands for enlightenment and may it strengthen the recognition in friendly readers that, notwithstanding all the differences among legal systems, a science of law is coming to life which will lay the foundations for a wider and deeper community of the peoples than was Roman Law itself".[2] This science has come into being and has grown up mostly in response to his inspiration. No matter that the Fascist dictatorship producing Second World War in 1937, forced *Rabel* to go into exile, and suppressed his periodical. *Rabel* found a new scientific home at the *University of Michigan Law School*, where he could continue his work.[3] In his study, published in the *Columbia Law Review*, on the functions of institutes of comparative law, he expounded his ideas on comparative law, on private international law and on general unification of law on a world-wide scale[4] and urged that all major countries needed periodicals on comparative law.[5] Thus he promoted the creation in 1952, of the *American Journal of Comparative Law* as a counterpart of the American Journal of International Law, which since has become known the world over. He was one of the first contributors to this periodical which was published under the editorship of his good friend, Professor *Yntema* of the University of Michigan Law School. Among the first sponsors of the periodical was Professor *Ehrenzweig* of the University of California Law School

[1a] See in the List of References: RABEL: *Conflicts*.
[2] RABEL (1), p. 4.
[3] RABEL: *Aufsätze*, see "Einleitung des Herausgebers", Bd. I. p. XXIV.
[4] See in the List of References, RABEL (2).
[5] RABEL (2), p. 242.

(Berkeley).[6] Among those institutes whose creation *Rabel* continued to urge[7] perhaps the most important is the *International Faculty of Comparative Law in Strassbourg*. *Rabel* had a share in a number of ventures which it would be impossible, and perhaps even superfluous, to enumerate here. He lived long enough to write an inaugural announcement *(Zum Geleit)*, when *Rabels Zeitschrift* was started again in 1949, six years before his death in 1955, with no less confidence in the success of his efforts to encourage international co-operation.[8]

This man of learning, who fled Hitlerite fascism, amidst the disillusionment, ire and exasperation of the War, did not only give expression to "the deplorable state" of his discipline, . . . "to a change of which mutual understanding and toleration were as wanting as in international policy".[9] He reiterated his faith for the epoch following upon the War in his comparative *Conflicts of Laws* as follows: "What this book is intended to suggest is a patient and concerted world-wide discussion determined to relieve the present chaos. . . The legal profession has great power and deserves great confidence."[10] His four volumes were *the formulation of his intellectual basic position for an epoch*, the fulfilment of a creed. Being peerless, they have ever since been on the desk of every student of private international and comparative law. His ideas and words recur, with critical remarks or as testimony, on the pages of all later works of significance.

It is only to be regretted that within a few years after the War the earlier expectations of an Augustan Peace, owing to the cold war, dwindled to mere hope. In the strained international situation the private international law of the socialist countries, indeed their entire civil law, were exposed to sharp and not always scientific criticism and discrimination in capitalist countries. And socialist legal writing was not very "cooperative" either. There remained little, or practically nil, of "the patient and world-wide discussion" operating towards international legislation. *Rabel*'s creed remained a creed only, and his book became not very much more than a technical source of comparative studies, though much read in the asylums of jurisprudence and learning.

2. The period of peaceful coexistence of the sixties was needed for a betterment. But history had partly superseded the *Rabelian* creed by a more "realistic", more sceptical discussion on a world-wide scale. The resolution of individual positions in a scheme of international legislation was making headway at a slow pace. Spectacular, wholesale results did not come to life

[6] See the paper of BOLGÁR on the historical background of the periodical (List of References, BOLGÁR), p. 25.
[7] RABEL (2), p. 245.
[8] RABEL (3), p. 1.
[9] RABEL: *Conflicts*, Vol. I, pp. XXII, XXIII.
[10] RABEL: *Conflicts*, Vol. I, p. XXIII.

easily, it was and is rather the centres of gravity of regional integration that tend to gain in strength.

A Rabelian-like *manifestation of this epoch* may be discovered in the *Private International Law of Ehrenzweig*, which is similarly planned for several volumes.[11]

On perusing the works of *Rabel* and *Ehrenzweig* on comparative private international law the reader will be tempted to compare. It would be difficult at present to ascertain with any pretence to accuracy and definitiveness the immanent parallelisms in the two works. Partly because so far *Ehrenzweig* has published only his first volume, the *General Part*. However, certain parallels may be drawn even at the present juncture.

In the first place, each work expresses the approach of an historical period. *Rabel*'s approach, and its relation to his period, has been outlined above. The years following the cold war, the sixties oriented to coexistence, may be charachterized as follows. In the first place, international codification on a world-wide scale has begun already. Compared to the intensity of the process of regional integration, it advances at a moderate pace. However, meanwhile in response to a large-scale unfolding of comparative law, the legal systems of the various countries have come to be better known in the world, this better acquaintance with the other man's law being a precondition of a more realistic long-range international codification scheme of established value. Secondly, the evolution of each domestic private international law as well as their legal and jurisprudential language have changed considerably. In the sphere of the controversies the parties have withdrawn to the line of defence of socially objectively defined peculiarities. In the socialist world peaceful coexistence has come into prominence, and capitalist countries have gradually ceased to discriminate against the institutions of socialist law.

Certainly in private international law *Ehrenzweig* is at present the most prominent Western representative of this approach. How does this change in approach manifests itself in *Ehrenzweig*'s work? Firstly, he formulates the future programme of private international law with more reservation. In his *Preface*, instead of speaking of international legislation he stresses the transmission of the experiences of the *Common Law* countries, the evaluation of the results achieved, the opinions prevailing in *European* countries, herein-cluded the socialist world, a better understanding between the *Common Law* and *Continental* approach, and even a co-operation between the two systems. Still, when he comes to speak of co-operation or mutual understanding, it is rather the methodological aspect he has in mind. The student of Common Law, who considers case-law, i.e. judge-made law as expressing current policy has something to offer to his *Continental* fellows, who accord a primary func-

[11] See in the List of References, EHRENZWEIG: *PIL*.

tion to doctrine.[12] Hidden behind this ostensibly methodological observation are, of course other practical problems. *Ehrenzweig* in the course of unfolding his own theory emphasies the real function of theory including that of socialist countries, in accord with international language and practice.[13]

II. Theoreticism and its Criticism

3. The first step should be to try to meet the trend of pure theoreticizing. It cannot be denied that *Ehrenzweig*, with passionate strokes, has taken great strides to this end. Even some of his provocative headings contribute to this effort, as when he speaks of the "*Establishment*", *revolution and counter-revolution.*[14]

At the very beginning he convinces us that both the courts and the theoreticians consider the traditional formulas and principles of conflicts law antiquated and insist on the solution of actual problems by an analysis of individual facts and legal policy. The "establishment" has been disestablished during the latter decades, and many a theory has been born in the "Revolution" against the traditional order, the *ancien régime.*

4. Above all *theories of European origin* deserve attention. One of these is that has been called *neo-comity.* This theory as at one time the statutists permit the foreign sovereign (the legal system of a foreign sovereign) to implement his own claims. In conformity with the statutists *Savigny* called this a *freundliche Zulassung* (friendly admission). Even if it sounds differently, the same idea finds expression among modern authors in *Eek*'s "international co-operation", in *Kahn-Freund*'s "growth of internationalism", in *Vitta*'s thesis of "equality", or in *Schmitthoff*'s opinion, according to which there are vested foreign rights, which deserve protection. Indeed, as *Ehrenzweig* stresses, the same idea comes forth from the recent approach of such socialist authors as *Szászy*, who elevate coexistence to a principle of conflicts law.[15] In the appraisal of the author these theories are open to so many constructions that they provide no assistance in the solution of concrete legal questions, which are not settled by statute law unless some sort of a *super* or *meta* law is assumed which would in each case refer us to a specific foreign system.

Essentially the same criticisms have been raised against reliance on *universal standards of justice*, although here the centre of gravity has been

[12] EHRENZWEIG: *PIL*, p. 69.
[13] EHRENZWEIG: *PIL*, p. 69.
[14] EHRENZWEIG: *PIL*, p. 57.
[15] See in the List of References, EEK's *The Swedish conflict of laws*, KAHN—FREUND's *The growth of internationalism in English private international law*, VITTA's work, *Il principio dell'eguaglianza tra "lex fori" e diritto straniero*, SCHMITTHOFF's (1) *The english conflict of laws*, SZÁSZY's (1), (2) *Private international law in socialist countries*, and *Problems of the codification of private international law*, and EHRENZWEIG's *PIL*, pp. 57, 58.

shifted from conflicts law to a just solution of substantive law. As *Ehrenzweig* states, the fact that judgements of justice differ not only from man to man, but also among the legal systems, calls for no special confirmation. No *a priori* theory can, here or elsewhere, be a substitute for the analysis of highly individualized policies.[16]

Nevertheless, we may find some guidance in *comparative law and efforts for a unification of law*, as *Rabel* suggested. This perhaps finds its clearest expression in the notion of an international *lex mercatoria*, as expounded by *Kegel* and *Schmitthoff*; by *Kegel* in his "Crisis of Conflicts Law",[17] by *Schmitthoff* in his study "Das neue Recht des Welthandels"[18] and in his introduction to "The Sources of the Law of International Trade" containing the proceedings of an East-West colloquy.[19] The *lex mercatoria*, or the *new law merchant* has become a matter of thorough analysis even in Hungarian literature.[20] Essentially the case for a new *law merchant* may be summed up as follows. The various non-national legal sources of international trade, the many international conventions,[21] will before long create the "autonomous legal order" of international trade. Here too *Rabel* is the intellectual ancestor. Both *Kegel* and *Schmitthoff* bear testimony to this. It was *Rabel* who said that the "crucial point to be reformed is the blind subjection of conflicts rules to the private law of each country".[22] He mentioned the *Introductory statute* (Einführungsgesetz) to the German Civil Code as an example of provincial thinking, since it made the attempt to incorporate the German private international law in the language of domestic law. He too spoke of *language*, and for that matter of an *incorporate language*, still he had more in mind than one could have by the technical meaning of the word *language* only.[23] By making reference to the conventions on negotiable instruments, carriage and other international agreements he demonstrated how effectively private international law could serve the interests of the various contries and various legal systems once relieved from the burden of local legal techniques and related to situations of actual life.[24] In his work *Das Recht des Verkaufes* he showed how through international agreements and other legal instruments implemented in practice, a new *lex mercatoria*, independent of domestic and the conflicts laws could be

[16] EHRENZWEIG: *PIL*, pp. 58, 59.
[17] See KEGEL, p. 260.
[18] SCHMITTHOFF: (2), p. 45.
[19] SCHMITTHOFF: (3), pp. 33 to 36.
[20] MÁDL (1) pp. 24 et ssq. (Section "Lex mercatoria – private international law")
[21] Such are the international regional and general agreements, the *Incoterms*, the *General Conditions* compiled under the auspice of the European Economic Committee of the United Nations, the *Reglements* applying to banking operations, the stock exchange usages, etc.
[22] RABEL: *Conflicts*, Vol. I, p. 102.
[23] RABEL: *Conflicts*, Vol. I, p. 102.
[24] RABEL: *Conflicts*, Vol. I, pp. 103 to 105.

established as a fact.[25] Still, argues *Ehrenzweig*, all this is on the level of a unification of substantive law and is restricted to trade. Consequently this modern *lex mercatoria* is by its very definition unsuitable to become a general theory for the solution of concrete problems of conflicts law. By referring to the slow process of American "uniform legislation" and its questionable nature, he suggests that we must not rely too much on the *new law merchant* although unification of substantive law may be our best hope for a solution of the problems of conflicts law.[26] What we may expect from comparative law as the "third school", *e.g.*, a gradual harmonization of decisions, the *Entscheidungseinklang* (harmony of settlements), is according to *Rabel* still an idea remote from reality.[27] Yet it is somewhat too harsh to ban this idea to the realm of phantasy, as some authors do.[28]

It is an almost universally recognized fact that comparative law may contribute to the promotion of a harmony *(Einklang)* of opinions in matters of conflicts law. On the other hand, as far as a conflicts law theory capable of controlling and guiding practice is concerned, the fact remains that neither the *lex mercatoria*, nor the comparative law *Einklang* may be considered such a theory.

5. Among the anti-fundamentalists in the *United States of America* was *Currie* with his *governmental interests* to be enforced with *self-restraint*.[29] Accordingly the forum applies its own law, when it has a legitimate governmental interest. A disinterested forum may take recourse to the law of the country which had a reasonable governmental interest in the case. When there are several such countries, then the forum will either apply its own law, or decide under the law of the state with the stronger interest.[30] Critics have objected to *Currie*'s theory by asking, by what objective standards could governmental interests be assessed in a concrete case, especially when it comes to choose the *reasonable* interest among the governmental interests of foreign countries. *Reasonableness* and *legitimacy* were, critics have thought, as equivocal categories as the "vested rights", or the "most significant relationship" in the sphere of the connecting factors. Consequently the author of this theory too was found to be reasoning in a vicious circle. In the absence of some sort of *superlaw* eventually decision has to be entrusted to some sort of a concrete conflict rule, although the purpose of the theory was to become the solution of the conflict itself in cases where there was no adequate solution in living law. Consequently since "courts have in effect abandoned the concept . . . *Currie* had lost not merely a battle, but his war".[31]

[25] RABEL: *Verkauf*, p. 36.
[26] EHRENZWEIG: *PIL*, p. 60.
[27] RABEL: *Conflicts*, Vol. I, p. 94.
[28] LEWALD, p. 646.
[29] EHRENZWEIG: *PIL*, p. 61.
[30] CURRIE (1), pp. 357 et ssq., CURRIE (2), pp. 778 et ssq.
[31] EHRENZWEIG: *PIL*, p. 64.

In Europe, including the socialist countries,[32] another American concept has found attention, namely the principle of the *most significant relationship.* As is known it is that principle on which most conflict rules of the *Restatement Second* compiled by the American Law Institute[33] and those of the *Uniform Commercial Code*[34] have been built. To all appearance the principle of the *most significant relationship* is a modern and flexible expedient in the face of the rigid formulae of *leges contractus, delicti, domicilii,* etc. of the traditional order. Still the principle has two weak spots. Firstly, replacing an earlier modicum of certainty, the new principle opens the gate to a "cadi" administration of justice. "The *most significant* is what I think to be." The resulting confusion has already had practical consequences.[35] Secondly, this principle may be made one of legislation at most, as judicial decisions have already declared it to be.[36] Still for a settlement of individual cases this and similar principles could hardly be used.

Other theoretical concepts are the widely argued *principles of preference* of *Cavers*, which have to be discovered in the construction of the law of the forum, in approximation to *Ehrenzweig*'s counter-revolution in conflicts law.[37] Also *Leflar*'s *choice-influencing considerations* have attracted much attention. However, even their author qualifies these as *almost rules*, and therefore in the criticism of *Ehrenzweig* they may be considered but one of the elements applied in the interpretation of the law of the forum.[38] And this is almost the return to the more realistic theoretical approach, the transition from "revolution" to "counter-revolution".

III. A Realistic Expedient: Ehrenzweig's Theory

6. Where lies now that promise of the future, that theory building upon reality, which *Ehrenzweig* promised in his writings?

His own theory claims three merits. One is that it reduces the storm round "revolution -- counter-revolution" to the level of realities (*infra* sections

[32] Szászy: (2), p. 186. According to Szászy "in private international law the correct policy is to apply the law to which in the opinion of the legislator of the forum the legal relation is most closely related".

[33] A compilation of American private international law by the *American Law Institute;* see § 5 of the 1965 Draft and § 10 of the 1967 Draft; Ehrenzweig: *PIL*, pp. 66, 67; see in particular two relevant papers of Reese (List of References: Reese (1), and Reese (2)).

[34] The *Uniform Commercial Code* has also been drafted by the *American Law Institute*, with great success, since all states have acceeded to it. The conflicts rules, which rely on the *most significant relationship* are taken up in Sections 1 to 105; Ehrenzweig: *PIL*, p. 67.

[35] For a description of these see Ehrenzweig: *PIL*, p. 67.

[36] See *Dyn v. Gordon*, 16 N. Y. 2d 120, 209 N. E. 2d 792, 801 (1965). See Ehrenzweig: *PIL*, p. 67.

[37] Cavers, pp. 9, 90, 109—110 et ssq.; Ehrenzweig: *PIL*, pp. 68, 69.

[38] Leflar, p. 281; Ehrenzweig: *PIL*, p. 69.

7—11). Secondly, that it limits the extent to which the function of any theory may go (*infra* sections 12—15). Thirdly, that it points the path to a realistic solution (*infra* section 16).

1. What is new and what is old in the "revolution" of the theory of private international law?

7. To *Ehrenzweig* any concept which fails to provide concrete decision is mere intellectual play in the "Heaven of Concepts", *im Begriffshimmel* as *Ihering* called it. However, he deprives the "revolution" of its halo. His principal argument is that in the *Common Law* countries is only one quasi-revolutionary revolution, namely in the sphere of the law of torts. In other spheres, where practice has also made use of the terminology of "revolutionary" theories, it has become evident that the solutions have remained conventional.[39] In the sphere of the law of torts the principle of the *lex loci delicti commissi* has been deprived of its alleged predominance. As a matter of fact in both the *Babcock* and *Macey* cases the American court abandoned the traditional principle of *lexi loci* and held the defendant liable under the law of that state which better served the interests of the party suffering the loss and to which the court found the case more closely related.[40] This development of delictual liability in private international law encouraged only the "revolutionaries". In America the theories outlined above borrowed strength from this development, or, conversely provided the modernist weapons for the "revolutionary" formulation of the new practice.

8. The "traditional order", the *establishment* against which the "revolution" was directed, could be identified, in comparative private international law, with the name of *Rabel*. His name is mentioned at this point also in juxtaposition with that of *Ehrenzweig*, who, we believe is one of the foremost experts of the private international law of torts inter alia because he has also published monographs on the substantive law of torts.[41]

As mentioned earlier it was *Rabel* who formulated the widespread "traditional" doctrine most comprehensively. According to him "the principle

[39] This has become evident as regards contracts and trust, see EHRENZWEIG: *PIL*, p. 70.

[40] The two decisions: *Babcock v. Jackson*, 12 N. Y. 2d 373, 191 N. E. 2d 279 (1963); *Macey v. Rozbicki*, 18 N. Y. 2d 289, 221 N. E. 2d 380 (1966). The court in the latter case applied the guest statute of New York law also protecting the guest passenger, though the accident happened in Canada, whereas the passengers (driver and passenger) were New Yorkers and insured in New York.

[41] In addition to a number of papers in 1950 the rather significant monograph *Negligence without fault, Trends towards an enterprise liability for insurable loss* was published, which with its concept stressing insurance instead of liability for damages met with international, though by far not unanimous, reaction. For a second time the paper was published in *California Law Review* 1966. p. 1422 et ssq. See furthermore the paper referred to in Note 56.

unanimously established by the canonists and later the statutists since the 13th century and generally adopted today is that the *lex loci delicti commissi* governs".[42] Or at another place: "The advantages of the principle of the *lex loci delicti commissi* are strong enough to have secured to it an almost universal adherence."[43] These calm waters we disturbed by the "revolution" in theory and practice just described. In Europe *Morris* – the editor of *Dicey*'s "Conflict of Laws", this English manual of private international law of established repute[44] – urged the adoption of the notion of "proper law" to promote "new principles better fitted to contemporary needs".[45] The prairie fire spread rapidly over the parched vegetation of traditional theory. On the Continent *Binder*'s paper, *Zur Auflockerung des Deliktsstatuts*,[46] herals the loosening of the traditional universalism of *Rabel*, an analysis of which may be read in a recent study of *Ehrenzweig* published under the striking title *The Not So "Proper" Law of a Tort: Pandora's Box*.[47] The topic has created a stir even in Hungarian literature. In the paper in question the reader will find a detailed analysis of the concrete social and economic factors which even under socialist conditions dictate a relaxation of the principle of *lex loci*.[48]

9. However, in a historical and realist analysis *Ehrenzweig* puts the question as follows: Is the principle of *lex loci delicti commissi* in fact an ancient and universally accepted principle as *Rabel* contends? As a matter of fact *Rabel* too brought forward the statement that in liability law the principle of *lex loci* had obviously sprung up from a criminal law approach, i.e. a delict had to be decided in conformity with the law of the country in whose territory the offence had been committed. The question, namely, how an act qualifies legally, can be settled only on the ground of the law valid in the given territory or jurisdiction. This again, *i.e.* the public policy approach, conflicted with the spirit of private international law.[49] At present civil law liability trends not only to break away from the quasi-criminal character of admonitory torts, from the delict earlier calling for private punishment, but to develop into an institution overwhelmingly concerned with compensation. We must assume, therefore, that a uniform *lex loci delicti* with its roots in criminal law "delict" will soon become untenable. As a reasonable principle the *lex loci* may still survive in the sphere of so-called admonitory sanctions, where the disapproval of misfeasance and concerne with the tort-feasor are the principal considerations. But the so-called compensatory "sanctions" which do not rely on wrong

[42] RABEL: *Conflicts*, Vol. II, p. 235.
[43] RABEL: *Conflicts*, Vol. II, pp. 253, 254.
[44] See in the List of References: DICEY—MORRIS.
[45] See MORRIS, p. 881.
[46] See in the List of References: BINDER.
[47] See in the List of References: EHRENZWEIG (1).
[48] MÁDL: (2), in section on *Extracontractual liability*, pp. 314 to 317.
[49] RABEL: *Conflicts*, Vol. II, p. 254.

doing and where the element of admonition is further dimmed by the mechanism of insurance (liability for hazardous activity and hazardous products and processes and its appearance in conjunction with the general or compulsory liability insurance), exclude a principle reference to a uniform *lex loci delicti commissi*. Here other factors, wholly independent of the human attitude responsible for the loss, may become relevant like the existence of insurance, the insurability of liability, the limitation of damages, liability to a member of family or passenger by courtesy (guest statute). Indeed, *Ehrenzweig* maintains that the *lex loci delicti commissi* has never been an exclusive principle of tort law.[50] *Smith* demonstrates on what *Ehrenzweig* relies, namely that for neither *Bartolus* nor *Savigny*, or even for *Wächter*, the *lex loci actus* was a by far unanimously solved problem of tort law. *Bartolus* settled the problem of torts as a quasi-criminal problem in conformity with the law of the forum, without soliciting conflicts law for a reply. Hence it is not at all true that as many would hold owing to the criminal law approach dominating in this sphere, in all cases the principle of *lex loci delicti* was predominant, even when it was true that in the field of non-compensatory sanctions the criminal law approach was and had remained the life and soul of the *lex loci* principle.[51] When we assume that an autonomous institution of civil law liability as distinguished from criminal law took on definitive shape only in the epoch when the great capitalist codes were compiled, *i.e.* in the 19th century, then no general conflict rule could have existed for civil law liability, because a general civil law liability institution did not exist either. This is pure arithmetic. The principle of the *lex loci delicti* as a universal doctrine, by far not with exclusive validity, could on the pattern of the *lex loci contractus* be integrated into the structure of legal reasoning tending towards comprehensive principles only in modern legal development.[52] This and no more is true of what the partisans of the "revolution" maintain. The *lex loci delicti* is not an ancient institution and in modern law it has never been exclusive.

10. What then is new in the *Macey* and *Babcock* cases? In tort law an intrinsic tension has arisen in the development of modern mass production and mass communication owing to uneven development, however, mainly owing to the unequal legal regulation and the inequality of standards. The tension manifests itself mainly in a differential formation of the financial interests in each case, owing to the differential standards of the legal systems figuring in the actual legal relations. The *lex loci delicti* is incapable of relieving

[50] EHRENZWEIG: *PIL*, p. 71.

[51] SMITH, pp. 450 to 452.

[52] The first civil codes which introduced a purely civil law system of liability were the French *Code civil*, in the 19th century, and with a somewhat feudal trait the earlier *Preussisches Landrecht*. For the historical evolution of civil law liability see MÁDL, F.: *Delictual liability* (Budapest, Publishing House of the Hungarian Academy of Sciences, 1964. 620 p.; particularly the section on the institution of delictual liability in the age of classical capitalism, pp. 339 et ssq).

this tension. The site where an act has been committed is fortuitous. The *lex loci delicti* cannot be accepted unless both the material conditions and the *compensatory order* of liability are at least roughly uniform. But in that case there is no need for conflict rules. Thus the gates have been thrown open to the consideration of each case. This is an "adjustment of established law to new needs by evolution rather than revolt".[53] A "revolution" has been stirred up by "revolutionary" theories, which in practice have proved to be a *Pandora*'s box. The principles of the *most significant relationship* and of *governmental interests*, and all others, when used to dethrone the *lex loci delicti*, have turned pretenders and have sought to become principles. The absurdity of this tendency was soon confirmed by the resulting chaos and uncertainty of law. It was not by mere chance that matters turned out this way, the contradiction was quite straight-forward in particular when we remember that these norm-promising doctrines operated with categories almost as elastic as the interests of the governments or the legal systems concerned, the justifiability of these interests, their weighing and comparison, the weighing of the relationships according to their significance, and so on.[54]

11. What doctrine, what generally recognized principle should then be approved? None. How then should we go on? One answer could be a structural realignment of substantive law. According to *Ehrenzweig* such a realignment implies, under the coercive effect of mass production and mass communication, the replacement of the mechanism of damages under liability law by the insurance mechanism in as generalized a form as possible.[55] *Ehrenzweig* had explained this opinion in other works, and in this connexion he refers to it once more.[56] As long, however, no generally valid conflict rule can be constructed, he would proceed in two stages. In the first stage he would abandon doctrinaire and dogmatic language, categories and formulation of the various misleading "theories". The second stage is *Ehrenzweig*'s forum theory.[57]

2. *How far can theory go?*

12. A reply to this question will be found in *Ehrenzweig*'s work, in the chapter *The Theory of this Book (Evolution)*, and in the sub-chapter *Areas removed from a priori theory (lex certa lata)*.[58]

The first thesis of the author postulates the application of a foreign relevant *individual legal rule* rather than that of the foreign legal system, even

[53] EHRENZWEIG: (1), p. 2.
[54] EHRENZWEIG: *PIL*, p. 75.
[55] EHRENZWEIG: *PIL*, p. 74.
[56] See the work in Note 41, further *Full aid; Compulsory "hospital accident" insurance: A needed first step toward the displacement of liability for "medical malpractice"*, University of Chicago Law Review, 1964. pp. 279.
[57] For its description see Chapter III, section 27 of this paper.
[58] EHRENZWEIG: *PIL*, pp. 75 et ssq.

when this rule has to be taken into account as embedded in its own legal system. This approach at the very outset eliminates the wrangling round *renvoi*, and reduces the theoretical thesis declaring that in private international law allowance has to be made for *governmental interest*.

13. According to the second thesis of the author a foreign legal rule has to pass through a set of filters before being applied. In the first place there are binding cogent rules which cannot be set aside. Then there are *moral data*, such as *reasonableness*, *equity*, reproachable conduct, *negligence*, *bona fides*, *good seamanship* in admiralty law, and so on, which, in whatever sense these are ever accepted, each forum will define and construe by its own scale of values. *Construction* and *characterization* too take place in the order of values of the forum, and this order is exceeded in exceptional cases only. The law of the forum is applied also by way of reference to *public policy*. In the light of statistics it will be evident that owing to an identity of foreign and domestic law the forum will to a considerable extent apply domestic law even when and where it believes that recourse has been had to foreign law. In fact "these cases did not present a conflict of laws". [58a] And this was also the case in the maze of examples quoted in *Ehrenzweig*'s great manual (Treatize), where in about ten thousand cases reviewed the fora applied domestic law in the disguise of foreign forms in about ninety per cent of all cases.

14. The third thesis declares that reality will preclude the practical application of any theoretical thesis of conflicts law even where foreign law has been applied, because no other law could be applied. As a matter of fact certain problems must be settled in conformity with the legal and other facts of the site of a foreign occurrence. Whether or not American nationals or other aliens enjoy equal treatment with Soviet nationals in the law of succession in the U.S.S.R., as required in several American states, can be decided only on the ground of Soviet law and Soviet practice.[59] Whether or not a person has infringed traffic rules of Saudi Arabia and is therefore liable for damages, can be settled only on the ground of the traffic rules of Saudi Arabia and the concrete Saudi Arabian facts at issue.[60] This is the so-called theory of *local data*, according to which certain questions have to be settled without a resort to a choice of law, on the ground of local facts, legal and other.[61] I shall come

[58a] EHRENZWEIG: *PIL*, p. 86.

[59] EHRENZWEIG: *PIL*, p. 84; in particular see the decision of the Supreme Court of California in the *Larkin case* (published in Pacific Reporter: 416 P. 2d 473, the California Reporter: 52 Cal. Rptr. 441), owing to its Hungarian bearings to be discussed in greater detail *infra*, section 27.

[60] In this connexion he refers (EHRENZWEIG: *PIL*, pp. 84, 178) to the decision in the Saudi Arabian case, where the principle of *local datum* should have been applied: *Walton v. Arabian-American Oil Co.*, 233 F. 2d 541 (2d Cir 1956), cert. denied 352 U. S. 872 (1956).

[61] EHRENZWEIG: *PIL*, p. 83.

back later to this problem (see section 27, *infra*). I belive, however, that here, too, a conflicts rule is in operation.

15. It is only after proper allowance has been made for all these circumstances that we may eventually be confronted with a conflicts problem. However, even here a living *lex lata* rule — *i.e.* formulated statutory or non-formulated judge-made rule may exclude theoretical discussion. Conflicts law theory cannot figure as real and adequate guide line unless in the sphere where there is no settled rule.[62] Only where there is no such rule the various notions of connecting factors, of legislative jurisdiction and other theories *may* have relevance. This is the narrowly limited area to which *Ehrenzweig* relates his forum theory. "It is within this narrow compass that I have advanced my own 'theory' ", he says and adds that he prefers to call it forum approach rather than forum theory.[63]

3. The theory: all roads lead through the forum

16. Now as regards the theory proper *Ehrenzweig* has formulated for the *lex incerta et ferenda*, a definition more exact than that of the author cannot be offered. Accordingly: Unless application of a foreign rule is required by a settled (formulated or non-formulated) rule of choice, all choice of law should be based on a conscious interpretation *de lege lata* of that "domestic rule" which either party seeks to displace (as a matter of fact when the parties unanimously insist on the application of a domestic rule, the problem has ceased to be a problem at all, FM). If that interpretation does not lead either to the dismissal of the suit or to the application of a foreign rule, the forum rule, in a proper forum, applies as the "basic" or as I prefer to call it, the "residuary" rule, as a matter of "non-choice".[64]

In addition to others at least two points will be evident from this definition. *One* is that the construction of the *lege lata* rule concerned is the pivot round which the whole process turns. The *other* point is that nevertheless the forum may prefer the application of a foreign legal rule. And here again two consequences are evident. *First* that even in that case the interpretation of a *lex lata* rule of the forum is the legal channel, through which the forum applies foreign rules. In the *second* place in this process there may still be a chance for the unfolding of the multiplicity of considerations and opinions which theoretically postulate the application of foreign law, such as the theory of the *better law*, *Schnitzer*'s "spezifische Leistung", the *centre of gravity*, the

[62] "Only where our quest for a formulated or non-formulated (true) rule of choice has failed are we entitled and called on to offer new suggestions based on Conflicts theories developed a priori independently from positive precepts." EHRENZWEIG: *PIL*, p. 90.

[63] EHRENZWEIG: *PIL*, pp. 90, 92.

[64] EHRENZWEIG: *PIL*, p. 93.

result-selective law, the *lex validationis*, and so on. One may even question whether one has not come back to the point whence one has set off, i.e. to these various anti-forum theories. I believe this is not the case, and if we adhered to the laws of logic then we could not free ourselves of *Ehrenzweig*'s "truth", we could not tell him that we are again where we were before, inasmuch as the value system of the forum is the keeper of the process, of the gate. This is the keeper who admits the various theories, or bars their path. Undoubtedly this differs from a theory to which one of the anti-forum theories is the starting point, the gate-keeper; in this case the *lex fori* could come into play only as one possible solution.

Against *Nussbaum*'s metaphor according to which owing to the increasing strength of the forum approach in practice, private international law, though purportedly relying on the application of foreign law, is determined by a homeward trend (Heimwärtsstreben), *Ehrenzweig* prefers the metaphor of a trend to stay at home (zu Hause bleiben).[65] He denies that in reality either the judge, or our legal thinking returns from the sphere of foreign law to domestic law. On the contrary, we live in our own system of values, we think in its categories, and it is thence that occasionally we step over to the paths of foreign law. This has always been the case and has remained so today.

This is where we are: it is the policy of the forum, its moral, legal, economic and political scale of values which might become the standard of a *lex ferenda*. Thus, the policy of the forum in the sphere of civil liability requires special attention to changes in the economic and legal structure in this area. Mass production and mass communication as well as insurance have shifted the stress from the individual conduct to guaranteed compensation. It is these facts rather than some sort of a "legitimate governmental interest", or the "most significant relationship", or other incomprehensible theoretical category, which will lead us to new solutions of problems of private international law. In comparison to this any theory will become a secondary consideration only, and — when it wants to be realistic and for considerations of the wholesome intrinsic harmony of the law, reasonable — justified as much as it is good enough to provide the optimum formulation. The essence of this formulation depends for each country upon the concrete form the effective norm, whose antiquatedness has just been discussed, will take on.[66]

IV. What may be said of these Theories?

17. Although *Ehrenzweig*'s theory is conclusive enough, much remains to be said. The first of the critical remarks this author advances is for that

[65] See NUSSBAUM, pp. 38 et ssq., EHRENZWEIG: *PIL*, p. 104.

[66] For better, more realistic solutions in concrete American cases see EHRENZWEIG: *PIL*, pp. 69 et ssq., and EHRENZWEIG (1), p. 1 et ssq.

matter one made in a positive sense. As a matter of fact this remark applies to the opinions in socialist legal literature concerning the gathering strength of the forum approach. In the conviction of the present author namely the forum approach calls for an appraisal which is to be more exact than that earlier developed in the socialist literature. Until of late in socialist literature roughly the thesis dominated that the forum approach was a tool in the hands of capitalist monopolies in their competition with economically weaker partners and hardly anything else.

There is no doubt that in economic rivalry large monopolies may make use of all possible means to reinforce their position, to weaken that of the competitors. And in certain cases one of these means is the application of domestic law. But it is unlikely that this is the only explanation of the growing strength of the forum approach, this "homeward trend" of *Nussbaum*, if for no other reason than that this trend is a fairly general one. As *Ehrenzweig* has demonstrated beyond doubt, both legislators and the judges incline to the application of domestic law from the very outset, *e.g.*, by making reference to public policy, imperative domestic rules, other obstacles to the application of foreign law, the notion of the choice of the forum as equivalent to a choice of the law, and *renvoi*. The members of the Judiciary have been trained in this understanding. Often the court watches out more effectively over the domination of its own legal system than the legislator himself, who through the rules of private international law, at least presumptively, releases the judges from their oath taken to their own law. This will hold true in particular in countries where in private international law customary law is predominant, as *e.g.*, in Hungary. In Hungarian practice the courts often settle disputes as if these were from the very outset governed by domestic law. Often the conflicts question is not even raised. The conflicts law position, *i.e.* the *lex fori*, is in the majority of cases concealed in the judgement only by way of implication. This almost immanent homeward trend of private international law cannot in principle and in the opinion of this author cease to exist, unless the functions of the court are taken over by some sort of an institutionalized super-national forum within the framework of co-operative activities, such as the International Court of Justice at the Hague, or the court of the Common Market in Luxenbourg may be mentioned as examples.

The preference of large enterprises for the application of their own domestic law is a phenomenon of many facets. Above all it is the expression of the intention to dominate the market but also of the conviction that the own domestic law always affords greater safety than the unknown external law, in many cases simply because that law is insufficiently developed. This will frequently be the situation when manufacturing plants are to be sold and installed abroad or goods to be sold and delivered to undeveloped countries. The private law system of these countries is often undifferentiated. In such

and similar cases the application of the law of the supplier will be almost inevitable. A solution nearly equivalent to this is the almost self-regulating contract, going into minutest details, the content of which is in the first place defined by the supplier. Although the adaptation of the standard contracts of the European Economic Committee of the United Nations, the so-called General Conditions,[67] in principle reinforce the position of the weaker party, still as for the content the difference is insignificant. These General Conditions are in their essence integrated summaries, differentiated for the particular types of contracts, of the developed capitalist legal regulations. The weaker party would fare well if in an almost self-regulating contract he could stipulate terms in their minutest details as favourable as possible, or agree on the law of a neutral country governed by a highly developed legal system.

On the other hand in a deal between two capitalist countries legal regulation will be fundamentally uniform. The stronger monopoly will namely favour the seller's law. In view of the abundance of supply the buyer may relatively easily guard against the stipulations of the selling stronger party by accepting the offer of another party promising better terms. Usually it is not the legal burdens or benefits which determine the fate of a deal, but rather business and financial considerations. The law of the seller loads the delivery so to say as a natural companion. This is today the general trend. The endeavour to apply the seller's law, finds expression also in the "blueprint" export contracts of the socialist countries. In general one of the final clauses stipulates application of domestic law and settlement by a domestic forum. Actually this is the general tendency at the sale of mass production goods.

To sum up, the statement may be advanced that the forum approach, the prevalence of domestic law over the network of conflict rules has become general and almost natural peculiarities of private international law. By itself this tendency implies no risks. Only the harmful application of this approach can be objectionable. There are several ways to enforce such a policy. In the first place the legislator or the Judiciary may declare the law of the forum to be absolute and enforce this law within a wider sphere than would appear to be justified. This will lead to provincialism, and may be detrimental to both nationals and aliens. Another and often practiced method is the one by which

[67] Such are 1. *CG pour la Fourniture à l'Importation et à l'Exportation*, 1957. II. E. (Mim 3.); 2. *CG pour le Montage à l'Étranger des Matériaux d'Équipement*, 1963 (Publ. des NU, No. de vente: 64. II. E. (Mim. 22); 3. *CG pour la Vente Internationale des Agrumes*, 1958 (Publ. des NU, No. de vente: 58. II. E. (Mim. 12); 4. *CG pour l'Exportation et l'Importation des Combustibles Solides*, 1958 (Publ. des NU, No. de vente: 59 II. E. (Mim. 1.); 5. *CG de Vente: à l'Importation et à l'Exportation de Biens de Consommation Durables et d'Autres Produits des Industries Mécaniques Fabriqués en Série*, 1961. (Publ. des NU, Not. de vente: 61. II. E. (Mim. 12); 6. *Contrat pour la Vente Céréales* No. 7. A. B. No. 8 A, B, 1961 (Publ. des NU, No. de vente: 62. II. E. (Mim. 30. Partie 7A, B, 8A, B). These general agreements have several earlier versions and even those of today cannot be considered definitive.

the large monopolies may through domestic law drive the weaker partners into a defenceless position when for want of a better offer, or for any other reason, they cannot choose a better supplier. The situation may become particularly detrimental for the weaker party, when the law of the country of the stronger party grants an unrestricted preferential position to monopolies. This is the case, when, *e.g.*, the law merchant of such countries are vague, or are interwoven with elastic clauses, which then the holders of large capitals can exploit for their benefit at their pleasure. A third manifestation of the absolutized forum approach is implied in deliveries of goods made, or services rendered, by large concerns (*e.g.*, air transport) to countries whose liability standards or liability laws are on a higher level than those of the country of the monopoly. In this case the monopoly will retire behind the defences of its own legal system if possible, by applying the law of the forum. However, as we have seen, it is in this very sphere where by an appropriate modification of the principle of the *lex loci delicti* directed to human conduct, or as *Ehrenzweig* advocates by a novel solution in favour of the *better law* in order to guarantee the best possible settlement of the concrete dispute.

18. The following critical remarks are directed against *Ehrenzweig*'s forum theory. There is something wrong in this theory, something that *Ehrenzweig* believes is its merit. What is wrong in the theory is that it can hardly be used for a purpose other than the one for which its author offers it. In a logical and clear-cut train of thought the author makes it clear that the judge should listen to him only when there is no other legal thesis or norm, statutory or judge-made, or when in the conviction of the policy of the forum the judge-made rule calls for an explanation. From this doctrine two things follow. In a legal system which basically relies on statutory law, like the socialist system nothing can be done with this theory. Obviously one cannot enjoin the legislator to start from a *lex lata* construction of the forum when the legislator is about to draft a code of private international law. This is equally true for a codification on an international scale, *e.g.*, the *Hague Conference*. Where a conflicts rule is to be shaped by a legislative process, there the need will arise for a theoretically established comprehensive notion. It is altogether different question, whether there is in every respect a practicable theory, or whether such a theory can be worked out at all. However, a reply to this question would go beyond the framework of this study. Also it is a different question, again one to be discussed in another paper, whether a comprehensive statutory regulation is called for at all in the international sphere. *Ehrenzweig* doubts this.[67a] But we have to consider the facts that for one reason or another

[67a] He formulated his doubts in his remarks on the new Italian draft code of private international law: "Codification in this area must fail insofar as it exceeds the regulation of highly specific questions; because private international law is not a "legal subject" accessible to systematic treatment as a whole. Analytically speaking, in the absence of a superlaw (treaty or international custom recognizing a priori competences) conflicts

several countries have entered upon the path of statutory regulation. When theory adopts the position of simple negation, then in these countries bad will turn to worse. It is a fact, writes Professor *Szászy*, that the socialist legislator too will have to start from some sort of a rational principle.[68] We believe it would be welcomed, if he started from the principle of peaceful coexistence, or from the principle that private international law is the channel to regulate the activites (goods or passenger transport) directed to co-operation for an international division of labour. It would also be a benefit, if in this sign the socialist legislator created legal institutions with an adequate flexibility for activities. Obviously the principle of regulation best suiting the nature of a legal institution of substantive law would be as practicable as *Schnitzer*'s "spezifische Leistung",[69] which *Ehrenzweig* fails to mention, or the tendencies (the international experiences) taking shape in comparative law, or the interests of foreign governments. Still this is not yet a theory. Obviously an all-embracing theory has to be related to a concrete legal system to judicial opinions, and to national traditions. Such a theory deserves a book for itself. Still the justification of these tendencies cannot be argued. Even *Ehrenzweig* writes of the *Entscheidungseinklang* of comparative law as potentially useful[70] and judicial practice favours the principle of the most significant relationship.[71]

19. Yet another remark. It is an almost general understanding that privat international law is an autonomous discipline relating to a specific scope of law. It follows that private international law must have certain general principles and a definite comprehensive theoretical system. It is though true that to a certain extent this is defined by the underlying social and actual legal relations, in particular as far as the external framework and the internal structural build-up are concerned. Still even beyond this the filling of private international law with flesh and blood, or with a dynamic content in conformity with the one notion or the other, or a theoretical display of the totality so created, from the social and economic factors down to the last technical rules, or its theoretical formulation, are tasks of jurisprudence, the right and at the same time the duty of the tillers of jurisprudence. *Ehrenzweig* himself limits the forum theory to legally virgin fields. As an all-embracing theory it is therefore out of the question. A theory with a claim to comprehensiveness has to be suitable for an extension to all essential institutions and principles of a given sphere of law. Whether there is such a theory at all, or whether one

solutions can be derived only from the interpretation of each substantive rule of the forum whose application or non-application is sought because of the presence of a foreign element." See *Prospettive del diritto internazionale privato.* Un Simposio, Parte II. Osservazioni alla relazione e al progretto di legge. Osservazioni del Prof. Albert A. EHRENZWEIG, pp. 301 et ssq.

[68] SZÁSZY (2), pp. 183, 185 et ssq.

[69] SCHNITZER: Vol. II, pp. 643, 644.

[70] EHRENZWEIG: *PIL*, pp. 59, 60.

[71] EHRENZWEIG: *PIL*, p. 60.

can be shaped, and whether this theory, if any, may consist of a single thesis only, such as the *principle of coexistence, governmental interest*, the *most significant relationship*, the *Entscheidungseinklang*, etc., are altogether different questions. One thing is certain, namely that we have to descend to the level of facts and institutions. I believe that the theories setting out from the above-mentioned, or other, much argued, theses, were not formulated by their authors exclusively, moreover not in the first place, to be applied to individual, quasi-judicial settlements of concrete legal problems not yet brought under regulation, but to private international law as a whole. Therefore *Ehrenzweig*'s criticism will hold only once the various theses the attacks have failed to stand the test in the virgin fields here referred to. This failure, on the other hand, does not bar these theories to represent comprehensive theoretical postulations of the evolution of private international law in the given country. On a careful reflection each theory, *i.e.* the *principle of coexistence*, *neo-comity*, *governmental interest*, the *most significant relationship*, the *Endscheidungseinklang*, the *spezifische Leistung*, the *better law*, will support a gradually liberalizing practice, and promote the desired goal, to have the courts in addition to national interests respect each significant element of the legal systems involved, of international experience, and of reasonable human and economic needs. We believe that this thesis does not conflict with *Ehrenzweig*'s theory. As a matter of fact, from the viewpoint of the forum's policy he wants the same, namely a practice of the administration of justice subservient to improved relations among the various countries. Perhaps it is not even necessary that, as he says with *Cavers*, in vast areas of the law settled case law should preclude theory from advancing general postulates.[72] This is true partly because it is almost unimaginable that lawyers should at one stroke forget all they have so far read of private international law. Secondly, and this is a question of fact, the better known theories have operated towards a more liberal practice, *i.e.* one which has enlisted the approval also of the forum theory and which has greater respect for the new developments in economic, social and international life. It is an altogether different question whether evolution must and could be achieved reasonably only through an intrinsic metamorphosis of the policy of the forum and by guaranteeing the internal order of positive law. However, the positive effect cannot be reasoned away from theories of a positive trend, when their intrinsic charge is really positive.[73] Hence the general theoretical concepts and postulates have their justification, partly in building up a general theory of private international law, partly in shaping the attitude of the practice.

[72] EHRENZWEIG: *PIL*, p. 68.

[73] Essentially this is recognized also by EHRENZWEIG: *PIL* pp. 65, 69, when he says that governmental interest may also be a consideration helping a correct choice of law, i.e. a so-called *choice-influencing consideration*.

All this does not alter the fact that *Ehrenzweig*'s forum theory is one permeating private international law as a whole. Whether private international law be codified or not, life will always give birth to legal problems which have not been brought under regulation by either a statute or a judge-made rule, and which cannot be settled except under *Ehrenzweig*'s doctrine. This is the case in particular when it is borne in mind that the majority of international agreements of substantive law in a number of cases refer to the domestic law as the secondary law in the background. This reference to domestic law emphasizes the significance of the law of the forum even in spheres brought under regulation by international law.

20. Finally a remark on *Ehrenzweig*'s conclusions as to the *lex mercatoria*, or rather to the unification of substantive law. The fact remains that most schemes on the agenda will mature slowly. The remark that the American *Uniform Commercial Code*[74] too was making slow progress only, does not sound too convincing. Partly because the Uniform Commercial Code has been accepted by all states, partly because the legal structure of most civil law countries is unitary rather than federal so that the constitutional problems besetting the United States will be absent. We abstain here from quoting statistical returns on the number of international agreements of private law nevertheless in force, and of such as are in the drafting phase. A Hungarian author will have greater faith in the reality of international legislation, in *Rabel*'s scheme, than anybody else, if for no other reason than that of national pride. It is a well known fact that on the initiative of Hungary, under the auspices of the United Nations an inter-governmental scheme for the development of international trade law has been launched on a world-wide scale.[75]

Finally I believe that the approach and programs of *Rabel* and *Ehrenzweig* can be comprehended as mutually complementary ones. This will bring us to the last chapter of this study. In general, *Ehrenzweig* does not deny this either. Moreover, as we have quoted him, he believes that "perhaps conflicts removal through the unification of internal law is our best hope".[76] However, before this has been achieved realistic and liberal legal solutions have to be sought for. This is where *Ehrenzweig* would like to lend his asistance. The *oeuvre* stands completed. The *opus magnum* is here. Its value will only rise with the lapse of time. Not only as a theoretical creation provoking scientific reconsideration, but in many respect as a source of realistic alternatives. Good examples to convey an idea of the character of this evolution are the

[74] EHRENZWEIG: *PIL*, p. 60.

[75] UN Committee on International Trade Law, UNCITRAL. See USTOR, E.: *The progressive development of international law and the UNO*. Acta Iuridica, 1—2/1966.; F. MÁDL, *Foreign trade monopoly. Private international law*. Budapest, Publishing House of the Hungarian Academy of Sciences, 1967. p. 18 et ssq.

[76] EHRENZWEIG: *PIL*, p. 60.

two decisions (the *Sabbatiano* and the *Larkin* case), which will be discussed in another connexion.[77] These two decisions will demonstrate what the author would like to promote with his ideas.

V. Ehrenzweig v. Rabel in Private International Law. Requirements of Reality in the Second Epoch: a few Examples

(Western Appraisal of Certain Theses of Socialist Law of Ownership and Succession)

21. At first glance this complex title may sound queer. Yet what follows here will perhaps justify it. As a matter of fact, by the tentative comparison suggested by the first part of the heading, its reference to the title of this study, we should like to make it clear that today one of the decisive criteria of realism is the way authors take note of legal systems of countries with a different social order and how they can thus become the architects of reasonable international relations. For a full presentation of the picture *Ehrenzweig*'s "realistic expedient" requires illustration, to qualify his comparative *Private International Law* as a counterpart of *Rabel*'s work.

22. We have tried to make clear (*supra*, sections 1, 2), that *Ehrenzweig*'s approach with the light of present historical realities is more realistic, and one is tempted to say, unfortunately, more modern than *Rabel*'s programme. Unfortunately in the sense that the idea of *Rabel*, which expected rapid post-war international co-operation and fast international legislation was not borne out by reality.

23. The second element which raises *Ehrenzweig*'s work to *Rabel*'s level is its more theoretical character. With both its historical background and criticism of earlier and modern theories, it is theoretically more solid; in its theoretical understanding it relies more on the criticism of reality than its predecessors; indeed it devotes a separate volume, an entire theoretical monograph, to the general part of private international law. It is a known fact that the general parts constitute the lion's share of theoretical problems. *Rabel* offers a fourth only of the theoretical matter of *Ehrenzweig*, and even this in a descriptive form. He does not even intend it to be a true theoretical foundation of private international law. Of the five parts of *Rabel*'s first volume, by the side of persons, marriage, invalidity of marriage and divorce, parental relations, there is one which deals with problems reckoned as theoretical. After a circumscription of the framework of the subject-matter first a historical-literary survey follows, partly broken down by countries, in a selective form; he goes to a sufficiently comprehensive analysis only as far

[77] See Chapter V, sections 26, 27.

as the United States, France, Germany and Italy are concerned. The chapter on the sources is of necessity descriptive. This part is followed by one on the structure of the conflict rules, with a summary of the connecting factory, by clauses. Then follows a single theoretical chapter only. The subject-matter of this chapter is the evolution of private international law, implying the scheme *Rabel* has already exposed on international legislation, the desirable shaping of uniform conflict rules, and the internationalization of private international law.[78] Only these two chapters may be considered being of a truly theoretical nature. *Rabel* himself writes of his critical theoretical approach, that "I have also restricted my own critical appraisals, and I have doubted whether any recommendations for the future should be added".[78a] *Ehrenzweig*'s *General Part* of several hundred pages is a wholly theoretical monograph of a fundamental character. We have already seen in what sense, and with what wealth of theoretical problems *Ehrenzweig* has written his work, although by far not all parts of the volume have been discussed here.

24. However, there is a flaw in *Ehrenzweig*'s comparative *Private International Law* as compared to *Rabel*'s four large volumes. Namely so far only a single volume, the *General Part*, has been published. Before the *Special Part* will have been published, *Ehrenzweig* cannot compete with the enormous mass of information massed up in the special parts of *Rabel*'s work. He cannot present the advantages and benefits of a systematic manual, which is particularly desirable for a comparative treatize.

Of course we cannot predict when *Ehrenzweig*'s *Special Part* will appear, and what it will contain although certain conclusions as to its standard may be drawn from the *General Part*.

25. What can *Ehrenzweig*'s *General Part* offer as a preview of the missing *Special Part?* We believe fairly much. Namely that in a theoretical generalization he states essential elements of American law and occasionally also of other legal systems. His Table of Cases, *e.g.*, in addition to dozens of French, German, Italian, etc. cases, enumerates several hundred American leading cases relating to practically all of private international law. Nobody should be misled by the want of an index of legal rules. This is not very unusual in an American work on law (although there is one in *Rabel*'s). It is characteristic of the case-law or pragmatist American approach that law is primarily what is contained in judicial decisions.

Pars pro toto, we should like to give two interesting examples of the work which ordinarily would have developed in a special part. The one is the *Sabbatino case*, the other the *Larkin case*. These cases are of interest because they are a demonstration of how the author has integrated reality into his theoretical structure. Furthermore, these cases are of interest because they

[78] RABEL: *Conflicts*, Vol. I, pp. 3 to 105
[78a] RABEL: *Conflicts*, Vol. I, pp. XXIII, XXIV.

bear testimony to the scale of values the author and American private international law have set up in certain concrete and current questions of significance.

26. In the *Sabbatino case* the Supreme Court of the United States adjudged money claims for a Cuban enterprise previously owned by the plaintiff shareholders living in the United States, but since transferred to national ownership, to the Cuban defendant. The Supreme Court rejected the argument of the plaintiffs that the discriminatory expropriation of the property of nationals of foreign countries without a compensation infringed upon international customary law, an argument which had been admitted by the lower courts of justice. The Supreme Court based its decision on the *act of state doctrine*, according to which United States courts could not challenge the validity of the acts of foreign sovereigns. American courts could do so only by virtue of a declaration of the Government as the competent federal agency to such effect. Still in the present matter the Government declared that nationalisations in Cuba were not discriminatory against United States nationals, and therefore could not be considered infringing international law.[79]

How did the case happened to be taken up in Ehrenzweig's theoretical monograph, beyond the fact that he makes clear the new position of American positive law in the question with remarkable precision? The case has been discussed once in the section on the sources of law, where the author makes it clear to what extent international custom can or cannot become the source of private international law.[80] Secondly the case is mentioned in connexion with the problem whether the matter was one of state or federal conflicts law. The author explains that in conformity with the new thesis of private international law confirmed by the holding of the Supreme Court in the *Sabbatino case*, an issue of this type is one coming within the sphere of sources of federal level. In relation to the socialist and other non-capitalist countries, the author states, that the decision in the *Sabbatino case* "has opened broad vistas of national law-making in international conflicts".[81] Furthermore he declares that in the light of the new decision the validity of a number of earlier decisions on the state level may now be questioned which confirmed the so-called "Iron Curtain Rules" *i.e.* rules which in socialist countries have always been considered discriminatory. *Ehrenzweig* points out that it is "fundamental to our constitutional scheme that in dealing with other nations the country must speak with a united voice". When we now add to this the hope of the author to have contributed with this work, the comparative method and the modern

[79] The decision was published in U. S. Reporter: *Banco National de Cuba v. Sabbatino*, 376 U. S. 398 (1964). For a detailed analysis of the case see *The aftermath of Sabbatino*, Background Papers and Proceedings of the Seventh Hamarskjöld Forum. New York, Oceana, 1965. p. 228, X.

[80] EHRENZWEIG: *PIL*, pp. 31, 32.

[81] EHRENZWEIG: *PIL*, pp. 36 to 40, 37.

approach to private international law, to the better interaction of the various legal systems, then it will stand to reason that the theses of private international law now outlined and their scientific exposition, bear witness for the decency of a science which operates towards a positive *dénouement*.[82]

For that matter after a period of faith in co-operation, which unfolded itself as the aftermath of the Second World War, and after the phase of the cold war which frustrated the not wholly realistic hope of *Rabel* for international unification, this example demonstrates how in the era of coexistence tending towards reality, new problems may approach a solution.[83] The *Larkin case* may be put in the same light as one which has produced a solution very much the same as the Sabbatino case, this time in the field of the law of succession. Destined to be a manifestation of the spirit of *Rabel*, the unification on an international plane of one or the other aspect of the law of succession reached the drafting stage a long time ago.[83a] Unfortunately the date on which this draft will become effective is still remote. Especially international legislation solving the problem raised by the *Larkin case* is still in the distant future.

[82] EHRENZWEIG: pp. 9, 37.

[83] It is another question — a deplorable fact which, of course, Ehrenzweig cannot be blamed for — that under the pressure of conservative forces Congress by the *Hickenlooper Amendment* practically set aside the decision of the Supreme Court, while the case was returned to the District Court for action, in accordance with the Supreme Court decision. The Amendment declared that the courts could examine the international law bearings of a case and that the courts were not barred from such an examination by the *act of state doctrine*. Although this did not mean that the courts had to decide against the Cuban party, still the law was construed in this sense, and decision was taken accordingly. See *Banco Nacional de Cuba v. Farr*. 243 F. Supp. 957, a ff'd. 383 F. 2 d 166; 36 L. W. 104; the name of the Sabbatino case is now *Farr case*. The Department of State this time did not lodge a protest and all that now can happen is that the Supreme Court might once again give judgement in favour of the Cuban plaintiff, however, this time by considering the merits of the principles of international law, declaring that there is no such general positive law rule of public international law as would preclude Cuba from turning over to national ownership enterprises within the compass of her jurisdiction. Whether or not this will be the case we shall know in about a year hence. In any event the Supreme Court will be hard put to it, and exposed to a strong political pressure from the right.

The Sabbatino case, with its first positive, and now with the not yet definitive negative decision is an indication of how in fact the inner mould of the policy of the forum, its evolution, is decisive in some of the principal sections of private international law. Still it is reassuring that the positive decision has been approved by learned circles, including the positive reflections of Ehrenzweig, and that in the actual situation great authorities have expressed their views that the new development in the case is both logically and politically unreasonable and deplorable. So, *e.g.*, L. Henkins, professor of international law at Columbia University, by pointing out the legally weak spots of the *Hickenlooper Amendment* and the practice that has sprung up in its wake, says " . . . there was not merely a reluctance to take a new, small step towards international cooperation, but the destruction of one small piece of mutual respect between nations that what the Supreme Court said was law in the United States"; see the lecture given by HENKINS, L.: *Summary of Remarks by Professor L. Henkins*, Hamilton Professor of International Law and Diplomacy, Columbia University Law School before the American Foreign Law Association, December 6, 1967 on the *Reversal of Sabbatino by Congress*, p.7.

[83a] See *Draft Convention Providing a Uniform Law on the Form of Wills*, which in the 45th session of the UNIDROIT Governing Council Professors R. DAVID and B. A. WORTLEY submitted. See: *Report on the activity of the Institute*. 1966. Rome. Editions "Unidroit" 1966. p. 28.

27. How has the *Larkin case* come up in *Ehrenzweig*'s work? By virtue of this case the Supreme Court of the State of California, against the earlier practice in an particularly interesting lawsuit established reciprocity with the U.S.S.R. in matters of inheritance by American nationals.[84] Yes, how does this case come up in a theoretical monograph?

First the book in a clear-cut form outlines clearly the California private international law of succession, a rule whose significance in international law needs hardly to be discussed. In conjuction with what has been set forth above, the statement may be advanced that this rule is one of those which the author would like to strengthen for the benefit of a better mutual understanding. It need not be emphasized that many Hungarians are domiciled abroad, among other countries also in the United States. This new decision may lead to a reassuring settlement of a large number of individual cases, since on the ground of Hungarian law and practice reciprocity may be established, *i.e.* American nationals have en equal status with Hungarian nationals in matters of inheritance.[85] Such a settlement in one of the channels may operate towards

[84] See the decision in *California Reporter* and in *Pacific Reporter*, 52 Cal. Rptr. 441; 416 P. 2d 473.

[85] In matters of private international law or private law in general, here included the law of succession, under Hungarian law the equal treatment of foreigners may be established by the following criteria: *a)* as regards private international law the *Introductory Act* to the new *Hungarian Civil Code* has not set aside the earlier set of conflict rules (Clause 2, Section 5). Consequently all that has been laid down in matters of private international law are the rulings of the Supreme Court published by virtue of Section 9 of Government Decree 4338/1949. Accordingly the rule maintained by Section 20 of the *Provisional Rules of Judicature*, later reformulated by the Supreme Court in its decision No. 203 of 1888, and introduced by Section 14 of the *Imperial Order* of 1852, that Hungarian nationality was not a condition of "the acquisition of real estate", or as subsequently formulated by decision No. 203 "Any person having the capacity of acquisition shall have the capacity of inheritance, so also aliens on the condition of reciprocity", is still effective Hungarian law. That the rule is effective also as regards the United States is confirmed by the following. Clause d., Article 211 Chapter IV, Part X of the Peace Treaty of Trianon, enacted as Act XXXIII of 1921 declares that in respect of the nationals of the Allied and Associated Powers (so also in respect of the nationals of the United States) Hungary will not apply such limitations as were not applicable against them on the 1st July, 1914, except, however, where such limitation shall apply also to the own nationals. So the equality of the legal status in the law of succession of American nationals with that of Hungarian nationals must be deemed to have been restored even if had been made subject to limitations during the War. As is known the *United States signed a supplementary peace treaty with Hungary*, enacted as Act XLVIII of 1921. Clause 1 of Article II of this treaty confirmed that the nationals of the United States would enjoy the same rights and benefits as had been defined in Sections V, VI, VIII, IX, X, XI, XII and XIV of the *Trianon Treaty*. Similar provisions had been included in the *Peace Treaty of Paris (1948)*, enacted as Act XVIII of 1948. Clause I, Article 26 of Part VI declared that Hungary, provided she had not already done so, would restore all lawful rights and interests of the United Nations and their nationals in Hungary as these existed on the 1st September, 1939. One of the signatories of the Treaty was the United States. The existence and continuity of the equality of status under the law of succession hereby has expressly been declared in relations between the United States and Hungary, and for that matter in legal sources of that high level as quoted above. Still even beyond this, other international agreements signed by Hungary indicate that the *régime national* is a generally recognized rule of private international law incorporated in the Hungarian law of succession. This and no restrictive *ius speciale* may be discovered in recent international agree-

an improvement of international relations, in particular of those between Hungary and the United States.

There is no separate chapter devoted to the law of succession or wills in *Ehrenzweig's* work. The problem turns up in a number of theoretical con-

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ments Hungary has signed on judicial assistance. These agreements expressly grant equal treatment to Hungarian nationals and aliens in matters of inheritance. Such provisions have been included in the agreements on judicial assistance signed with *Czechoslovakia*, Section 34 of Law-decree No. 28 of 1951, with *Bulgaria*, Section 32 of Law-decree No. 2 of 1954, with the *German Democratic Republic*, Section 43, of Law-decree No. 20 of 1958, with the U.S.S. R, Section 36 of the Law-decree No. 38 of 1958, with *Rumania*, Section 35 of Law-decree No. 19 of 1959. All these agreements declare in a clear-cut manner that the nationals of the contracting parties enjoy an equal status in inheritance in the countries of the signatories. *b)* The section on succession of the *Civil Code* of Hungary includes no such provisions as would make the validity of any title to an inheritance dependent on Hungarian nationality. As regards the capacity of inheritance the Civil Code does not expressly state that aliens may inherit equally with Hungarian nationals. This would have been a conflicts law rule. Still here too all that has been set forth in *a)* holds. Read in conjunction with the provisions of the *Civil Code* on legal capacity, according to which (§ 8) "in the Hungarian People's Republic everybody has legal capacity, i.e. may have rights and obligations. Legal capacity is equal irrespective of age, sex, nationality or denomination" (official translation), it follows that according to the meaning of this provision aliens have to be treated as having equal rights with Hungarian nationals in matters of inheritance. *c)* Nationals of the United States become entitled to an inheritance under substantive law on an equal footing with Hungarian nationals in the *actual practice* followed in matters of succession. This is confirmed by administrative actions so far entertained. No action to the contrary, or a judicial decision calling into doubt the claim to an inheritance could be found, as any such action or decision would have been unlawful. The same is verified by notary public cases in American—Hungarian cases of inheritance. Although the notary public records are never published, access to them may nevertheless be obtained. *d)* The draft *Code of Private International Law* of Hungary declares in Section 9: "Failing statutory provision to the contrary the personal and property rights and obligations of aliens are uniform with those of Hungarian nationals." (*Draft to the Code of Private International Law of Hungary*. Published by the Institute of Legal and Administrative Sciences of the Hungarian Academy of Sciences Budapest, 1968). This indicates that in Hungarian law this thesis is an established rule. *e)* Writers have always professed that aliens had equal personal and property rights with Hungarian nationals. See the recently published works: SZÁSZY, I.: *Private international law in the European people's democtraces*, Budapest, Publishing House of the Hungarian Academy of Sciences, 1964. pp. 23, 31; NIZSALOVSZKY, E.: *Succession of aliens in Hungary;* this paper, published in Állam- és Jogtudomány, 1/1966., is about to be published in the American Journal of Comparative Law; MÁDL, F.: *Hungarian private international law on new pathways*. Section "Positions taken in the appraisal of the order of succession of the socialist countries" under paragraph *c)* (Állam- és Jogtudomány, 2/1968. pp. 310 et ssq). *f)* The fact that the *Code of Foreign Exchange* (1950) insists on a permit of the foreign exchange authorities for any legal transaction of a financial nature, for the transfer of goods between foreign exchange aliens and foreign exchange nationals, does not affect the reciprocity in matters of inheritance, because *aa)* the relevant provisions do not affect claims to an inheritance, as the heir may dispose of the estate in Hungary, and by a permit of the foreign exchange authorities, may even transfer part of it; *bb)* foreign exchange restrictions of a minor or major extent are known the world over, in the various legal systems of the world; *cc)* the foreign exchange regulations are not discriminatory. From the *Trianon Treaty* — as the *supra* cited disposition reads — it is evident that the victorious powers do not consider the rights of their nationals unlawfully and unduly restricted, if the same restrictions equally apply to Hungarian nationals. This stands to reason because when owing to an inheritance Americans or other aliens could freely transfer their inherited estate, they would be privileged as compared to Hungarian nationals and would derive rights from the estate which the testator did not have. Obviously here too the axiom holds that *nemo plus iuris transferre potest quam ipse habet*. This is a thesis accepted in both positive law and literature. As far as Hungary

siderations. In this connexion we should like to refer to one of these. This is the so-called doctrine of *local data*, which, as has already been mentioned earlier,[86] *Currie* has introduced into the theory of private international law, only to play into the hands of *Ehrenzweig*'s forum theory. Accordingly there are certain specific preliminary questions in some of the spheres of private international law which in general and typically can be settled only on the basis of foreign law, simply because any other method would amount to turning things upside down. In such and similar cases, and this is the point where *Ehrenzweig*'s forum theory comes to the fore, there is simply no conflict of legal systems no selection of a law by the forum, to which the various creators of theories attach all sorts of super-law doctrines. There is no conflict of legal systems, or a selection of the legal system by the forum, there are simply *local data*. Among the many examples is the Larkin case. In this case, without any intermediary conflicts solving theory, naturally in conformity with Soviet law the conditions were established on which American nationals could inherit in the U.S.S.R. This course was taken, because these conditions were *local data*, facts of the site, and it was not necessary to bring into collision two legal systems in their entirety, and then to be looking for a solution which reasonably could not have been found unless recourse was had to the *local data* principle. To be looking for conflicts rules is quite superfluous, therefore in the mind of the reasonable man by definition, excluded.[87]

Here I must contradict. It may easily be that for a reasonable man here a resort to a conflicts device is by definition excluded. But not, I think, for a reasonable *lawyer;* for him, in his mind a selecting action is by definition

is concerned not only the *Trianon Treaty* disposes in this sense, but also the *agreement on judicial assistance signed with Czechoslovakia*, which in Section 34 states that the restrictions under the law of succession relating to the estate and effective against the own nationals of either party cannot be considered a violation of the principle of the *régime national*, whenever these restrictions are applied to the nationals of the other party. *dd)* In an essentially similar legal situation Californian law has already recognized the reciprocity with the Soviet Union in the *Larkin case*, and very recently the Supreme Court of the United States passed a decision according to which the devolution of an inheritance could not be denied on the plea of reciprocity. See *Zschernig v. Miller*, 389 U.S. 429 (1968). *ee)* If an American forum denied the devolution of an inheritance on the plea of reciprocity, this would result in escheat, *i.e.* the property would pass over to a public institution in the United States, an act equal to confiscation and in the face of Hungarian practice unreasonably discriminatory. It would be an altogether different matter if an accrued inheritance devolved upon the heir could not be transferred from the United States on the ground of foreign exchange restrictions. A denial for any other reason would be unlawful, illogical and discriminatory.

This study was just completed when I received the *Ester Kish v. Trenton Trust Company* case. In this case the Supreme Court of New Jersey — while citing repeatedly the *Zschernig* case on the reciprocity problem as ruled by the US Supreme Court — decided July 31, 1968 in favour of the Hungarian heirs by stating "that proofs presented adequately established that Hungarian beneficiaries would have the use, benefit and control of their shares . . . and there was no federal prohibition against transmission of private funds to Hungary". See: *Ester Kish v. Trenton Trust Company* 52 N. J. 454, 246 A 2 d 1.

[86] CURRIE (1), p. 67, EHRENZWEIG: *PIL*, p. 83.

[87] EHRENZWEIG: *PIL*, pp. 83, 84.

included. There are more than one legal systems involved in the case, this is a fact without which no situation amounts to a conflicts law problem. To refer to either system presupposes a selecting process. Be the *local* law as reasonable and unquestionable as it is, I cannot get to it but *via* station "Conflicts Law". This may occur through the selection of "Local Data" but there is an element serving as basis for an option. Before the judge finds *local data* — allegedly without resort to conflicts law — he has already decided a previous question, that namely that to *local data* applies always the law in force in the country of the *datum* in question. An entirely other question is the circumstance that the *local datum* theory was a jurisprudential vehicle by which American practice could be relieved of an attitude favouring the lex fori. American jurisprudence contributed hereby much to open broader vistas also to other legal systems, including those of socialist countries. Until recently, prior to the Larkin case, with the help of the theories so passionately attacked by *Ehrenzweig*, the existence of reciprocity in matters of inheritance according to American requirements was denied to nationals of socialist countries. Perhaps here the cold war may have also been in the play. But now a new sober approach has led to a reasonable solution, at least as far as the Soviet Union is concerned.[88] It is to the author's credit that he jumps at the case with delight and integrates it into his general doctrine.

28. Naturally the sources in *Ehrenzweig*'s book are most up-to-date not only as far as the evolution of positive law is concerned, but also in all other respects. This is quite understandable, as the documentation of *Rabel*'s work, though edited by *Drobnig* and *Bernstein* in a second edition remains on the level of 1958/1964. In view of the changes which have taken place since this means that the sources of socialist law have been dealt with scantily only. Will there be a truly new *Rabel* edition? One cannot tell. If so, one cannot tell when.

29. *Ehrenzweig*'s work has also some other traits worth mentioning. The fact that though a work on comparative law, it relies primarily on American law may perhaps be appraised as a deficiency. However, even this deficiency has certain positive aspects. Here are a few.

As far as we know, in private international law no theoretical monographs have been written, which would have attempted to segregate American international conflicts law from American so-called inter-state law, and to summarize the rules, institutions and opinions matured to an international level. It is true that as the author writes "it would have been incorrect to speak of an International Conflicts Law *of* the United States, since that law

[88] It is only to be welcomed that in 1968 in a case which had come up in Oregon, the Supreme Court of the United States held that on the plea of reciprocity, *i.e.* on a plea which the courts of the states could not decide, the question being one within federal competence, the devolution of an inheritance could not be denied. The case is one where East-German heirs were concerned, *Zschernig v. Miller*, 389. U.S. 249 (1968).

is almost entirely controlled by the 50-odd jurisdictions of the Union".[89] Even the title conflicts law "*in* the United States" implies problems, because the law of the states also varies according to the foreign states with which they have dealings. This explains the title of the book. This has placed him in a position to publish a monograph of private international law in general, instead of a quasi-textbook giving a precise, itemized description of the federal and state conflicts law of the United States, which would have required several thousand pages. Instead, he has been able to explain the principal trends of American conflicts law, its institutions, and theoretical policy-making opinions and controversies.

30. Another positive trait of the book is that within the above methodological framework it is the first summary of American private international law and scientific opinions which is based on a thorough knowledge and treatment of the domestic inter-state law as well as on several bilateral international studies. The author himself writes in the Preface that the work of twenty years has been invested in this book, during which he explored the various layers and levels of American domestic law and international conflicts law, and their interaction. Mention has to be made of two smaller manuals and about a hundred papers of the same author, further of his books on American–Greek Private International Law and American–Japanese Private International Law, and above all of this *Treatise*.[89a] It is from this workshop that this new work, this new-born child cherished by the master with all his affection and love, has come forth often adorned with the pen of a literary man. It is from this peculiar and unique workshop, from the flux and evolution of American domestic inter-state conflicts law, from the material of judge-made conflicts law on the international level, that the author has disentangled what is of universal and lasting value and has made it accessible to Continental lawyers in a scientific and true-to-reality manner. It is mainly for this reason that it is worth while for a Continental student of private international law to peruse it. In its unique extensive practice American private international law has confronted many a problem which we too shall have to face. It is useful for us, therefore to know what conclusions have been reached there under highly developed business conditions.

31. *Ehrenzweig*'s work may safely be compared to *Rabel*'s also because the reader receives a survey of American Common Law in categories familiar to Continental lawyers, due to the partially European legal erudition of the

[89] EHRENZWEIG: *PIL*, p. 7.

[89a] Works of major importance and standard publications are: EHRENZWEIG: *A treatise on the conflict of laws.* 1962.; *Conflicts in a nutshell.* 1967.; EHRENZWEIG—FRAGISTAS—YIANNOPOULOS: *American—Greek private international law*, 1957.; EHRENZWEIG—IKEHARA—JENSEN: *American—Japanese private international law.* 1964. For other works see EHRENZWEIG: *PIL*, pp. 243, 244.

author. This is by no means indifferent for a student who has tried to fathom the spirit and explore the categories of the Common Law from the outside.

Ehrenzweig is right when he says that European students often have recourse to the *Restatement*, when they want to learn of the institutions of American law, or have to refer to them in their works. This is the case also with Hungarian literature. From this work, and also from others of the present author it stands to reason that at least in the sphere of private international law the Restatement — *Ehrenzweig* spares no trouble in attacking it — is a distorted presentation of American law. Therefore *Ehrenzweig* may perhaps justifiably hope to have contributed to the banishment of the *Restatement* from the technical sources of American law also among European lawyers, partly because Ehrenzweig's work in contrast to the Restatement presents American law as it really is.

32. However, *Ehrenzweig*'s work does not merely explain American private international law to non-Americans. It is at the same time a manual and monograph of general private international law in the sense that by preserving the essence of it in a sublimated form it embraces the five hundred years old history of European thinking of private international law. As he writes with modesty ". . . it will perhaps make more accessible in the common-law orbit the treasures of thought accumulated in continental Europe over half a millennium."[90] As a matter of fact, however pragmatic, the American legal mind despite the example of *Ehrenzweig*, *Rheinstein*, *Riesenfeld* and others however slightly suspicious all European theoretizing may be in America, American lawyers do not deny that much can be learned from European doctrinaires. *Ehrenzweig* too emphasizes this. It is one of his first observations that "We need only remember . . . the debt owed by both English and American law to continental doctrine".[91] We believe that among living scholars *Ehrenzweig* has unique merits here. Perhaps nobody else before him has transmitted so much of a historical approach and European doctrinal and theoretical categories to the world of the Common Law. In this work the Common Law and Civil Law approaches combine in a fortunate manner also in that *Ehrenzweig* does not respect a judicial decision as the sole source of law, as Common Law lawyers are too likely to do. And vice versa he considers not only the statutory law and its theoretical and doctrinal principles essential for law and jurisprudence, as European lawyers are prone to do. But he wants to discover the path to mutual understanding and possible co-operation by integrating the two approaches.[92]

33. To all this we should add that as far as this author knows, since *Rabel* this is the first work which with a claim to universality extends not

[90] EHRENZWEIG: *PIL*, p. 9.
[91] EHRENZWEIG: *PIL*, p. 7.
[92] EHRENZWEIG: *PIL*, p. 9.

only to the law and jurisprudence of Western Europe. To be sure, *Ehrenzweig*'s career began there, with forced interruptions very much the same as those of *Rabel*'s career, and where he often returns to give lectures (this year *e.g.* at the Academy of International Law at the Hague). But relying partly on earlier publications he also draws upon the private international law of distant countries and legal systems,[93] as well as on the private international law of the European socialist countries. He even finds words of acknowledgement free of any bias for certain institutions of those countries, which as we have already mentioned is one of the criteria of a "realistic expedient". This then is yet another reason why the jurisprudence of a socialist country should recognize the significance of this work.

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with the code designations used in the notes

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Discussions théoriques et didactiques sur le nouveau manuel du droit administratif hongrois

La publication d'un nouveau manuel d'une discipline universitaire est toujours un événement important non seulement de l'enseignement universitaire, mais aussi du monde des sciences. En effet, un tel manuel, tout en étant une synthèse méthodique moderne des résultats de la branche respective de la science, est au même temps une oeuvre scientifique. D'ailleurs c'est précisément dans un manuel d'enseignement universitaire qu'on peut observer le mieux les liens qui unissent l'enseignement supérieur et l'activité scientifique, notamment le fait que, d'une part, l'enseignement aux universités s'appuye sur les réalisations de la science et que, d'autre part, cet enseignement encourage les recherches scientifiques, et en prend souvent même l'initiative.

Le grand intérêt avec lequel les spécialistes de la théorie et de la pratique ont accueilli le manuel de la discipline universitaire du droit administratif, trouve son explication en particulier dans le fait, qu'en l'espèce il s'agit du premier manuel *socialiste* du droit administratif publié en Hongrie, et d'autre part dans la valeur de l'ouvrage issu des efforts collectifs des auteurs, des professeurs d'université Sándor Berényi (Budapest), János Martonyi (Szeged), Lajos Szamel (Pécs) et du professeur chargé de cours Lajos Szatmári (Budapest).[1] Avant la publication de cet ouvrage, c'était pour la dernière fois en 1942 qu'un manuel de droit administratif d'une valeur scientifique a été publié en Hongrie.[2] Le nouveau manuel dont nous parlons, publié en 1966, n'était naturellement pas sans précurseurs. Depuis 1948 un grand nombre de cours polycopiés ont vu le jour. Après 1950 on a publié des cours unifiés, destinés à l'usage de nos trois facultés de droit, écrits par les professeurs de celles-ci et rédigés par le professeur János Martonyi et du regretté János Beér. Ces cours polycopiés peuvent être considérés comme des travaux préparatoires du manuel, comme un essai de donner une description systématique de l'organisme et du droit socialistes de l'administration d'Etat hongroise et des résultats de plus en plus remarquables de la science socialiste hongroise du droit administratif. Parmi ces cours une importance particulière revient au précurseur immédiat du manuel, publié en 1963 par les auteurs de ce dernier.

[1] BERÉNYI—MARTONYI—SZAMEL—SZATMÁRI: *Magyar államigazgatási jog, általános rész (Droit administratif hongrois, partie générale)*. Réd. L. Szamel, Budapest, 1966.

[2] MAGYARY, Z.: *Magyar Közigazgatás (L'administration publique hongroise)*. Budapest, 1942.

Peuvent être considérées également comme précurseurs du manuel les monographies et les études publiées au cours des derniers vingt ans concernant nombre de thèmes importants de la science du droit administratif et des sciences avoisinantes ainsi que les réunions et conférences scientifiques ayant eu trait au même sujet.[3]

Dans les milieux des spécialistes la publication du manuel a été saluée avec approbation générale. Son niveau scientifique et didactique élevé est démontré par le fait qu'il a provoqué des discussions de grande valeur – également dans les revues scientifiques — au sujet de beaucoup de problèmes théoriques des sciences s'occupant de l'administration d'Etat, comme concernant les tâches et les méthodes de l'enseignement universitaire aussi. Parmi ces discussions celle qui a été organisée au mois de juin 1968 par le doyen de la Faculté des sciences politiques et juridiques de l'Université de Budapest et par le Comité scientifique de cette dernière, a révélé une importance particulière. Cette discussion, à laquelle ont pris part en dehors des représentants de la science administrative ceux des sciences avoisinantes aussi ainsi que des hauts fonctionnaires de l'administration publique, a mis en relief nombre de thèmes essentiels des branches de la science s'occupant de l'administration d'Etat, en donnant lieu à une confrontation des idées non seulement à l'intérieur de notre pays, mais au-delà de nos frontières aussi. D'autre part, les opinions y exposées au sujet des buts et des méthodes de l'enseignement supérieur du droit, seront certes profitables dans le domaine d'autres disciplines aussi.

I.

Nous pouvons classer dans le premier groupe des thèmes discutés *les problèmes des principes qui doivent présider à la rédaction des manuels universitaires.* Une discussion d'ordre général a eu lieu concernant *la destination et le caractère* des manuels en question. Selon l'avis de plusieurs, notamment des professeurs György Antalffy (Szeged) et Imre Takács (Budapest) le manuel du droit administratif qui vient d'être publié, peut être considéré quasi comme un traité théorique d'un niveau élevé. Le professuer Sándor Berényi a expliqué qu'un manuel universitaire — et surtout celui du droit administratif — à côté de sa fonction didactique doit remplir pour les fonctionnaires de l'administration et pour les représentants d'autres branches de la science la fonction d'un répertoire aussi. D'autres participants à la discussion, notamment Ferenc Toldi, maître de recherches à l'Institut des Sciences politiques et juridiques de

[3] Parmi ces réunions était particulièrement importante la conférence de table ronde internationale de science administrative réunie à Pécs, au mois de mai 1963, consacrée aux différentes tendances scientifiques s'occupant de l'étude de l'administration d'Etat et à l'enseignement universitaire des connaissances y relatives. (Les travaux en ont été publiés dans le volume: *Az államigazgatás-tudomány feladatai a szocialista országokban (Les tâches de la science administrative dans les pays socialistes).* Budapest, 1964.

l'Académie des Sciences de Hongrie et le professeur Andor Weltner ont, par contre, souligné la primauté de la fonction didactique des manuels, en considérant que concernant le contenu, la disposition de la matière et le niveau de l'ouvrage, les exigences qu'on doit former à l'égard d'un traité scientifique sont autres que celles qu'on peut former concernant un manuel d'enseignement.

En ce qui concerne les fondements scientifiques de la matière des manuels, Ferenc Toldi attribue une grande importance aux expériences qu'on peut tirer de la rédaction des livres d'enseignement. Il était d'avis qu'en ce qui concerne le niveau du manuel récemment publié on aurait pu profiter d'un manuel antérieur. Déjà dans son opinion de réviseur concernant l'ouvrage, János Beér a mis en relief les parties, au sujet desquelles on a pu déjà utiliser les solutions apportées par les monographies et études de la littérature scientifique de la matière. Les critiques de l'ouvrage ont loué la manière dont les nouveaux résultats scientifiques ont été rendus publics dans le manuel. Ils n'ont cependant pas manqué d'attirer l'attention sur la nécessité d'avoir soin de ce que telles parties de la matière soient susceptibles d'être appris sans difficulté par les étudiants. Beaucoup ont apprécié la grande quantité des sources littéraires socialistes et occidentales dont on a fait usage lors de la rédaction du manuel, avec des renvois dans le texte. Dans la discussion y relative s'est caché au fond la question de savoir si un manuel devait réfleter en premier lieu les résultats scientifiques auxquels les auteurs sont arrivés, ou bien s'il devait plutôt donner un exposé d'sensemble de la matière à un niveau adéquat de la science moderne. Il semble qu'une séparation rigide de ces deux solutions n'était approuvée ni par les auteurs, ni par les autres intervenants à la discussion. Ce fait s'est manifesté aussi dans les débats relatifs à la question de savoir si dans la rédaction des manuels *l'avenir favorisera les ouvrages collectifs de plusieurs auteurs ou bien celles d'un auteur unique.* Le professeur Antal Ádám (Pécs) et le professeur chargé de cours Péter Schmidt (Budapest) — en mettant en relief les avantages didactiques d'une conception théorique uniforme et d'un contenu harmonique de la matière d'enseignement — ont plaidé pour la nécessité de ce que les manuels soient écrits par un seul auteur. Par contre les auteurs du livre (surtout les professeurs Szamel et Martonyi) étaient pour la solution de co-auteurs, en considérant avant tout le fait qu'eu égard à l'ampleur et la variété des thèmes d'un manuel on ne peut guère attendre de qui que ce soit qu'il expose tous les thèmes avec le même approfondissement scientifique. En cas d'un travail collectif on peut, par contre, arriver à une grande abondance des thèmes élaborés. (Plusieurs intervenants ont loué précisément la richesse des thèmes traités dans le manuel.)

On a discuté également la mesure, dans laquelle on peut attendre d'un manuel juridique qu'il *conserve sa valeur pendant longtemps et que son contenu soit stable.* L'actualité de la question est mise en relief par le fait que, dans

notre pays, en conséquence de l'introduction d'un nouveau système de la direction de l'économie et d'une transformation y conforme de l'organisme d'Etat, beaucoup de changements importants sont intervenus dans notre droit positif. (En ce qui concerne l'influence exercée par cette situation sur le contenu du manuel, plusieurs intervenants y ont attiré l'attention et en premier lieu Tibor Kovács, vice-directeur de la section du secrétariat du Conseil des ministres s'occupant des organes des conseils locaux.) Imre Takács a souligné la nécessité de ce que les manuels d'enseignement aient le caractère d'un instrument durable de l'instruction. Gyula Fonyó, chef de groupe du secrétariat mentionné du Conseil des ministres était d'avis qu'il n'est que naturel que par les changements du droit positif certaines parties d'un manuel scolaire sont rendues périmées. En conséquence il attendait d'un tel manuel qu'il repose sur les éléments stables et relativement constants de l'organisme administratif. Par contre Ferenc Toldi — en se référant aux expériences acquises en matière de rédaction de manuels de droit administratif soviétique, yougoslave et français — a pris position dans le sens qu'en ce qui concerne le manuel universitaire du droit administratif on ne doit pas former l'exigence qu'il conserve sa pertinence pour une longue période de temps. Il a exprimé l'opinion, que du point de vue du niveau des livres d'enseignement il est utile que des nouvelles éditions révisées en soient publiées dans des intervalles plutôt brefs. C'est seulement ainsi qu'on peut acquérir les expériences qui sont nécessaires à la disposition raffinée de la matière, à la technique convenable de l'élaboration des problèmes et à la détermination des éléments de connaissance à transmettre aux étudiants.[4]

Une autre question qui pouvait compter sur l'intérêt de tous était celle de savoir *jusqu'à quel point les livres scolaires devaient avoir un caractère critique et donnant aussi les perspectives de l'avenir ?* On était d'accord pour approuver que dans certains chapitres de l'ouvrage, notamment dans ceux ayant trait au centralisme démocratique, aux organes locaux du pouvoir d'Etat et aux contraventions, les auteurs critiquent les solutions actuelles du droit positif ainsi que les opinions se manifestant dans la doctrine, qu'ils exposent également les tendances probables de l'évolution et leurs idées relatives à des solutions nouvelles. Les intervenants n'ont cependant pas manqué de signaler le danger que de tels passages polémiques du livre peuvent facilement compromettre son caractère d'un livre d'enseignement.

II.

Comme on y pouvait s'attendre, la discussion des questions ayant trait au contenu du livre a donné lieu à une escarmouche concernant quelques problèmes théoriques cardinaux de la science administrative et des disciplines

[4] *Avis* de censeur de F. Toldi, p. 2.

avoisinantes. C'est en effet pas surprenant que l'approche scientifique du sujet du manuel d'une part, et les efforts de délimiter celui-ci des disciplines mentionnées d'autre part, du moment qu'il s'agissait de la doctrine du droit administratif, ont provoqué des débats intéressants aussi du point de vue de la systématologie des sciences.

La discussion la plus vive et la plus étendue s'est dégagée au sujet de *l'approche scientifique de l'administration d'Etat* et notamment au sujet de la question de la proportion dans laquelle devaient figurer dans l'enseignement universitaire les résultats de la *science du droit* d'une part, et ceux de la *science administrative* (de la *science de l'organisation*), d'autre part. La discussion était forcément lié au problème d'ordre plus général de la tendance et des vues qui devaient régir les recherches scientifiques entreprises dans le domaine de l'administration publique.

L'on sait, que la plupart des manuels de droit administratif sont écrits dans un esprit exclusivement juridique, ce qui veut dire qu'ils présentent l'organisme et le fonctionnement de l'administration d'Etat – sur une base relevant de la théorie générale du droit – tels qu'ils sont réfletés par le droit en vigueur. A l'opposé de cet usage, les auteurs du nouveau manuel hongrois de droit administratif – à côté des connaissances des plus importantes ayant trait à l'administration publique – traitent également dans leur livre une matière intéressant la science administrative (la science de l'organisation). «Notre livre – écrivent les auteurs dans la préface de l'ouvrage — porte le titre "Droit administratif hongrois", en conformité avec le programme des études universitaires. En élaborant notre matière, nous sommes néanmoins partis de la considération que les institutions du droit administratif ne sauraient être suffisamment éclaircies par cette analyse purement juridique. C'est pourquoi nous nous sommes efforcés de présenter notre administration à la fois du point de vue de l'organisation et du droit.» Ces efforts étaient réalisés dans le fait que le livre contient nombre de chapitres communiquant des connaissances relevant de la science administrative. (Tels sont par exemple le Chapitre I^er^ du Titre II consacré aux principes qui se font valoir dans la structure de l'organisme administratif, le Chapitre III du même Titre sur les organes de l'administration – comprenant entre autres des thèmes comme ceux des organes individuels et corporels, des modes linéaires et fonctionnels de la direction ainsi que de la direction exercée par un état-major administratif — et finalement le Chapitre VI du Titre III sur la direction et le guidage des organes administratifs.)

La double approche de la matière se manifeste dans le livre de la façon que les auteurs présentent un sujet donné à la fois sous son aspect juridique et sous son aspect relevant de la science administrative. Cette méthode se manifeste de la manière la plus frappante lors de l'approche de la notion de l'administration d'Etat. Au premier Chapitre du Titre I^er^ l'auteur (le professeur

Lajos Szamel) prend pour point de départ le fait que l'administration d'Etat est également une espèce d'administration, à cause de quoi la notion de l'administration d'Etat peut être retrouvée à l'aide de la notion plus générale de l'administration, en mettant en relief, bien entendu, les caractéristiques qui la distinguent des autres genres de l'administration.[5] Dans ce but l'auteur traite d'abord les sujets, la matière, le but et le contenu de toute administration, pour traiter ensuite la même question du point de vue de l'administration d'Etat. En ce qui suit, l'auteur présente l'administration publique comme une activité de l'Etat. C'est à l'aide de la même approche que l'auteur communique les connaissances relatives à la direction (au guidage) ainsi que les moyens juridiques et non juridiques de ces derniers.[6]

Cette méthode a été presque unanimement approuvée par les interventions aux débats. Les motifs en ont été formulés par le professeur Antalffy comme il suit: «Dans les Etats socialistes la fonction organisatrice de l'administration d'Etat avance par excellence au premier plan. En conséquence, la formation des juristes socialistes doit munir ceux-ci de connaissances qui rendent les juristes futurs capables de s'acquitter des tâches qui leur incombent en matière d'organisation.»[7] Dans son avis de lecteur le professeur Beér a souligné que «dans l'ouvrage les vertus socialistes de la science administrative et de la science du droit administratif se présentent dans une synthèse vivante».[8] Les opinions étaient par contre partagées d'une part concernant l'importance relative des études de droit et de science administrative et, d'autre part, concernant la proportion «dans laquelle doivent être fondues les connaissances découvertes par la science du droit et par la science administrative.

Les représentants de l'une des opinions opposées: István Kiss, le professeur chargé de cours István Szentpéteri (Debrecen) et Tibor Kovács, auraient préféré que l'ouvrage consacre encore plus d'espace à la science de l'organisation (de l'administration) et ont suggéré que lors d'une révision le livre soit développé dans cette direction. En comparant le manuel avec celui de Zoltán Magyary conçu en 1942 sous les auspices de la science administrative, István Szentpétery a constaté que dans l'ouvrage de Magyary la proportion des parties consacrées à la science administrative et à la science du droit est celle de 2 à 1, tandis que dans le manuel cette proportion est inverse, ce qui n'est pas justifié.

Les partisans de l'autre manière de voir, notamment Ferenc Toldi, Lajos Szatmári, Sándor Berényi et Andor Weltner — tout en reconnaissant la nécessité de l'enseignement des connaissances relevant de la science administrative — ont pris position en faveur de la primauté des connaissances juridiques. Selon Ferenc Toldi: «Le sujet du manuel est le droit administra-

[5] *Manuel*, p. 9 et 26.
[6] *Manuel*, § 6 du VI[e] chapitre du troisième Titre, p. 440.
[7] *Critique* du prof. Gy. Antalffy, p. 1.
[8] *Avis* de censeur du prof. J. Beér, p. 2.

tif . . . C'est la charpente de l'ouvrage et c'est seulement pour le rendre complet et pour mieux comprendre l'administration d'Etat et ses institutions que peut être justifié — dans une mesure qui est indispensable à cette fin — qu'on fasse usage des connaissances analogues ou résultant des disciplines auxiliaires relatives à la matière.»[9] Plusieurs intervenants, notamment István Szentpéteri et le professeur adjoint Tibor Madarász (Budapest) on remarqué qu'en ce qui concerne l'éclaircissement simultané des mêmes notions par la science administrative et la science du droit, on n'a pas pu réaliser encore une concordance, ce qui dérange l'harmonie qui doit régner entre les différentes parties de l'ouvrage.

La discussion y afférente a porté de nouveau à la surface le problème de l'approche scientifique de l'administration d'Etat et la nécessité de recherches scientifique ultérieures y afférentes, et en particulier le fait que la matière de ce qu'on appelle science administrative, ensemble avec les buts et les méthodes de ses recherches, ont encore besoin d'être plus concrètement élaborés. En effet, la matière d'enseignement — et aussi le manuel — sont subordonnés à la conception scientifique qu'on a de la matière.

A la suite de la publication du livre se sont ranimées les anciennes controverses relatives à la *structure du système de droit et à la délimitation des différentes branches du droit et des sciences y relatives.* On a été unanime pour approuver l'attitude négative du manuel concernant le droit économique en tant qu'une branche du droit. On a été également unanime pour rejeter la manière de voir contestant l'existence d'un droit administratif de fond et ne reconnaissant qu'un droit de procédure administrative, — manière de voir qui voulait intégrer le droit administratif de fond dans le droit constitutionnel et qualifier la procédure administrative d'une procédure de droit constitutionnel.[10] A ce propos Sándor Berényi a expliqué que l'intégration du droit administratif de fond dans la constitution serait une entreprise dangereuse. Une tentative dans ce sens aurait pour conséquence d'effacer l'importance des institutions constitutionnelles fondamentales et délayerait les limites entre les institutions constitutionnelles et les autres institutions du droit. Cette manière de voir ne veut pas contester la nécessité de ce que les institutions fondamentales du droit administratif de fond soient réglées par la constitution. Le professeur Berényi est d'avis qu'il n'est pas justifié de traiter le droit de procédure administrative comme une branche autonome du droit, parce que la séparation de la règlementation et de l'étude des rapports de droit de fond et de procédure, étroitement liés les uns aux autres, signifierait la désagrégation par force d'une unité naturelle. C'est une absurdité que de vouloir qualifier le droit

[9] *Avis* de censeur de F. Toldi, p. 3.

[10] Samu, M.: *Az Államtudomány szakágazatai. Alkotmányjog és államigazgatási eljárásjog (Des branches spéciales de la science de l'Etat. Droit constitutionnel et droit de procédure administrative).* Állam és Igazgatás, 12/1967.

administratif d'une procédure faisant partie du droit constitutionnel, puisque la réalisation des dispositions de la constitution s'opère d'une manière complexe, à travers de toutes les branches du système de droit et non seulement à l'aide des moyens offerts par la procédure administrative. Lajos Szatmári et Tibor Madarász se ralliaient à cette manière de voir, en soulignant que la négation de l'existence autonome du droit administratif de fond est théoriquement insoutenable; une telle thèse, en connaissance du matériel juridique, est impossible d'être approuvée. Dans le domaine du droit administratif ce n'est pas l'existence du droit de fond qui peut être sujet de discussion; la discussion doit porter sur la question de la matière, qui doit être choisi parmi le vaste ensemble du droit de fond comme matière à enseigner, ainsi que sur le système dogmatique selon lequel cette matière devrait être enseigné le plus opportunément.

C'était en partie en connexité avec ces problèmes qu'un échange de vues très animé a eu lieu concernant la thèse des auteurs du manuel relatif à *la classification des diverses formes de l'activité de l'Etat et à celle des différents types des organes d'Etat.* C'était la controverse d'ordre didactique concernant la délimitation du matière d'enseignement du droit public et du droit administratif qui a attiré l'attention à ce problème théorique cardinal. Certains intervenants (comme par exemple Imre Kovács) ont estimé que les parallélismes entre les deux matières (et les deux manuels de leur enseignement) sont exagérés. A ce propos s'est posé d'une part le problème de la définition de la matière du droit public (ou du droit constitutionnel) et d'autre part celui de la délimitation notionnelle des organes du pouvoir d'Etat et des organes d'administration d'Etat. En ce qui concerne le premier thème, selon Péter Schmidt ce n'est pas un chemin praticable que de vouloir renvoyer les règles du fonctionnement des organes qualifiés d'organes du pouvoir d'Etat dans la matière du droit public et celle des organes administratifs dans la matière du droit de l'administration d'Etat. C'est également une erreur de partir d'une séparation des organes représentatifs centraux et locaux, ensemble avec leurs organes exécutifs respectifs, et de considérer les premiers comme un terrain de la discipline du droit public et les seconds comme celui de la science du droit administratif. Selon le professeur Schmidt cette manière de voir doit être abandonnée. Pour que la science du droit public devienne en réalité droit constitutionnel, il faut que la première tâche de ses recherches soit la découverte et l'élaboration dans chaque branche du droit des fondements constitutionnels de la branche respective.

Les spécialistes des sciences de l'Etat et du droit ainsi que de la science du droit public ayant pris part à la discussion (Antalffy, Schmidt, Takács, Ádám) on porté une attention particulière au problème de la délimitation des organes du pouvoir et de l'administration d'Etat et surtout à celui des *notions de l'administration d'Etat et de l'organe administratif.* Les auteurs du manuel

ont construit la matière à enseigner sur les fondements théoriques socialistes traditionnels. Ils ont formulé leur point de départ comme il suit: «Nous devons . . . considérer les organes de l'administration d'Etat comme des organes administratifs des organes du pouvoir d'Etat. Une telle conception donne des bases suffisantes pour conclure à ce que l'administration d'Etat est l'activité d'exécution et de disposition des organes du pouvoir d'Etat, activité qu'ils n'exercent en règle générale pas directement, mais moyennant leurs organes affectés précisément à ce but.»[11] Ou encore: «. . .nous considérons comme administration d'Etat l'activité d'exécution et de disposition des organes du pouvoir d'Etat, qu'ils réalisent au moyen d'organes administratifs spéciaux, créés à cette fin (organes d'exécution et de disposition).»[12] Cette thèse initiale a pour conséquence que «les organes du pouvoir d'Etat ne peuvent jamais être des sujets de rapports de droit administratif. Par la participation des organes du pouvoir d'Etat à ces rapports, ceux-ci se transforment en rapports de droit public».[13] La majorité des participants à la discussion a exprimé l'opinion catégorique, que ces problèmes devaient être approchés d'une nouvelle façon, puisque une telle distinction formelle des organes du pouvoir et de l'administration d'Etat, ne donne aucune possibilité d'une élaboration substantielle (Imre Takács). Selon Antal Ádám: «. . .il faut rompre avec la classification traditionnelle des formes de l'activité étatique basée exclusivement sur l'appartenance à différents types des organes déployant une activité donnée.»[14] En désapprouvant la séparation rigide du caractère et de la destination des organes du pouvoir et de l'administration d'Etat, le professeur Ádám croit nécessaire d'abandonner la thèse catégorique selon laquelle il est impossible qu'un organe du pouvoir d'Etat puisse être le sujet d'un rapport de droit administratif.

Aussi le professeur György Antalffy est partie de la thèse qu'il est impossible de définir correctement l'essence de chacune des différentes activités d'Etat en les approchant du côté des sujets. C'est seulement une analyse d'ordre objectif qui peut aboutir à un résultat satisfaisant. En distinguant les trois genres primordiaux de l'activité d'Etat — législation, administration de la justice et administration d'Etat — et en donnant une définition objective de cette dernière, il constate que l'administration d'Etat est mise en oeuvre par les différentes unités de l'organisme d'Etat, indépendamment de la place que ces unités occupent dans le système constitutionnel des organes d'Etat. Il considère les unités spécialisées de l'organisme d'Etat comme des organes administratifs au sens stricte du terme. Or, en interprétant l'administration d'Etat d'un point de vue fonctionnel, l'organisme qui réalise l'administration d'Etat en est beaucoup plus étendu, puisque y doivent être compris aussi les

[11] *Manuel*, p. 37.
[12] *Manuel*, p. 58.
[13] *Manuel*, p. 98.
[14] *Avis* du prof. A. Ádám, p. 2.

entreprises et les instituts d'Etat, voire les organismes de la société, qui exercent certaines activités d'administration publique. «L'essence d'une définition objective de l'administration d'Etat consiste précisément dans son caractère organisateur et le but de son activité (accomplissement des tâches de l'Etat) ainsi que dans la connexité dialectique existant dans les modes de la réalisation de ce but (réalisation directe et réalisation pratique).»[15] Conformément à cette conception, le professeur Antalffy essaie de définir d'une nouvelle façon la notion de l'organe de l'administration d'Etat également. Il considère comme un tel organe l'unité de l'organisme qui est compétente pour réaliser l'administration d'Etat prise dans un sens objectif.[16] Des éléments constitutifs de cette notion il élimine l'appartenance à l'appareil d'Etat, malgré que la plupart des organes s'acquittant de fonctions administratives en font effectivement partie.[17]

Parmi les auteurs du manuel c'était Sándor Berényi qui est intervenu à la discussion. Tout en reconnaissant l'opportunité d'une discussion scientifique du problème, il a attiré l'attention sur le fait que le système entier des thèses de la théorie de l'Etat et du droit ainsi que des sciences du droit public et du droit administratif est échafaudé sur des fondements traditionnels. Ainsi la modification éventuelle d'une thèse fondamentale comporterait la nécessité de reconstruire le système entier, ce qui cependant ne pourrait être que le fruit d'études à longue haleine.

III.

Le troisième groupe des thèmes discutés s'est composé de *problèmes didactiques*. Ces thèmes peuvent compter sur un intérêt général concernant les disciplines de l'enseignement universitaire et en particulier concernant l'enseignement du droit administratif, partout où on doit affronter des problèmes analogues.

L'aptitude du livre à être appris par les étudiants était en général louée par les intervenants, même s'ils signalaient que les termes techniques trop spéciaux usés dans certaines de ses parties pourraient causer certaines difficultés. Sur la base des expériences acquises au cours de l'enseignement basé sur le livre, plusieurs intervenants (en particulier Tibor Madarász) ont rendu compte du rehaussement du niveau des connaissances des étudiants. A la faculté de Budapest, grâce à ce manuel de niveau adéquat, les connaissances des étudiants de bonnes dispositions se sont sensiblement accrues. Par contre, les étudiants moins doués ont eu plus de difficultés de maîtriser la matière

[15] *Critique* du prof. Gy. Antalffy, p. 7.
[16] Ibidem, p. 9.
[17] Le prof. Gy. Antalffy a exposé tous les détails de sa conception dans son article Berényi—Martonyi—Szamel—Szatmári: *Magyar államigazgatási jog (Droit administratif hongrois)*. Állam és Igazgatás, Mai 1968.

du livre que ce n'était le cas des cours polycopiés. La fonction de «triage» ainsi exercé par le livre a été approuvée par les intervenants qui l'ont considéré comme un moyen utile du rehaussement du niveau de l'enseignement universitaire.

Parmi les sujets d'ordre didactique la primauté revenait à *la connexité entre la partie générale et la partie spéciale du droit administratif et* aussi à *la manière dont cette dernière devait être enseignée.* Même si le manuel contient seulement la partie générale de cette discipline, il ne peut pas être appréciée convenablement que dans ses rapports avec la partie spéciale. On était unanime pour considérer, que l'enseignement de la matière de cette dernière doit recevoir dans le manuel des fondements plus solides que ce n'est le cas actuellement. Cette exigence a surgi à propos de la conception didactique que dans la formation générale (donc pas spécialisée) des juristes il n'est pas nécessaire qu'on enseigne le droit positif de toutes les branches de l'administration. Il suffit que les groupes les plus importantes de ces branches (administration de l'économie, administration des affaires culturelles etc.) soient enseignées dans des cours facultatifs, avec la possibilité pour les étudiants d'en choisir.

En cas d'une telle solution du programme des études, on aurait du reste besoin d'élargir aussi la matière actuellement enseignée de la partie générale. (C'était par ailleurs suivant cette conception que la matière théorique et pratique des contraventions a été élaborée dans le manuel par Lajos Szatmári.) Dans cet ordre d'idées Ferenc Toldi a proposé de considérer aussi l'éventualité que certaines fractions de la partie générale soient transplantées dans la partie spéciale. Plusieurs intervenants (comme p. ex. Sándor Berényi) étaient favorables à l'idée que les fondements de l'enseignement de la partie spéciale devraient être placés dans la partie générale au moyen de thèses récapitulatives résultant de la généralisation des thèses de plusieurs branches de l'administration.

Sur la base des expériences acquises au cours de l'instruction, Lajos Szatmári et Tibor Madarász préconisaient l'idée, qu'au lieu d'exposer dans la partie spéciale tous les détails du droit régissant les organismes respectifs, les étudiants reçoivent seulement un résumé du système des organes administratifs, et ceci quasi comme une concrétisation ultérieure des chapitres de la partie générale relatifs aux organismes. Ils considèrent comme également possible que dans la partie générale soient présentées les institutions les plus importantes du droit administratif de fond (par exemple les espèces les plus fréquentes des différents permis), et qu'ainsi la matière actuelle du manuel ayant trait au fonctionnement de l'administration soit amplifiée. En ce qui concerne l'intégration partielle de la matière de la partie spéciale dans celle de la partie générale, la majorité des intervenants à la discussion était d'avis, qu'on devrait au fond construire, pour ainsi dire, une «partie générale» de la partie spéciale, qui devrait être traitée dans la partie générale du droit administratif c'est-à-dire dans le manuel.

La nécessité d'enseigner les parties historiques de la matière était également discutée. Les auteurs du livre ont voulu donner des explications historiques seulement là, où il était impossible de comprendre la situation actuelle sans qu'on connaisse le processus historique de sa formation. Plusieurs intervenants ont cru nécessaire qu'une orientation historique plus étendue soit donnée aux étudiants. Le professeur chargé de cours Tibor Nagy (Budapest) était favorable à l'idée que le manuel donne dans un chapitre spécial un aperçu de l'histoire de l'administration hongroise des temps modernes. La majorité était cependant d'avis que soit un aperçu historique à part, soit l'exposé de l'histoire des institutions distinctes, pourrait rendre difficile aux étudiants de se faire une idée d'ensemble de la matière.

Quant au *plan de l'ouvrage* les opinions étaient en général favorables. Certains (Ferenc Toldi, János Beér) ont désapprouvé qu'en conséquence des parties distinctes relatives à l'organisation et au fonctionnement, il arrivait que les auteurs traitent à deux reprises la même institution, d'abord dans le cadre de l'organisation, puis dans les chapitres ayant trait au fonctionnement. (C'était le cas du conseil des ministres et des comités exécutifs des conseils locaux.) Contre la division du livre (première partie: notions fondamentales; deuxième partie: organisation; troisième partie: fonctionnement) Ferenc Toldi a objecté d'abord que le chapitre sur le personnel de l'administration d'Etat ne figure pas comme une des parties principales. Il a suggéré en outre que la doctrine des actes administratifs soit (au moins en partie) transférée de la troisième partie relative au fonctionnement, dans celle des notions fondamentales exposant les fondements du droit administratif. (Actuellement, en effet, les étudiants apprennent le droit positif régissant les actes administratifs avant qu'ils en connaissent la notion et les diverses espèces etc.)

Parmi les thèmes d'aspect didactique une place importante revenait encore à la question de *l'uniformité des conceptions et de la terminologie*. Plusieurs intervenants ont rappelé qu'il est inévitable que dans un ouvrage écrit par plusieurs auteurs, les conceptions différentes n'entrent en conflit. On peut en retrouver les conséquences aussi dans le manuel, notamment dans l'emploi non absolument concordant de certains termes techniques, voire dans le manque de concordance de quelques thèses énoncées à plusieurs reprises. D'autres ont signalé qu'une incertitude concernant la terminologie du droit positif peut être également observée dans certains passages du livre et que certaines notions sont employées dans le manuel dans un autre sens que dans certains chapitres des cours polycopiés de la partie spéciale du droit administratif.

Pour finir, il vaut la peine de passer en revue quelques thèmes importants dont le manque du manuel a été reproché par les intervenants.

C'est intéressant que la plupart des intervenants a suggéré que les thèmes traités dans la troisième partie de l'ouvrage ayant trait au fonctionnement

de l'administration d'Etat soient élargis davantage et ceci nonobstant le fait, que les onze chapitres de cette partie (environ la moitié du livre) comprennent déjà un matériel abondant et de grande variété. A côté des thèmes qu'on peut considérer classiques, comme les actes administratifs, la procédure administrative, les moyens coercitifs de l'administration et le personnel de cette dernière, la partie en question contient aussi des chapitres analysant le fonctionnement de l'administration, la direction par l'administration d'Etat des entreprises et des instituts, la direction et le guidage des organes administratifs, le rôle du contrôle dans l'administration; la collaboration des organes admnistratifs avec les organes judiciaires, avec les procureurs d'Etat et avec les organes coordonnés de l'administration d'Etat; la vie intérieure des organes administratifs, le fonctionnement effectif du gouvernement et des comités exécutifs des conseils.

Plusieurs intervenants ont suggéré que dans la prochaine édition révisée du livre un nouveau chapitre soit inséré sur l'*application du droit par l'administration publique*. D'autres ont considéré nécessaire que dans la partie relative au fonctionnement de l'administration on s'étende sur les *fondements théoriques et dogmatiques du droit administratif*, parce que dans cette partie du livre les considérations «procéduralistes» prévalent. Dans cet ordre d'idées on a formé aussi l'exigence que, parallèlement à la forme importante de l'administration d'Etat qu'est la direction des entreprises et des instituts, il faudrait laisser de l'espace aussi à l'autre fonction principale, notamment à *l'activité déployée en qualité d'autorité publique*. On a proposé aussi d'insérer dans la matière du manuel les *contrats administratifs* et aussi la *gestion des biens d'Etat*.

Les auteurs ont répliqué en rappelant les difficultés d'élargir les sujets traités dans le livre et aussi la nécessité de recherches scientifiques qui devraient encore entreprises avant de donner à ces sujets la forme de matière d'enseignement.

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Naturellement, la discussion relative au manuel ne peut pas être considérée comme close. C'est évident que l'étude ultérieure des questions controversées ainsi que des échanges de vues ultérieurs sont une condition importante d'un remaniement convenable du manuel qui ne tardera pas à venir, remaniement, qui permettra que la nouvelle édition du livre soit une fois de plus un synthèse d'un niveau élevé des thèses scientifiques du jour.

T. MADARÁSZ

Гражданское процессуальное право[1]

1. Литература по венгерскому гражданскому процессуальному праву за последнее время обогатилась двумя значительными работами. *Комментарий к Гражданскому судопроизводству*[2] издан Издательством экономической и юридической литературы. А двое из авторского коллектива, подготовившего комментарий, заведующий кафедрой профессор Ласло Нэваи, и почетный профессор, заместитель министра юстиции Енё Сильберекн, подготовили *учебник для университетов по гражданскому процессуальному праву.*

Предыдущий учебник для университетов по гражданскому процессуальному праву был издан в 1959 году,[3] т. е. почти десять лет тому назад. Уже само издание новых законодательных актов, непосредственно или косвенно касающихся процессуального права, а также и развитие судебной практики сделали необходимым разработку нового учебника по гражданскому процессу. Авторы сознательно стремились издать работу, которая учитывала бы все наступившие изменения. Поставленную перед собой цель достичь им удалось. В своей работе авторы подытоживают не только достигнутые на настоящее время результаты венгерского социалистического гражданского процесса, а во многих отношениях в книге содержатся и принципиальные руководящие выводы.

Учебник материал по гражданскому-процессуальному праву разделяет на две части: Общую и Особенную, и в этом подразделении охватывает действующий правовой материал венгерского гражданского процессуального права, а также основывающийся на нём материал судебных решений. В Общей части рассматривает основные понятия гражданско-процессуального права, предмет и понятие гражданского процесса и гражданско-процессуального права. Определяет место гражданского процессуального права в правовой системе. После раскрытия системы и источников гражданско-

[1] Névai, L.—Szilbereky, J.: *Polgári eljárásjog (Гражданское процессуальное право).* Ред. L. Névai; Оппоненты. J. Bacsó, Gy. Gellért Budapest, Tankönyvkiadó, 1968.

[2] *A polgári perrendtartás magyarázata (Комментарий к гражданскому процессу).* Budapest, Közgazdasági és Jogi Könyvkiadó, 1967. 1488 p.

[3] Bacsó, J.—Beck, S.—Móra, M.—Névai, L.: *Magyar polgári eljárásjog (Венгерское гражданское процессуальное право).* Budapest, Tankönyvkiadó, 1959.

[4] стр. 20.

процессуального права показывает развитие венгерского процессуального права. Наряду с изложением правового развития периода, предшествующего социалистическому преобразованию страны, подробно рассматривает по-отдельности развитие процессуального права в период народно-демократической революции, а также в период заложения основ социализма и полного построения его. Вслед за этим занимается основными принципами гражданского процесса, судом, участвующими в процессе сторонами и ролью прокурора в гражданском процессе.

Особенная часть учебника, показывая весь ход гражданского процесса, рассматривает предъявление иска, рассмотрение дела и вынесение по нему решения, порядок пересмотра решений, и наконец, стадию исполнения. В рамках процесса неискового характера рассматривает процесс по платежным поручениям, кадастровый, нотариальный и исполнительный процессы. Наконец, работа, связывая с учебным материалом гражданско-процессуального права, излагает вопросы третейского производства и разбирательства в хозяйственных арбитражах.

Таким образом, монография разрабатывает очень многослойный правовой материал по одной отрасли права, и особый интерес вызывает помещенный в конце каждой части подробный список литературы, появившейся со времени вступления в действие нового гражданско-процессуального закона, и, можно сказать, дает полную картину о венгерской юридической литературе, относящейся к этому кругу вопросов. В этом списке встречаемся и со ссылкой на важнейшую зарубежную юридическую литературу.

Анализировать все важные, изложенные в такой крупной и объемистой работе, вопросы в одной рецензии невозможно, поэтому в нижеследующем мы рассмотрим и дадим критическую оценку точкам зрения, сложившимся по нескольким таким интересным и заслуживающим внимания вопросам, которые дадут возможность показать ценность этой работы.

Исследуя, например, предмет гражданско-процессуального права, о важности темы дает понять использование статистических данных. Даже и не для юристов о значении гражданско-процессуального права говорят сообщенные в работе данные, согласно которым в Венгрии ежегодно в рамках норм гражданско-процессуального права суды разрешают 200 000 гражданских дел. Бесспорно, что этот метод, который отправляясь от скрывающейся за статистическими цифрами близости к жизни приходит к научному абстрагированию, ведет студентов по такому пути мышления, который в конце концов убеждает их в том, что избранная им профессия — юридическая работа — вытекает из потребностей жизни. Познав правовую науку, может подготовиться к тому, чтобы как применяющий право жизнь граждан, состоящих в разнообразных и многослойных правовых отношениях, могли направлять так, как это требует общество в созданных им правовых нормах.

Авторы в книге указывают на важное положение, когда подчеркивают, что в системе гарантий социалистической законности гражданский процесс играет все большую роль в области обеспечения результативности социалистического хозяйствования, охраны собственности, применения прав и законных интересов социалистических организаций и граждан. Соответственно этому возрастает и вес гражданского процесса в правосудии. В количественном отношении возросли гражданско-процессуальные гарантии социалистической законности и возможности урегулирования гражданских требований в судебном порядке и в силу этого действительно возрос вес гражданского процесса внутри правосудия.

Можно было бы указать и на иные примеры отыскания пропорции нынешнего распространения знаний и социалистического воспитания юристов. Но среди них в качестве значительного примера можно было бы указать на таблицу, составленную авторами по вручению копий вынесенного решения.[5] На первый взгляд сам круг вопросов вручения решений едва ли кажется значительным, но поближе рассматривая этот вопрос бесспорно, что это является одним из условий обеспечения социалистической законности, вовлечения заинтересованных лиц в процесс, уведомление их о новой стадии процесса, о каждом решении, вынесенном судом. В гражданском судопроизводстве, относящиеся к вручению решений положения, встречаем в различных местах. Эти распоряжения закона авторы собирают в хорошо обозримую таблицу.

3) По определению авторов, венгерский гражданский процесс, это – деятельность суда по осуществлению правосудия по гражданским делам – осуществляемая на принципах социалистического демократизма и в законном порядке – при сотрудничестве сторон и иных субъектов процесса.[6]

Ценность этого определения понятия повышает то, что в нем раскрыт полный смысл слова «правосудие». По мнению авторов, суд выполняет тройную задачу:

а) Охраняет и реализует социалистическую законность, что означает применение в гражданском процессе материальных правовых норм, относящихся к делу, и соблюдения законного процессуального порядка. Гражданский процесс обеспечивает охрану нашего государственного устройства, общественного порядка, экономической системы и социалистической собственности, далее, личных и имущественных прав, законных интересов граждан. Если эта охрана реальна, тогда в гражданском процессе осуществляется социалистическая законность.[7]

б) Осуществляет социалистическую справедливость. Правосудие социалистического государства руководствуется новым представлением о

[5] стр. 350.
[6] стр. 30.
[7] стр. 31.

справедливости, взглядом, сложившимся о несправедливости капиталистической эксплуатации, новой оценкой значения и роли труда, взглядом пролетариата на справедливость, социалистической справедливостью. Социалистическая справедливость покоится на принципе социализма: «От каждого по способности, каждому по труду.» Осуществлению справедливости служит обеспечение гармонии между общественным и индивидуальным интересом. Восстановление гармонии нарушенных интересов сторон на основе согласования на высшем уровне общественного и индивидуального интереса является постоянным требованием социалистического гражданского судопроизводства. И социалистический гражданский процесс, как правило, является ареной столкновения актуально противоположных интересов.[8] Предпосылкой осуществления социалистической справедливости является раскрытие важных с точки зрения права, относящихся к делу фактов, установление объективной истины, правильно отражающей объективную действительность, раскрытие общественно-экономических взаимосвязей, вынесение убедительного по силе, соответствующего социалистическому правосознанию трудящихся решения.

в) Способствует сложению и развитию социалистического сознания граждан. Осуществление судебно-воспитательной работы относится к кругу культурно-воспитательной деятельности социалистического государства. Суд — в отличие от суда буржуазного государства — не ограничивается исключительно применением государственного принуждения, а по крайней мере в такой же степени стремится осуществлять и воспитательную функцию. Суд в процессе гражданского судопроизводства обязан, с одной стороны, воспитывать социалистические организации и их представителей в духе усиленного соблюдения требований взаимного сотрудничества, с другой стороны, граждан в духе соблюдения основывающихся на социалистической морали правил общежития. Необходимо способствовать тому, чтобы соблюдающее правовые нормы поведение становилось привычкой для граждан и во все более широком кругу осуществлялось сознательное и добровольное соблюдение законодательных актов.[9]

В действительности сложнее кажется точка зрения науки гражданского процесса по вопросу истины и справедливости, чем как это видно из книги. Например, принцип распоряжения, в действительности больше осуществляется, например, в практике буржуазного процесса, чем в социалистическом процессе и полная крайностями практика и теория может дойти до отрицания «объективной истины», как это хорошо иллюстрирует учебник на примерах, и в конце концов формальная «внешняя истина» становится господствующей в практике.[10] А поскольку и в капиталистическом обще-

[8] стр. 35.
[9] стр. 38—39.
[10] стр. 37.

стве не безразлично сохранение безопасности оборота в хозяйственной жизни, гражданское процессуальное право — как средство обеспечения материально-правовых норм, регулирующих коммерческую хозяйственную жизнь — является фактором, часто играющим роль в раскрытии объективной истины. Заинтересованный в безопасности оборотной жизни господствующий класс в процессуальных спорах между собой в силу их интереса в существовании был вынужден придерживаться возможностей понуждения к решениям, осуществляемым на основе «капиталистической истины». Гражданское процессуальное право возникло в политической борьбе с феодальным произволом, означало шаг вперед по сравнению с ранее существующим положением. Другое дело, что в период монополистического капитализма, с одной стороны, эти принципы искажаются и возрастает число случаев, которые разрешаются на основе «формальной истины», а с другой стороны, социалистическое процессуальное право сохранило и развило дальше передовые черты основных принципов процессуального права, сложившегося в борьбе с феодальным произволом, возможно, так же как принцип осуществления правосудия «на основе истины», который стал господствующим в социалистическом гражданском процессуальном праве. К этому необходимо добавить, что и при осуществлении этого правильного основного принципа в силу некоторых недостатков в условиях социализма вследствие материально-правовых положений, как давность, просрочка, положения законодательных норм о законной презумпции — можно встретиться и с таким решением, хотя это очень редко и вообще не является характерным — которое не соответствует выраженно требованиям справедливости, правильно выдвинутым авторами, но не смотря на это, не противоречит законодательному акту.

4) Авторы рассматривают вопрос судебного «правотворчества» со стороны процессуального права. Высказывают свою точку зрения, согласно которой «всеобщее признание характера судебной практики как источника права не совместимо с требованием социалистической законности, суд в социалистическом государстве является органом, применяющим право, а не создающим его». В данной ими формулировке значение имеет то, что они выступают против «общего признания». В соответствии с действительно существующим положением подчеркивают, что из судебных решений следует выделять и отдельно рассматривать принципиальные решения и руководящие указания Верховного Суда, которые являются обязательными для нижестоящих судов, и как таковые, оказывают влияние на суды, а этим самым распространяются и на стороны, а также и на другие лица гражданского процесса, выступающие в суде. Вследствие этого, принципиальные решения Верховного Суда, имеющие обязательную силу, являются своеобразным сужением или расширением созданных призванными на это органами правовых норм, осуществляемым путем правового толкования, что

хотя не является правотворчеством, но в то же время и не является простым толкованием права. Они расположены где-то между этими двумя понятиями, и в настоящее время предметом спора является то, к чему они стоят ближе, не являются ли они особым случаем правотворчества.

5) В главе под заглавием «Система и источники гражданского процессуального права» авторы показывают своеобразную диалектику процесса. Гражданский процесс рассматривают как единый процесс, который в свою очередь не является неразделимым, процесс разделяется на ясно отграниченные целесообразным и разумным образом части.[11] Фазы, показывающие относительную замкнутость, составляют части процесса, а именно: а) стадия предъявления иска, б) стадия рассмотрения иска в судебном заседании, в) стадия пересмотра вынесенного по делу решения, г) стадия исполнения решения. Все эти стадии не во всех случаях имеются налицо, например, стадия пересмотра решения не наступает без обжалования сторонами или по протесту прокурора. В случае, если обязанная в решении сторона проявляет поведение, соответствующее решению, имеющему законную силу, не наступает стадия исполнения и т. д.

Своеобразным познанием авторов является то, что стадии процессов не искового характера в основном или полностью подобны стадиям гражданского искового процесса а несколькими отклонениями, вытекающими из отдельных особенностей процессов неискового характера.

6) Основными принципами гражданского процесса авторы считают следующие: а) принцип добросовестности процесса, б) принцип равноправия сторон, в) принцип распоряжения, г) принцип объективности, д) принцип гласности, словестности и непосредственности, е) принцип обеспечения возможности пользоваться родным языком. Из связанных с основными принципами умозаключений особенно интересна их точка зрения, связанная с принципом добросовестности процесса. В первом предложении § 5 Гражданского судопроизводства, согласно которому «Стороны свои процессуальные права обязаны осуществлять добросовестно» по мнению авторов формулирует один из самых важных принципов гражданского процессуального права. Этот основной принцип является значительной гарантией раскрытия объективной истины.

Добросовестный процесс: добросовестное осуществление вытекающих из процесса прав. В круг понятия недобросовестного процесса относится всякое такое процессуальное действие и поведение, которое направлено на затягивание процесса или затруднение раскрытия объективной истины, или же может это вызвать. Из принципа добросовестности процесса вытекает: а) запрещение утверждения того, что не имеет места и фальшивоя отрицание (активная ложь), б) запрещение умалчивать о важных с юриди-

[11] стр. 60.

ческой точки зрения для дела фактах или обстоятельствах (пассивная ложь), в) запрещение затягивания процесса. Излагают несколько положений действующего гражданского судопроизводства, которые стимулируют стороны процесса и другие, участвующие в процессе, лица или заставляют их к проведению процесса на основе принципа добросовестности процесса. Указывают на то, что правовое регулирование в отдельных социалистических странах — например, в Болгарии, СССР и Чехословакии — содержит отдельные позитивные распоряжения в отношении требования добросовестности процесса. Авторы приходят к точке зрения, что в правовой науке зарубежных социалистических стран не существует общепринятого взгляда, который упомянутый выше принцип ставил бы на уровень основного принципа, но, по их мнению, совершенно обоснованным было бы, если бы социалистическое гражданское процессуальное право сделало принципиальный вывод из в основном одинаковых положений кодексов, отразило природу требования добросовестности процесса как основного принципа социалистического гражданского процессуального права. Ведь это является одним из имеющих большое значение завоеваний социалистического гражданского процессуального права по сравнению с буржуазным гражданским процессуальным правом.[12]

7) Процессуальное право социалистических стран за несколькими исключениями не регулирует случаев отвода прокурора. И венгерское гражданское судопроизводство также не содержит норм, относящихся к отводу прокурора. Авторы указывают на то, что это связано с процессуально-правовым положением прокурора. Прокурор не судья, он не решает дело, не является стороной процесса, а если же в процессуально-правовом смысле является стороной, не распоряжается предметом процесса. Из всего этого можно было сделать вывод о том, что у прокурора не может быть таких субъективных обстоятельств, как у суда или у стороны, или если бы они и имелись, то они в силу процессуального положения прокурора не имеют важного значения. В то же время авторы приходят к противоречивому выводу: по их мнению может встречаться и такое, когда от прокурора нельзя ожидать по какой-либо причине объективного ведения дела.

8) Понятие иска авторы определяют следующим образом: иск является первоначальным средством осуществления судебной защиты субъективного права, осуществляемой в судебном процессе. В гармонии с этим их определением находится и их точка зрения, что иск является одним из самых важных процессуальных действий, который является одновременно и предпосылкой возбуждения гражданского процесса. То средство правовой защиты, с которого начинается гражданский процесс. Авторы подчеркивают, что в социалистическом гражданском процессуальном праве не осущест-

[12] стр. 101—104.

вляется буржуазное правило, согласно которому непосредственно заинтересованным сторонам принадлежит монополия по предъявлению иска. Соответственно положениям венгерского гражданского судопроизводства — в случаях, особо указанных в законодательных актах — помимо заинтересованных лиц с целью обеспечения социалистической законности, охраны прав и законных интересов общественных организаций и отдельных лиц, иск может предъявить прокурор, а в отношении алиментов по содержанию малолетних — органы опеки, а также право предъявления иска имеют и профсоюзы, и управление по охране авторских прав и т. д. Осуществление охраняемых правом интересов социалистическое государство обеспечивает и в том случае, если непосредственно заинтересованная сторона из-за неосведомленности и т. д. не возбуждает процесс, или же в силу какой-либо преграды не в состоянии сделать необходимые шаги в интересах осуществления своего права. В определенных в законодательных актах рамках в таких случаях государственные и общественные органы могут возбудить гражданский процесс, служащий защите субъективных прав стороны. Этим самым то положение, согласно которому без иска нет гражданского процесса приобретает социалистический смысл.[14]

Из сложившихся в буржуазной юридической науке теорий иска авторы знакомят читателя со следующим:

а) Теорией материального права (Савини, Пукта, Унгер, Малишев),

б) Теорией абстрактного права на иск (Плос, Гордон, Дегенколб);

в) Теорией конкретного права на иск (Вах, Гелльвиг, Енё Бачо (старший) и т. д.).

Авторы указывают на то, что в период империализма все больше говорят о ненужности понятия права на иск, поскольку это право пригодно для того, чтобы угрожать осуществлению судебного произвола империалистического государства. После раскрытия советской теории права на иск авторы приходят к выводу, что право на иск — противоположно часто фиктивной сущности его в буржуазном процессе — в социалистическом гражданском процессе становится реальным и посредством того, что суд в силу принципа судебного разбирательства дела и принципа распоряжения раскрывает действительные права сторон и их отношение друг к другу путем раскрытия действительных обстоятельств дела. Право на иск является институтом социалистического демократизма, который способствует осуществлению задач социалистического правосудия.

9. Вопросами доказывания занимается глава XIV работы, которая по предмету и разработанности относится к самым важным частям работы.

Свои соображения, относящиеся к доказыванию, авторы начинают с определения понятия доказывания и доказательства. По их мнению, до-

[13] стр. 241.
[14] стр. 243.

казывание является совокупностью всех тех процессуальных действий, с помощью которых суд, сотрудничая со сторонами и другими участниками процесса, устанавливает действительность или недействительность необходимых для разрешения дела фактов. Значит, по мнению авторов, доказывание направлено на установление фактов, явлений действительности.[15] Затем переходят к тому, что процессуальное доказывание является по существу познанием. На основе этого приходят к выводу о том, — и правильно — что для познания как процесса мышления, действительны те же закономерности, которыми занимается теория знаний. Процессуальное доказывание помимо вывода суда содержит и иную судебную деятельность, содержит в себе и деятельность сторон по доказыванию. Нормы, относящиеся к процессу доказывания, занимаются в первую очередь не логическими правилами вывода, к которому приходит суд, а многочисленными нормами, относящимися к распоряжению о проведении доказывания и самому проведению доказывания.

В гармонии с социалистическим подходом к осуществлению правосудия на основе истины, авторы раскрывают то, что они понимают под свободной системой доказывания: «Суд — поскольку закон не распоряжается иначе — не связан с формальными правилами доказывания, с определенным методом доказывания или с применением определенных средств доказывания, и свободно может использовать сообщения сторон, а также может использовать всякое такое доказательство, которое пригодно для раскрытия фактических обстоятельств дела. (абзац I § 6 Гражданского Судопроизводства).[16] В качестве исключения указывают на законные презумпции и на те положения законодательных актов, согласно которым то или иное обстоятельство следует считать действительным до тех пор, пока не будет доказано противоположное, т. е. согласно которым к действительности той или иной сделки необходим документ, возможно официальный документ, и таким образом лишь этим может быть доказано.

В кругу доказывания авторы занимаются предметом и обязанностью доказывания, видами доказывания и видами доказательств. Занимаются объяснением сторон, свидетельским показанием, заключениями экспертиз, предметом осмотра, документом, как доказательством, а также оценкой результатов доказывания. В отношении оценки сложившаяся их точка зрения хорошо подытоживает их взгляд на эффективность доказывания и воспользование раскрытым материалом доказывания. Оценку результатов доказывания считают сложной задачей, что охватывает помимо прочего, собирание, анализирование доказательств, их оценку, сопоставление доказательств и таким образом их взаимный контроль, анализ взаимосвязей между фактами, а также экономические и общественные взаимосвязи. Итак,

[15] стр. 319.
[16] стр. 320.

оценка доказательств охватывает фактические выводы, установление отдельных фактов и фактических обстоятельств дела вцелом. В круг свободной оценки входит правосознание, внутреннее убеждение судьи, связанное с его мировоззрением, со знанием общественного порядка, правовую систему и право которого судья применяет.[17]

10. Глава XV работы занимается судебными решениями. Авторы подразделяют судебные решения, излагают вынесение решений и уведомление о них. В отдельности рассматривают судебные решения, определения, устранение недостатков решений, правовые последствия судебных решений, мировое соглашение, а также занимаются вопросом временной меры и предварительной исполнимости.

Говоря о судебных решениях, авторы констатируют, что судебное решение является самым значительным решением, решением суда, решающим дело по существу.[18] Оно призвано к тому, чтобы на уровне вынесения решения реализовало задачи правосудия. Костяком правосудия является судебное решение, все вертится вокруг него. Весь предшествующий процесс служит вынесению решения, а весь процесс вслед за этим направлен на контроль, а потом на исполнение судебного решения. Судебное решение суммирует результаты судебного разбирательства.

В соответствии с пониманием важности судебного решения авторы очень подробно анализируют виды, структуру и элементы содержания судебного решения. Среди элементов судебного решения они указывают на законность, на обоснованность, на полноту и последовательность.[19] Сущностью требования законности, предъявляемого к судебному решению, является действительная правовая охрана, соответствующая правовым нормам. Требование обоснованности судебного решения означает, что а) судебное решение должно содержать состав, б) установленный состав должен соответствовать действительным фактическим обстоятельствам дела (объективная истина), в) это тождество суд должен обосновать доказательствами, г) из доказанного и соответствующего действительности обстоятельства дела суд должен прийти к правильному выводу в отношении квалификации спорного правоотношения.

11. Главы XX—XXIII занимаются процессами по делам особого производства, судебным исполнением, третейским разбирательством, хозяйственным арбитражным процессом. По мнению авторов, помимо общей цели гражданского процесса имеются много таких особых целей, которые, с одной стороны, не требуют исковой формы процесса, а с другой стороны, требуют особого регулирования и внутри процесса по особому производ-

[17] стр. 343.
[18] стр. 352.
[19] стр. 355.

ству.[20] Для обоих видов процесса характерным является то, что субъектом процесса является суд или в отдельных случаях нотариус, а также лица, правомочные участвовать в процессе. Оба вида процесса являются деятельностью, состоящей из взаимосвязанных действий и предметом обоих является гражданское дело. Помимо общих характерных признаков отличающей чертой между ними является форма процесса.

В процессе по делам особого производства иногда отсутствуют те гарантии (основные принципы), которые сопровождают форму процесса по гражданскому иску. По мнению авторов, характер дел особого производства, а также особая цель процесса не требует существования этих гарантий. Для проведения объективной истины обычно достаточно принимать во внимание одностороннюю просьбу, ибо возможно, и нет спора между заинтересованными лицами и в иных случаях целью является лишь установление какого-либо факта, где не существует сторона с противоположным интересом.

Авторы в своей книге по гражданскому процессу всегда подчеркивают важность гарантий в гражданском процессе. Эти гарантии рассматривают как средства усиления социалистической законности. Значит, понятна их точка зрения, которая связана с некоторыми оговорками в отношении особого производства. Они признают важность, целесообразность особого производства, но типичным считают исковой процесс, а особое производство исключением, не типичным. По их мнению, развитие социалистической правовой системы действует в направление сужения круга особого производства. Укрепление этой своей позиции видят в том, что в не социалистической системе права часто применяют особое производство там, где хотят избежать даже формальных гарантий гражданского процесса.

12. Авторы уверенно использовали опыт науки социалистического процессуального права как внутри страны, так и в международном масштабе. Разработкой на высоком научном уровне теоретических и практических вопросов гражданского процессуального права авторы создали выдающуюся работу. Они закрепили результаты развития в течение двух десятилетий венгерского гражданского процессуального права и создали основу для более глубокого исследования по науке гражданского процесса.

Л. Хартаи

[20] стр. 484.

Recensiones

Meznerics, I.: Banking Business in Socialist Economy*

1. Already at the very outset the attention of the reader should be called to two circumstances. First, the work quoted in the headline has been published in English, consequently it is directly accessible to an international circle of readers interested in the problem. Second, the title suggests a work of economic science. Still in fact the title implies much more. While the author offers a comprehensive survey of the place that banks and credit systems or banking and credit transactions occupy in a socialist economy, a legal analysis of the whole scope is given at the same time. Hence the work is by far more than a mere description of the economic aspects of the subject-matter. It is an exact guidance to the actual legal structure of the topic. It will be agreed that this goes beyond a mere economic analysis, for the very reason that the work will serve as a trustworthy source for all those who in the one way or the other take part in the existing and expanding banking and financial relations with Hungary and the other socialist countries, and want to become acquainted with the nature of these relations. As a matter of fact, statutory regulation is the most exact formulation of the fundamental elements of an economic machinery.

It is unnecessary to remind the reader that as far as this reviewer knows literature has not produced a summarizing monography in this field as yet. Therefore it may be taken for granted that with the publication of this work both the author and the joint publishers will meet a considerable international interest. The author well known in both Hungarian and foreign literature comes up to expectations. Iván Mezneries is not only a versatile author, but for many ears the prominent legal consultant of Hungarian banking and in this capacity he had and has prominent functions in the formation of the legal order of Hungary's international financial relations.

Of course it is not by mere chance that a work of this type has been published in the book market of the socialist countries at the present juncture. On objective considerations it was about time to publish such a work. As it is well known, international economic relations have partly expanded, partly become differentiated by the sixties and their corresponding legal regulation or the legal channelling of their financial relations have developed to an extent that a far-reaching evolution of the earlier legal mechanism has been brought about. In this connexion we would merely remember the formation of the Bank of International Economic Cooperation and, simultaneously with it, the introduction of a multilateral accounting system of the Comecon countries, the expanding functions of the banks within the framework of the reform of economic management, the growing cooperation of the Comecon countries in production and marketing on an enterprisal level, the growth of the

* Joint English edition by Akadémiai Kiadó, Budapest, and A. W. Sijthoff — Leiden 1968, 383 pp.

East-West trade of the socialist countries. In a straightforward manner this has at the same time entailed a differentiated organization of the financial and payment bearings of the economic processes here affected. A comprehensive analysis and the integration into a system of all this have become a practical and scientific task which had to be tackled without delay. The reader will find that Iván Mezneries has handled the matter on a very high level.

2. As for its method the work may surely be called examplary. In this respect the principal features of the work may be summed up as follows. The author sets out in all cases from actual economic and financial processes and their living statutory order, offering a legal analysis directed to practice. The theoretical concepts turn up as the scientific postulates of the needs of practical reality and reality itself. By this way the author contributes appreciably to the development of fiscal law, the law of banking transactions and of the theoretical order of this scope of law in many respects. It is his comparative method which gives a survey of the relevant legal material and legal opinions not only of Hungary, but also of other socialist, essentially Comecon countries. The sources of law and of literature as cited equally extend, to Hungary and the socialist countries and to the legal sources and those of jurisprudence bearing upon the economic and financial relations between East and West.

3. A brief survey will give an idea of the topical wealth of the work. Part I of the work of four parts, in addition to the usual definition of the subject-matter, discusses the sources of the law relating to banking business and the categories of banking transactions.

Part II, Banking Business in East-West Trade, absorbs about one half of the work. From the practical aspects of international commercial and economic relations, presumably this part of the work will attract most of interest. In the exemplary manner already mentioned, this part of the book discusses problems of not less significance than the various credit contracts, banker's loans, securities for banker's credits and loans, discount letters of credit, collection of commercial papers, money orders and letters of credit, the cheque contract, remittances abroad and clearing accounts, payment operations in connexion with special foreign trade transactions, further the purchase and sale of foreign exchange (gold) and foreign currency operations and finally dealings in securities.

Part III is a comprehensive survey of the functions of banking activities in the socialist economy, on the one hand, and the organizational and legal structure or the socialist banking system, the relations of banks to socialist enterprises and other socialist economic units on the other hand. Chapter XVI is perhaps one of the most interesting sections of the work analysing questions of principles and theory. This chapter may contribute appreciably to a true understanding of socialist economy and the socialist banking system in the foreign world. Owing mainly to the lack of information it is here, as it is known, we meet most of the vulgarizing simplifications of the Western world, misbeliefs such as the legal coalescence of state and enterprises, or the view that the pursuit of profit is an element altogether alien to socialism and therefore the function of profit in the new mechanism of economic management is, in fact, a solution inconsistent with socialism, if not a withdrawal from the principles of the economic policy of socialism.

Further chapters of Part III deal with the banker's credit and loan in the socialist credit system, banker's credit and loan in the law, various types of banker's loans in the socialist credit system, security of banker's loans, deposits of socialist economic organizations, savings deposits, other bank deposits, banknote issue, principles of payments and system of bank accounts, account contracts, payments and other monetary settlements.

Part IV discusses the order of banking transactions of the Comecon countries. For the international economic relations of the Comecon countries, the sphere of problems of greatest significance lies obviously here. Not that two thirds of the total volume of international transactions between the socialist countries are absorbed by dealings with Comecon countries, but also because in the process of economic integration it will be in this sphere in which we shall witness and bring about ever newer elements of a dynamism which promises more and more advantages for the participating national economies. Also from this aspect, the author's work is a noteworthy contribution to the subject-matter of his work.

F. MÁDL

Une monographie importante sur les questions de l'Etat et de la démocratie*

Les réalisations de l'évolution sociale socialiste, les nouveaux traits de cette évolution — notamment la mise en oeuvre plus étendue et plus profonde du principe du démocratisme socialiste ainsi que les changements de l'activité d'Etat qui en résultent — amènent la théorie socialiste de l'Etat à réexaminer ses problèmes fondamentaux d'une façon plus différenciée, à confronter ses notions avec la réalité sociale ayant changé d'aspect, à adopter sa structure et les terrains de ses recherches aux exigences de l'évolution sociale et enfin à mettre ses réalisations théoriques en parallèle avec les conclusions auxquelles les théories bourgeoises de l'Etat sont arrivées. Le professeur Antalffy, auteur de plusieurs études concernant le développement de la théorie de l'Etat et de la pensée politico-juridique, dans sa monographie actuelle qui suit ses livres sur l'*Etat et la Constitution de la Démocratie d'Athènes* (1962) et sur la *Société, l'Etat et le Droit* (dont il était co-auteur), se propose de formuler à nouveau les problèmes fondamentaux de la théorie socialiste de l'Etat en les comparant avec la pensée politique bourgeoise antérieure et postérieure à Marx, pour dessiner de cette façon les contours d'une théorie marxiste de l'Etat ayant pour son point central la démocratie.

L'ouvrage du professeur Antalffy est composé de quatre parties qui s'occupent d'abord des problèmes méthologiques des études relatives à l'Etat, puis analysent les idées politico-juridiques sur l'Etat avant la formation du marxisme. Dans la suite l'auteur examine les traits principaux des tendances de la doctrine bourgeoise moderne, en les mettant en parallèle avec le concept marxiste de l'Etat, pour traiter à la fin les problèmes fondamentaux de la théorie marxiste de l'Etat, en s'étendant sur quelques problèmes théoriques primordiaux de l'Etat du capitalisme aussi. La structure de l'ouvrage et le mode du traitement de la matière sont déterminés par l'exigence — expliquée et motivée par l'auteur à la fin de son livre — qui veut que la théorie marxiste de l'Etat traite sa matière dans une indépendance relative de la théorie marxiste du droit, à l'aide de méthodes qui lui sont propres, mais en même temps avec des vues complexes et d'une manière qu'on pourrait qualifier d'interdisciplinaire.

Dans sa *première partie* la monographie analyse les fondements philosophiques et les questions méthodologiques des études relatives à l'Etat. En ce qui concerne la façon de les approcher, l'auteur attribue une importance particulière à la méthode empirio-sociologique dont l'application est rendue possible, selon l'auteur, par *la nature double de l'Etat* (p. 27), c'est-à-dire

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* ANTALFFY, GY.: *Állam és demokrácia (Etat et démocratie)*. Budapest, Közgazdasági és Jogi Könyvkiadó, 1967. 542 p.

par la circonstance que l'Etat apparaît d'une part comme un fait objectif ayant des régularités qui lui sont propres et qui sont indépendantes des individus et, d'autre part, comme un phénomène social formé des conditions humaines et se manifestant dans les conduites des hommes.

La deuxième partie examine les idées politiques et juridiques antérieures à Marx en touchant les problèmes fondamentaux de l'Etat, de la société et de la démocratie. L'auteur s'occupe séparément des doctrines politiques des principaux représentants de l'Orient de l'antiquité, de la Grèce, de Rome et de la féodalité. Il porte une attention spéciale aux idées des démocrates révolutionnaires russes ainsi qu'aux traits caractéristiques principaux de la doctrine politico-juridique précédant la lutte pour l'indépendance de la Hongrie. Des explications de l'auteur contiennent entre autres un examen critique des conceptions politico-juridiques de Miklós Zrínyi, de Ferencz Rákóczi, István Széchenyi, Lajos Kossuth, József Eötvös, László Szalay et Mihály Táncsics et aboutissent, par rapport aux recherches antérieures à des résultats essentiels et, sous plusieurs aspects, nouveaux.

La *troisième partie* qui s'occupe de l'importance de la formation de la théorie marxiste de l'Etat, présente la manière de voir marxiste dans le cadre du développement historique des idées générales relatives à l'Etat. L'auteur démontre que dans son ensemble le marxisme signifie un dépassement théorique et historique des doctrines politico-juridiques antérieures. Après une analyse des idées de Marx et Engels il éclaircit les thèses au moyen desquelles Lénine a contribué au développement ultérieur des conceptions marxistes. Dans la suite, l'auteur passe en revue les doctrines politico-juridiques nées simultanément ou postérieurement au marxisme et étant en opposition à celui-ci. En cette matière on pourrait mettre en relief l'analyse critique des idées de Comte, Durkheim, Weber, König, Radbruch et del Vecchio et, parmi les auteurs hongrois, celles de Győző Concha, Ágost Pulszky et Félix Somló.

La partie fondamentale et la plus volumineuse de l'ouvrage est sa *quatrième partie* consacrée aux problèmes cruciaux de la théorie marxiste de l'Etat. Après avoir esquissé les tâches de cette théorie, l'auteur analyse les catégories générales de la théorie de l'Etat et les notions générales exprimant les différents aspects du caractère d'Etat. Puis il étudie le problème de la souveraineté, le problème de la fonction de l'Etat, lié à celui du but de l'Etat, la relation entre l'Etat et le droit et, pour finir, *la possibilité d'une définition d'ordre général de l'Etat*. Concernant cette dernière question l'auteur adopte une attitude négative, puisqu'à son avis «une définition universellement valable de l'Etat effacerait la différence qualitative qui existe entre les Etats de type exploiteur et l'Etat du prolétariat» (p. 324). L'auteur effleure dans la suite quelques-uns des principaux problèmes de l'Etat du capitalisme, en traitant avec abondance de détails les questions de l'Etat-providence. A ce propos l'auteur examine — en connexité avec l'importance de l'activité socio-économique de l'Etat bourgeois moderne — la réalité des objectifs et des réalisations dans les domaines du plein emploi, de la répartition du revenu national, de la législation sociale, en expliquant que l'Etat-providence est resté tout de même un Etat exploiteur, au fond capitaliste, même si selon ses apologistes il exprime une tendance dirigée à la diffusion du pouvoir et à la création d'organes au-dessus des classes.

L'exposé introductif de la quatrième partie que nous venons de mentionner est suivi par l'explication des *principaux problèmes théoriques de l'Etat socialiste*. L'auteur analyse d'abord les différentes étapes du développement de l'Etat socialiste, notamment les caractéristiques de l'Etat de la dictature du prolétariat et de l'Etat du peuple tout entier. Il constate que la croissance de l'Etat du peuple tout entier ne signifie point la formation d'un nouveaux type d'Etat. En ce qui concerne ses traits caractéristiques essentiels, à l'avis de l'auteur, l'Etat du peuple tout entier

reste identique aux autres Etats socialistes, même s'il a cessé d'être l'instrument de la domination d'une classe. Dans le paragraphe consacré à l'explication du *rôle dirigeant du parti marxiste-léniniste* l'auteur rappelle que dans la société socialiste le parti ne saurait suppléer à l'Etat et aux organes de celui-ci; au contraire il suppose le fonctionnement efficace de ces derniers. En effet, les buts de ces deux sont les mêmes, à cause de quoi une rivalité entre eux serait dépourvue de tout fondement social. Le rôle dirigeant du parti se réalise dans plusieurs formes, notamment par le fait que c'est le parti qui fixe le programme de l'activité de l'Etat; c'est lui qui, du point de vue de sa propre politique, contrôle l'activité des organes d'Etat; ce sont les meilleurs fonctionnaires du parti qui déploient une activité de direction dans les emplois publics supérieurs; et c'est le parti qui mobilise la société tout entière aux fins de l'accomplissement de tâches concrètes. La direction exercée par le parti — continue l'auteur — ne se présente pas dans la forme d'une contrainte, ni d'une façon administrative: «le contrôle exercé par le parti concernant l'activité des organes d'Etat est, quant à son caractère, un contrôle exercé par la société et non pas un contrôle exercé d'une position hiérarchiquement supérieure» (p. 388). C'est à cela que correspondent deux caractéristiques du rôle dirigeant du parti, notamment que, d'une part, dans la formation des principes régissant la direction prennent part les organes dirigés de l'Etat et de la société aussi et que, d'autre part, le rôle dirigeant ne signifie pas des rapports juridiques de nature hiérarchique, même si ce rôle est en général prévu par les constitutions socialistes (pp. 391—392). La *souveraineté de l'Etat socialiste* est examinée par l'auteur en connexion avec la démocratie. L'auteur constate entre autres que «la souveraineté de l'Etat socialiste se réalise dans l'unité organique du peuple et de la nation» (p. 398). Il passe ensuite à l'analyse des différents formes et mécanismes de l'Etat socialiste. En cette matière il convient de mettre en relief la thèse de l'auteur suivant laquelle il est nécessaire que les enquêtes sociologiques générales et spécialisées, y afférentes soient approfondies davantage, puisque du point de vue de la sociologie, *l'Etat socialiste est également un groupe social*, en conséquence de quoi il peut révéler dans son contenu des intérêts particuliers, des positions de statut et de fonction, des structures et des normes informes, des désorganisations et ainsi de suite (p. 440).

A propos de l'examen des fonctions de l'Etat socialiste l'auteur insiste également sur l'approfondissement des enquêtes sociologiques générales et spécialisées, notamment sur la mise en parallèle des catégories de la fonction manifestée, de la fonction latente et de la disfonction avec celles de la doctrine des fonctions propres à la théorie de l'Etat. Dans la suite, en rapport avec les problèmes du démocratisme socialiste et de la déétatisation, l'auteur traite les relations qui existent entre l'Etat socialiste, les organismes de la société et le droit. Il définit et classifie les organes de la société et examine les relations qu'ont avec l'Etat les syndicats, les organisations du front populaire, les sociétés, les tribunaux sociaux, les organes du contrôle exercé par le peuple, ainsi que les piquets d'ouvriers. Ces explications sont suivies par une critique sommaire des définitions qui ont été faites jusqu'ici concernant l'Etat socialiste, pour passer dans la suite aux problèmes du dépérissement de l'Etat socialiste. En cette matière l'auteur résume l'essence de *l'administration de la société communiste par elle-même* dans le fait que cette auto-administration sera un organisme social dépourvu, d'une part, de tout caractère politique et de caractère de classe et, d'autre part, de tout appareil spécial, séparé et distinct. L'activité de cet organisme reposera avant tout sur la persuasion et sur une contrainte psychique de nature propre et seulement dans des cas extrêmes et exceptionnels sur une contrainte physique, p. e. au cas d'un traitement médical forcé (pp. 499—500). La contrainte de la

société communiste sera, selon Lénine, cité par l'auteur, comme la direction tendre d'un chef d'orchestre. Dans la brève partie finale de l'ouvrage l'auteur insiste sur l'autonomie relative de la discipline marxiste de la théorie de l'Etat vis-à-vis de la théorie marxiste du droit, en indiquant que les problèmes de l'Etat doivent être étudiés dans une indépendance relative, dans le cadre d'une vision complexe, en tenant compte de ses aspects philosophiques, sociologiques et juridiques aussi.

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En ce qui précède, nous avons pu rendre compte d'une manière sommaire seulement, de la monographie très étendue, mais en même temps très synthétique, qui embrasse des questions importantes de l'histoire de la doctrine et des problèmes de la théorie de l'Etat. L'auteur traite nombre de problèmes qu'il approche d'une manière nouvelle sous plusieurs aspects. C'est précisément en considération de l'importance de cette manière que la Faculté de droit de l'Université József Attila de Szeged a convoqué au mois de février 1968 une réunion en vue d'y soumettre l'ouvrage à une discussion approfondie. A cette discussion ont pris part les représentants de la science hongroise de l'Etat et du droit, le corps des enseignants de la Faculté ainsi que beaucoup de juristes de la vie pratique.

Au cours de la discussion, en dehors de l'appréciation de l'ouvrage et des questions de sa structure et de la méthode de son élaboration, de nombreux problèmes ont surgi qui vont même au delà du livre même. Ainsi par exemple *M. Samu* a soulevé la question de certains aspects de l'influence exercée par le mode asiatique de la production sur l'évolution de l'Etat, ainsi que — en matière de la doctrine des fonctions d'Etat — la distinction de l'intérêt d'Etat, en tant qu'élément relativement indépendant et affectant à la fois les buts et les fonctions de l'Etat, comme la nécessité d'élaborer les branches spécialisées des sciences de l'Etat aussi. *M. Szotáczki*, auteur d'un compte-rendu sur l'ouvrage, a soumis à une critique la manière de voir de l'auteur relative à la notion générale de l'Etat. Comme il l'a formulé, «la notion générale n'a pas pour rôle de servir de base à la délimitation des phénomènes conceptuellement conjointes, mais celui de mettre en relief les traits communs et généraux de ces phénomènes et de contribuer ainsi à leur distinction et délimitation d'autres groupes hétérogènes de phénomènes». (Magyar Jog, XV [1968], p. 180.) Par conséquent, on doit distinguer la notion générale de l'Etat et les notions spécifiquement générales de l'Etat socialiste et de l'Etat exploiteur. A propos de l'Etat du peuple tout entier *T. Vas* a expliqué qu'il doit être considéré comme une nouvelle forme d'Etat de type d'Etat socialiste. *K. Kulcsár* a exprimé sa conviction que du point de vue de la théorie de l'Etat et de la théorie du droit la relativité de leur autonomie devient de plus en plus douteuse, puisque dans le développement moderne des sciences ce sont les recherches différenciées qui avancent au premier plan et qui ont pour condition de ce qu'un phénomène donné soit étudié sous plusieurs aspects et à l'aide de plusieurs méthodes. Selon *E. Pólay* les conceptions de la Rome antique étaient impropres à fonder une philosophie de droit autonome. *J. Martonyi* a analysé l'influence exercée par les idées de la théorie de l'Etat sur le droit positif, tandis que *R. Horváth* a examiné les rapports entre le raisonnement de la théorie de l'Etat et le raisonnement économique, en insistant sur la nécessité de la complexité et de l'universalité des sciences relatives à l'Etat. Enfin *V. Peschka* a rappelé que les phénomènes de l'Etat et ceux du droit forment deux groupes distincts de phénomènes qui doivent être étudiés séparément, puis, en connexité avec la définition générale de l'Etat, il a indiqué que l'intégration de l'Etat du peuple tout entier — concernant lequel nous n'avons pas encore d'expériences suffisantes — dans une notion générale de l'Etat, souleverait pour le moment de graves problèmes théoriques.

La théorie de l'Etat et la théorie du droit, en tant qu'éléments constitutifs de la théorie marxiste—léniniste de l'Etat et du droit forment une matière d'enseignement unie; toutefois dans les discussions ayant eu lieu dans les dernières années leur autonomie relative dans le système des sciences de l'Etat et du droit a été presque unanimement reconnue. (Voir à ce sujet le compte-rendu de l'auteur de ces lignes sur une réunion internationale de travail qui c'est occupé aussi de cette question. — *Acta Juridica*, X. 1968. pp. 183—189.) Cette autonomie est confirmée par le fait aussi, que depuis plusieurs années déjà les recherches intéressant la théorie du droit se poursuivent séparément. L'importance de l'ouvrage du professeur Antalffy consiste dans les efforts, couronnés de succès, qu'il avait déployés en vue de regarder les problèmes cardinaux de l'Etat d'une manière complexe, de compter en la matière d'une façon prononcée avec les facteurs extrajuridiques et de chercher par cette voie une réponse à ces problèmes dans le cadre de la théorie marxiste de l'Etat — qui est en train de chercher les voies et les possibilités conduisant vers une autonomie relative — ou au moins de donner des indications relatives à leur solution. Par son ouvrage qui après tant d'années est la première monographie systématique de grande envergure de la science de l'Etat, le professeur Antalffy a contribué efficacement au développement en Hongrie de cette science.

Cs. VARGA

Un commentaire du Code pénal hongrois

Dans la période succédant à la deuxième guerre mondiale le commentaire du Code pénal récemment publié est le premier traité synthétique du système tout entier du droit pénal hongrois; sa publication est un événement important de la vie juridique hongroise. Le Code pénal est incorporé dans la loi no. V de 1961; il a été mis en vigueur par le décret-loi no. 10 de 1962.

Avant la promulgation de ce code un Code pénal datant du dernier siècle était en vigueur en Hongrie, avec certains amendements et modifications. Ce n'était que naturel qu'après la libération d'importantes normes de droit pénal ont été créées. Parmis ces dernières il convient de mentionner la loi no. VII de 1946 sur la défense du régime démocratique et de la République, le décret-loi sur la police des changes ainsi que le décret-loi no. 24 de 1950 sur la protection de la propriété sociale. Une modification essentielle de l'ancien Code a été promulguée par la loi no. II de 1950 qui en a codifié de nouveau la Partie générale. Ce système de droit pénal, mélange d'éléments anciens et nouveaux, ne correspondait pas assez aux nouvelles conditions socio-économiques radicalement changées et même certaines dispositions des règles de droit émises après la libération avaient besoin d'être révisées. Le nouveau Code est une oeuvre de législation qui dans son essence est en harmonie avec les conditions socio-économiques actuelles. C'est un ouvrage complet qui embrasse le droit pénal dans son ensemble, y compris les dispositions relatives aux mineurs, aux infractions militaires, et certaines dispositions particulières de sa Partie générale ayant trait aux militaires. Le commentaire contient les thèses de la jurisprudence d'après la libération qui peuvent être considérées comme généralement valables; ce sont les expériences de cette jurisprudence et les résultats de l'activité doctrinale des derniers vingt ans qui constituent les fondements du commentaire.

Quant à la *jurisprudence, comme une des sources* à laquelle le commentaire a puisé, il convient de rappeler que c'est la Cour suprême qui guide, aux termes de la loi, l'activité juridictionnelle des tribunaux. La Cour s'acquitte de cette tâche de différente manière. Concernant les questions d'intérêt général elle énonce des principes directeurs. Concernant les

questions d'ordre plus restreinte elle prononce des arrêts de principe qui sont obligatoires pour les juridictions. De plus, une pratique s'est établie, suivant laquelle les problèmes d'interprétation surgis dans la jurisprudence sont discutés par les chambres réunies (dites collèges) de la Cour. Les résultats de ces discussions sont consignés dans des «prises de position collégiales». Ces dernières n'ont pas de force obligatoire, mais elles sont en général suivies par les tribunaux qui en apprécient les considérants. Des moyens ultérieurs du guidage en question sont encore les arrêts prononcés dans des cas concrets, contenant l'énonciation de certains principes. Toutes ces manifestations de la Cour sont publiées dans un périodique édité par la Cour et portant le titre *Bírósági Határozatok* (Décisions judiciaires). Après la promulgation du nouveau Code pénal, la Cour a procédé à la révision des principes directeurs, arrêts de principe et prises de position collégiales antérieurs et, suivant qu'ils étaient conformes ou non aux dispositions du Code, elle les a écartés, ou maintenus soit avec un texte modifié, soit invariés. Il convient de remarquer encore que récemment on a receuilli la jurisprudence antérieure, susceptible d'être considérée comme valable, en la publiant dans trois volumes sous le titre *Büntetőjogi Döntvénytár* (Receuil des arrêts de droit pénal). De toutes ces publications usage a été fait par les auteurs du commentaire.

Une autre source importante du commentaire était l'exposé des motifs accompagnant le projet de la loi portant code pénal, contenant des explications interprétatives de toutes les dispositions du Code.

Les auteurs du commentaire ont profité également des monographies et des articles de revue, publiés depuis la promulgation de la loi.

En ce qui concerne l'*organisation des travaux de la rédaction du commentaire*, il convient de rappeler que le temps écoulé depuis le premier juillet 1962, date de l'entrée en vigueur du Code, était trop bref pour qu'une jurisprudence pût se former concernant toutes ses dispositions. En ce qui concerne les infractions plus fréquentes, la jurisprudence est plus riche; par contre, relativement aux infractions plus rarement perpétrées elle est plus exiguë. Concernant les dispositions qui par rapport à l'ancien Code n'ont subi aucun changement par effet du Code nouveau ou l'ont subi à peine, l'ancienne jurisprudence a fourni un matériel plus abondant que c'était le cas des nouvelles dispositions fondamentales. Dans ces conditions on peut constater forcément certaines disparités de l'ampleur et de la précision de l'élaboration des différentes parties du commentaire. Les nouvelles dispositions ont soulevé toute une série de questions d'interprétation. Ce fait et le laps de temps relativement bref écoulé depuis l'entrée en vigueur du Code font comprendre les difficultés auxquelles se heurtait la rédaction du commentaire. Ces difficultés ne pouvaient être maîtrisées qu'à l'aide d'une méthode consistant dans l'association au travail d'un relativement grand nombre d'auteurs, dont chacun s'est chargé en règle générale de l'élaboration d'une partie déterminée du Code, notamment de la partie, sur le terrain de laquelle ils ont possédé les plus grandes expériences pratiques et théoriques. Une telle répartition des annotations, en dehors des circonstances déjà mentionnées, a contribué également à certaines inégalités, du reste insignifiantes, des diverses parties de l'ouvrage. Parmi les 17 co-auteurs il y avait des spécialistes de grandes expériences pratiques; des juges de la Cour suprême et du Tribunal de Budapest et des fonctionnaires du Ministère de la Justice; il y avait aussi des criminalistes attachés aux universités et à l'Institut des Sciences politiques et juridiques de l'Académie des Sciences de Hongrie. Malgré son élaboration partagée, le commentaire est une oeuvre méthodique et homogène. Le caractère homogène a été assuré aussi grâce à la révision et la rédaction en commun.

En ce qui concerne *le caractère de*

l'ouvrage, il convient de constater que — comme les commentaires en général — il veut avant tout servir de guide à ceux qui appliquent le droit, concernant l'interprétation des règles de droit en vigueur; par conséquent l'ouvrage suit décidément des considérations d'ordre pratique. Les problèmes théoriques ne sont pas mis particulièrement en relief, mais les différentes solutions des problèmes d'interprétation manifestent des positions théoriques adéquates et on peut rencontrer des explications théoriques aussi dans la justification des différentes solutions pratiques qui ont été adoptées. Bien entendu, les thèses et les interprétations du commentaire n'ont aucun caractère obligatoire. Les positions prises par l'exposé des motifs accompagnant le Code ont été pour la plupart adoptées par la jurisprudence, il y en a cependant un certain nombre qui n'ont pas été acceptées par cette dernière qui a adopté souvent une autre manière de voir. Les auteurs du commentaire se conforment — en général, mais pas toujours — aux explications de l'exposé des motifs ainsi que les positions prises par la jurisprudence. Il arrive, qu'ils ne se conforment pas à certaines explications de cet exposé ou qu'ils critiquent certaines positions prises par la jurisprudence, en développant et justifiant leurs propres thèses en toute indépendance. Certains auteurs soulèvent, et résolvent aussi, des questions qui n'ont pas été posées ou résolues ni par l'exposé des motifs, ni par la jurisprudence. La pertinence de quelques-unes de ces solutions est quelquefois discutable. Néanmoins, et surtout dans les cas d'une nouvelle loi, un tel exposé des idées personnelles a l'avantage incontestable de favoriser le développement de la pratique et de la vie juridiques.

Quant à la *structure du commentaire et la méthode* du traitement de la matière nous devons faire les remarques générales suivantes:

Dans le Code pénal hongrois figurent des infractions qui se réalisent seulement au cas où l'acte concret atteint un certain degré du danger comporté pour la société. (Telles sont les infractions contre l'économie populaire, les infractions contre les biens, la fraude douanière, l'infraction contre la réglementation des devises etc.) Les actes qui n'atteignent pas cette mesure réalisent seulement des contraventions à des règles administratives qui n'entraînent pas de sanctions de nature pénale et qui en principe ne rélèvent pas de la compétence de la juridiction pénale. Toutefois, les dispositions légales incriminant ces infractions ne contiennent pas de critères pouvant servir de base à leur délimitation des contraventions; on peut les retrouver dans d'autres règles de droit définissant ces dernières et en première lieu dans le décret-loi no. 10 de 1962 sur la mise en vigueur du Code pénal. En s'occupant des infractions de cette nature, les auteurs font connaître aussi les règles de droit relatives à la forme contraventionnelle des actes dont il s'agit, en élaborant les questions de délimitation des infractions et des contraventions analogues, ensemble avec la jurisprudence y relative. A ce propos il convient de remarquer que les travaux de rédaction du commentaire ont été terminés au mois de juin 1967 et que c'était après cette date que fût adopté la loi Ière de 1968 sur les contraventions et le décret no. 17 de 1968 relatif à la même matière: ces règles de droit ont quelque peu modifié les faits constitutifs des contraventions dont nous venons de parler. Les modifications en question ont été ajoutées au texte du commentaire dans la forme de notes en bas des pages respectives.

Une autre remarque d'ordre général que nous voudrions faire concerne le fait que certaines infractions sont définies par le Code dans la forme de dispositions-cadres. Telle est avant tout une partie considérable des infractions contre l'économie populaire, mais l'infraction contre la réglementation des devises et la fraude douanière sont au fond également de la même nature. Pour pouvoir appliquer ces dispositions il faut connaître les règles de droit remplissant ces cadres. Aussi dans

les cas d'autres infractions, il peut quelquefois être nécessaire de découvrir les autres règles de droit qui affectent les normes pénales. Aussi les auteurs n'ont-ils pas manqué de faire connaître les autres règles de droit intéressant l'application du Code pénal ainsi que la jurisprudence adoptée en la matière. Il faut en conséquence constater que le commentaire est une oeuvre qui aspire à l'intégralité, qui englobe l'entier système du droit pénal et qui s'efforce de donner une orientation à tous ceux qui appliquent le droit, concernant toutes les questions intéressant le droit pénal. C'est pourquoi la matière du commentaire est d'une richesse extraordinaire. C'était pendant les travaux de rédaction du Code que s'est opéré la transition graduelle à des nouvelles méthodes de la direction de l'économie. C'était évident, que cette nouvelle forme de la direction aurait des répercussions aussi dans le domaine du droit pénal. Il fallait compter avec l'abrogation ou la modification des règles de droit remplissant les cadres des dispositions constituant certaines infractions contre l'économie. Les auteurs du commentaire en ont tenu dû compte. Les règles de droit d'ordre économique promulguées après la clôture des travaux de rédaction sont publiées dans un appendice, de la sorte que le lecteur est convenablement orienté aussi à ce sujet.

En ce qui concerne le plan du commentaire, nous pouvons mentionner qu'il se compose de deux volumes; il est divisé, conformément à la structure du Code, en chapitres, puis en titres. Dans les titres la matière continue d'être répartie selon les articles du Code. Chacun des articles est suivi d'annotations, divisées en paragraphes suivant les questions de détail y traitées. La clarté du matériel est assurée par la mise en relief du texte de la loi en gros caractères. Lorsque des formes contraventionnelles s'ajoutent à l'infraction, le texte respectif du décret-loi no. 10 y figure également, composé en italique. Les annotations, c'est-à-dire les explications interprétatives suivent les textes légaux. La clarté de l'ouvrage n'est qu'augmentéé par le fait que, à l'intérieur des annotations, les règles de droit invoquées et les passages indiquant la jurisprudence sont également italiqués. La facilité d'emploi est favorisée encore par des brèves introductions figurant en tête des différents chapitres, et en partie des différents titres aussi. Les introductions donnent une orientation sommaire sur la matière y traitée, en esquissant éventuellement aussi son évolution historique. C'est l'appendice qui contient les nouvelles règles de droit constituant des contraventions. Le commentaire contient aussi une table des matières et un index analytique.

Le commentaire commence, en guise d'un préambule, avec une partie portant le titre «La tâche de la loi pénale», tandis que le Chapitre Ier analyse les dispositions relatives au champ d'application de la loi. Ces deux parties relativement brèves sont suivies par le Chapitre II sur les personnes et actes punissables; ce chapitre, plus volumineux que les premiers, est caractérisé par l'abondance des questions posées et par la profondeur des analyses. Il traite entre autres aussi les questions de la tentative et des actes préparatoires.

A ce propos, il nous faut dire au préalable, qu'on peut trouver dans le commentaire des intérprétations et des énonciations de principes qui se prêtent à discussion. Le présent compte rendu ne peut pas s'étendre sur toutes ces questions. Nous aimerions cependant en faire connaître à titre d'exemple, deux, dont l'une choisie de la matière du volume Ier que nous allons exposer ci-après, et l'autre, prise du XVIe Chapitre, volume II, à laquelle nous reviendrons plus tard. (Du reste, le fait d'avoir choisi justement ces deux exemples n'a aucune importance.)

Au sujet de la délimitation de la tentative et des actes préparatoires l'auteur du deuxième chapitre dit qu'il est impossible de donner une réponse généralement valable à la question de savoir quels sont les comportements susceptibles d'être considérés comme parties intégrantes de l'acte

de perpétration et quels sont ceux qui en sont des simples préparatifs. Or, à ce propos il convient de rappeler que de la jurisprudence on peut tirer la conclusion que nos tribunaux considèrent comme tentative aussi les éléments d'un acte précédent immédiatement et nécessairement l'acte concret, dont — selon la manière de voir ordinaire — ils ne peuvent pas être séparés. C'est cette même manière de voir qui figure dans l'exposé des motifs de la loi, notamment dans les annotations à l'art. 9 de celle-ci, comme aussi dans certains ouvrages étrangers. (Voir notamment *Chargorodski—Belajev:* Commentaire du Code pénal de la République Soviétique Socialiste Russe, Leningrad, Éditions de l'Université, 1962. p. 85; *Rittler—Lammarch:* Manuel du droit pénal autrichien, Wien, 1933. p. 193; aussi l'ouvrage de *Frank, R.* sur le Code pénal du Reich allemand.

En ce qui concerne les propres thèses pertinentes des auteurs, nous voudrions mentionner, à titre d'exemple, la suivante:

Aux termes de l'article 10 du Code ne pourra être punie pour tentative la personne qui par acte volontaire en a détourné les effets. Si toutefois l'acte est constitutif d'une autre infraction, il y aura lieu d'établir la responsabilité pour ce reste d'infraction. Or, à ce sujet l'auteur fait la critique des restrictions y apportées par la jurisprudence. Selon l'avis de l'auteur, pour que le détournement volontaire des effets puisse être constaté, il n'est pas nécessaire que — par exemple en cas d'un attentat à la vie — l'enchaînement des causes provoquant la mort soit interrompu sans l'intervention de tierces personnes par l'auteur seul, ou bien d'une façon thérapeutiquement décisive par celui-ci. Les arguments invoqués par l'auteur au soutien de sa thèse sont convaincants (Commentaire, Vol. I^{er}, pp. 62 à 63). C'est dans cette partie du commentaire que sont traités les questions relatives à l'auteur, au co-auteur, à l'instigateur et au complice ainsi que celles de l'intention et de l'imprudence, et enfin des causes excluant ou mitigant la responsabilité pénale.

Le Chapitre III élabore la jurisprudence ayant trait aux peines et aux mesures judiciaires. Le Chapitre a le titre: «Fixation de la peine.» Le chapitre précédent traite les problèmes statiques et le dernier les problèmes dynamiques de la punition. Quant à ce chapitre, l'auteur avait à sa disposition une jurisprudence extrêmement riche, à laquelle il n'a pas manqué de puiser. C'est dans cette partie que sont traités et systématisés aussi les problèmes du cumul d'infractions, en tenant compte de la récente jurisprudence de la Cour suprême. La solution est caractérisée par une manière de voir criminologique relative au cumul. En tout cas il convient de noter que dans la doctrine on peut rencontrer aussi des idées opposées à celle de l'auteur.

Le V^{e} Chapitre porte le titre «Dispense des désavantages attachés à la condamnation»; le VI^{e} traite les dispositions d'ordre général relatives aux mineurs et le VII^{e} celles relatives aux militaires. Le VIII^{e} Chapitre fait connaître d'une façon plutôt succinte les dispositions interprétatives du Code ainsi que la jurisprudence y relative. Le IX^{e} Chapitre s'occupe des infractions contre l'Etat, le X^{e} des infractions contre la paix et l'humanité, ensemble avec la jurisprudence relativement exiguë y afférente. C'est au Chapitre XI que sont traitées les infractions contre l'administration et la juridiction et au XII^{e} celles contre la sécurité et l'ordre publics. Une partie de ces dernières infractions consiste dans des actes de détérioration, tels les actes provoquant un danger public, les perturbations causées à un service ou à un établissement d'intérêt public, les infractions contre la sécurité de la circulation etc., tandis qu'une autre partie comprend des comportements mettant en danger la santé publique, comme par exemple l'infraction commise avec objets de consommation nuisibles à la santé, l'empoisonnement des puits, l'abus commis avec des stupéfiants et avec des substances vénéneuses, l'exercice illégal de la médecine. Dans ce chapitre figurent aussi des infractions menaçant l'ordre et

la tranquillité publics, comme le passage interdit de la frontière, la complicité dans un tel passage, les infractions de presse, le désoeuvrement entraînant un danger public, l'organisation de jeux de hasard interdits, le comportement antisocial, l'incitation contre la loi ou une mesure prise par les autorités, le colportage de nouvelles alarmistes ainsi que les faux en écritures publiques et privées.

La jurisprudence ayant trait aux infractions contre l'économie populaire et les règles de droit y afférentes font l'objet du XIII[e] Chapitre. Le matériel abondant et varié receuilli dans ce chapitre est particulièrement apte à faciliter le travail de celui que est appelé à appliquer le droit.

Le Chapitre XIV consacré aux infractions contre la personne embrasse un terrain très étendu de la jurisprudence. A côté des attentats à la vie, à l'intégrité physique et à la santé entrent dans ce terrain également les dangers causés dans l'exercice d'une profession, et ceci en premier lieu en connexité avec les accidents de la circulation. Les infractions en question peuvent se vanter d'une très ample jurisprudence et littérature. C'est dans ce chapitre que figurent également les infractions contre la liberté et la dignité humaines, telles la diffamation et les injures, la violation de la liberté personnelle, la violation du domicile ainsi que la violation du secret et de la correspondance privés.

Le Chapitre XV du commentaire porte le titre: Infractions contre la famille, la jeunesse et les moeurs. Parmi la matière y traitée sont dignes d'une attention particulière les parties qui font connaître et analysent les dispositions appellées à donner une protection efficace et variée au développement de la jeunesse.

Les infractions contre les biens figurent avec le pourcentage le plus élevé parmi les actes criminels commis dans notre pays; la plupart de ces actes sont cependant des infractions moins graves ou réalisent seulement des contraventions. La jurisprudence y relative est peut-être la plus abondante de toutes et elle est en général fermement établie. Cette matière est expliquée et commentée par les auteurs dans tous ses détails. C'est à cette matière qu'a trait le chapitre XVI portant le titre: Infractions contre la propriété sociale et contre les biens des particuliers. Comme nous l'avons promis, nous en mettons en relief, à titre d'exemple, un principe énoncé par le commentaire en la matière.

Aux termes de l'art. 308 du Code commet le délit de non-révélation d'une infraction contre la propriété sociale celui qui, ayant une connaissance digne de foi d'une infraction volontaire en préparation contre la propriété sociale ou de la consommation d'une telle infraction non encore découverte, ne l'aura pas signalée à l'autorité. Or, selon les auteurs, la dénonciation des infractions déjà découvertes est également obligatoire lorsque, selon l'avis de celui qui en a pris connaissance, en dehors de lui-même et de l'auteur, personne n'en sait rien. Comme les auteurs écrivent «. . .il faut considérer d'une façon subjective, du côté de la personne tenue à le dénoncer, le fait de savoir, si l'infraction commise a été déjà découverte ou non . . .» Selon nous cependant, dans la disposition légale le terme «infraction non encore découverte» figure comme un élément constitutif objectif de l'infraction; il résulte de la loi que c'est la dénonciation d'une infraction non encore découverte qui a de l'intérêt pour la société. L'opinion contraire des auteurs doit donc être considérée comme leur manière de voir personnelle, à l'appui de laquelle ils sont du reste incapables d'invoquer la jurisprudence.

Les infractions militaires sont traitées au XVII[e] Chapitre de l'ouvrage; l'auteur de ce chapitre donne à celui qui doit appliquer la loi, une orientation complète concernant ce domaine particulier du droit. Il convient de mettre en relief les définitions claires et précises des notions juridiques spécifiques figurant dans ce chapitre.

Comme je viens de mentionner, il arrive que dans l'ouvrage on rencontre l'énonciation des principes d'un caractère personnel, des principes qui sont sujets

à contestation et que, par voie tout-à-fait exceptionnelle, certaines thèses adoptées par la jurisprudence sont également discutables. Par rapport aux solutions correctes et aux conclusions, en principe pertinentes, des annotations, ces cas sont toutefois insignifiants. Pour finir, nous soulignons une fois de plus qu'en l'occurence il s'agit d'un code neuf qui devait se conformer à des conditions sociales et économiques nouvelles. Or, dans cette situation on peut imaginer que certains changements se produiront encore à la fois dans la jurisprudence et dans la règlementation juridique.

M. LÁZÁR

Internationalia

LAW IN A CHANGING AMERICA. Edited by G. C. HAZARD Jr. in the American Assembly Series. Prentice Hall, Inc. Englewood Cliffs, 1968. XIII, 207 p.

1. Dealing with law as a social phenomenon, with legal education, jurisprudence, the legal profession, the actual social, economic and political function of law has in all appearance come into prominence in the United States. In 1967 the voluminous work of M. Mayer, The Lawyers, was published by Harper and Row, New York (XVIII, 586 pp). In a critical form deserving special attention, already this work raises some of the problems of American law and the legal profession, and designs a vivid and comprehensive picture of the situation of this group of society. The author touches also problems of legal education, the administration of justice and of other legal functions about which much has to be done in the United States. Whereas the work of Mayer contemplates, however the actual position of the problems overwhelmingly from the aspects of a lawyer or the community of lawyers forming a group of the society, and offers an interesting picture of the legal guild so to say from the outside, the work quoted in the headline is by far more comprehensive for the authors chose as the subject-matter of their discussion the actual American problems of law as a social phenomenon.

The work was published in the series The American Assembly. The American Assembly is a social body organized at Columbia University; in its board of twenty or twenty-five members the most prominent personalities of American social and political life have been elected, at present among others ex-President Eisenhower, the well-known politicians Harriman and George Ball, etc. The object pursued by the American Assembly is to organize conferences in cooperation with the leading personalities of the social and political life of the country for the discussion of social and political problems of the United States, and to publish the proceedings of these conferences. The conferences organized for the discussion of a definite subject-matter are preceded by the publication of an approved collection of the proposed lectures, a so-called background book. Another purpose followed by the publication of the background book is to place the matter of the debates and their result at the disposal of the broad public. Irrespective of the subject-matter actually put up for discussion, the participants of the conference approve some sort of a final report giving the conclusions of the debates and the recommendations of the conference. The final report is also published in all cases.

2. The American Assembly organized a conference from March 14 to 17, 1968, on these lines in the Chicago University on the subject Law and the Changing Society. The conference was attended by about one hundred prominent representatives of American practical and theoretical lawyers, education, economy, the judiciary and other social and political organizations. In the respective sections papers were read on the following subjects: Structural Change in American Society: W. E. Moore, Forthcoming Patterns of Social and Political Structure; W. T. Gossett, Balances and Controls in Private Policy and Decision-Making; L. H. Pollak, To Secure the Individual Rights of the Many. Effects of Social Science in Legal Analysis: H. Kalven, Jr, The Quest for the

Middle Range: Empirical Inquiry and Legal Policy; W. K. Jones, Legal Regulation and Economic Analysis; A. Yarmolinsky, Responsible Law-Making in a Technically Specialized Society. Changing Demands on the Legal Profession: M. L. Schwartz, New Arrangements for Providing Legal Services to the Middle and Lower-Middle Income Groups; R. W. Nahstoll, Regulating Professional Qualification Education in and about Law: D. F. Cavers, Legal Education in Forward-Looking Perspective; A. S. Goldstein, The Unfulfilled Promise of Legal Education; I. F. Reichert, Jr, The Future of Continuing Legal Education, A. Elson, General Education in Law for Non-Lawyers. Population and Economic Projections (a paper of Roger L. Price was published under this heading).

3. The publication referred to above has been compiled of these lectures and it also contains the final report of the conference. The last mentioned paper is an Appendix to the book.

A discussion of the problems dealt with in the chapters of the book, i.e. in the lectures would lead us too far. A critical analysis going into greater depth would even exceed the limits of this study. Moreover, a critical analysis of the particular chapters of the work cannot be replaced by a single review. All that can be done in this connexion is to throw a light on the principal elements of the subject-matter of the book. To illustrate the method by which problems were dealt with, we shall refer to altogether two points. The one is that, as it is clear from the papers forming the volume, and as it is indicated in the Final Report, the conference focussed its attention on five groups of problems, viz. a. social and political institutions; b. legal services; c. legal education; d. research and modern technology; e. justice and respect for law. The other point is the form in which the one or the other problem was presented in the Final Report, or before, in the respective papers. Under the heading The Institutions of Society, the Final Report declares "Our problems arise partly from basic weakness in social, economic and political institutions, and partly from weakness in the machinery of justice itself. Lawyers, who traditionally have acknowledged responsibility for the machinery of justice, must assume an important share of the responsibility for the reform of these other institutions in our society. — To achieve social justice will require far-reaching institutional changes. For example, our welfare system must do more than support persons in a state of dependency. Union rules and practices that restrict job opportunities must be abated. Building codes and practices must be modernized to reduce housing costs. Political boundaries must be adapted so that they accomplish their role of keeping government close to people without obstructing better education, more effective law enforcement, and more equitable distribution of welfare burdens. — Lawyers have special skills — as advocates, planners, negotiators and organizers — needed in achieving such objectives. They must help provide leadership in both the public and private sectors. The profession should promptly create devices for placing these matters high on its agenda and moving forward rapidly with them. — Greater responsibility must be assumed through legislation for dealing with society's current problems and changing needs. Lawyers must help to create understanding of the need for legislative changes; they must draft appropriate legislation. They must press for its enactment, as individuals, as members of the organized bar, and as legislators."

Finally as regards the fate of the recommendations formulated in the Conference and in the publication, no institutionalized solutions exist for reasons implied in the method of procedure of the American Assembly. Nevertheless, we may justifiably assume that through the mechanism of transmission to political, economic, social and scientific life at least some of the recommendations will be translated into fact, also because objectively most of the recommendations insist on some sort of a social response.

F. MÁDL

STONE, J.: LAW AND THE SOCIAL SCIENCES IN THE SECOND HALF CENTURY. Minneapolis, University of Minnesota Press, 1966. 121 p.

The volume is a compilation of three lectures read by the prominent Australian professor in the Law School of Minnesota University within the framework of the William S. Pattee Memorial Lectures.

In the first paper on the present position of law and social sciences the lecturer makes it clear that an analysis of the relationship between social and legal order came into prominence in the first half of this century. Legal positivism was thrust to the background and lost its battle against the sociological approach. After outlining the historical antecedents Professor Stone makes the statement that jurisprudence has here many chances. In fact the postulate of modern social sciences, the revolt against formalism, as formulated by Morton White, have become true in jurisprudence much ahead of all other social sciences. This is confirmed already by the role of Savigny, Jhering, Maine, and others.

The second lecture on the borderland of jurisprudence and sociology touching the questions of programme and evolution appraises the significance of sociology, in the first place of the sociological notion of function-category, in its relation to jurisprudence. Since according to Stone law is one of the most important means for the definition of functions, and in general function-category operates towards the creation of a connecting tie between society regarded as a functioning unit and the individual, he analyses and criticizes the opinions of T. Parsons set forth in his work The Social System (1952) with particular attention. At the same time Stone clearly recognizes that sociology cannot solve the problem of jurisprudence, because in the latter the analysis of the peculiar tools of legal techniques already has a prominent part. Therefore sociology is needed in the first place for providing a theoretical substructure and framework for a social analysis of the law.

The third lecture giving an analysis of the problem of the relation of man and machine in the search of justice points out certain, in the first place semantic problems of the application of law in connexion with the potentialities of a mechanized application of law. In the opinion of the lecturer, the meaning of the words and theses is determined by their position in the sentence, the context of the sentences and the social and historical implications of the text as a whole. However, this is merely a delimitation, and not the definition, of an exclusively correct meaning. Therefore machines are in general unsuitable in the application of the law, and their use is restricted merely to provide information of the legal matter or literature concerned. So machines may assist the organs of the administration of justice in making decisions. Still they cannot replace the man appearing as the subject of social experiences and discernment, the factor responsible for the decision, in particular when it comes to hear an appeal.

In our opinion Stone's work may most appropriately be considered one that throws out problems. In fact he touches on questions of greatest interest, questions which are equally argued in both bourgeois and socialist theory. At the same time it should be noted that many of the problems do not emerge in socialist and bourgeois society with equal urgency, although the problem itself may to some extent appear as justified even from the point of view of socialist theory. In particular in Anglo-Saxon jurisprudence, the nature of legal parlance is e.g. a subject-matter of debates for a number of years. Anglo-Saxon jurisprudence sets out from the fact that in an application of law relying on precedents there is always an uncertainty factor. In point of fact, legal cases have not only a single exclusively correct and justifiable normative meaning, or *ratio decidendi*. However, in Anglo-Saxon jurisprudence this recognition is attributed

to the characteristics of the language and exactly of the language of the law rather than to a peculiar trait of case law. By having recourse to various theses of semantics, Anglo-Saxon jurists try to prove that in their assumption this uncertainty is a necessary, permanent property of the application of law. Cs. VARGA

MICHALSKA, A.: PRAWO A NORMY TECHNICZNE W PAŃSTWIE SOCJALISTICZNYM (Legal and technical norms in the socialist state), Poznań, 1968. 165 p. (Poznańskie Towarzystwo Przyjaciół Nauk — Wydział nauk historii i nauk społecznych, tom XIV, zeszyt 1)

The monography deals with the relations between legal and technical norms, i.e. a sphere of problems so far neglected and not explored to a proper depth by the socialist theory of law. The authoress analyses a rather comprehensive literature on the subject-matter, still her theoretical reflections and conclusions are in the first place based on Polish legal material, and she refers to the legislation of other countries merely for the sake of drawing comparisons. The first three chapters of the work deal with the notion of technical norms and general problems related to them. In four chapters the principal forms of manifestation of the technical norms are analysed, and the last chapter is devoted to raising a few problems and drawing general conclusions.

According to the authoress the norms of conduct are sentences which specify definite modes of conduct for the addressees under definite circumstances. These sentences differ from others in the first place by their functions and not by their linguistic forms or forms of expression. Social norms are norms of conduct whose observation is related to the interests of others. The authoress rejects the doctrine widespread mainly in Soviet literature which divides the norms of conduct into social and technical norms. According to her opinion technical norms equally qualify as social norms on both genetic and functional considerations. As a matter of fact, the substructure of technical norms is formed by experiences directed to the laws of nature in their bearing on the process of production, the causal relations between the phenomena and the appraisal of the means for the attainment of ends. The function of the technical norms is exactly the regulation of relations emerging among men in the course of exercising effects on nature, and not that of the relations between men and the objects of nature. Consequently the specific nature of the technical norms turning up in the law is fundamentally defined by the peculiarities of these norms.

Technical norms may be transformed into legal norms by a variety of methods. The most frequent method is when legal acts include technical norms in their direct provisions or in their supplements. The second way is when, within a process of normalization, the administrative organs of the state issue norms of expressly technical nature. Here it is of frequent occurrence that the addressees and the sanctions are specified by other norms, so that these latter norms qualify according to the authoress as supplementary rules of the character of a *renvoi*. In the process of the creation of technical norms the causal relations have to be established before all, then the technical directives are formulated, and finally on this ground the technical norm is defined. It may occur that the law formulates the observation of technical directives as a legal obligation, and so refers to theses of technical manuals or given by experience outside the legal system and not to those defined by governmental agencies. This is the third, however extremely questionable, form of the transformation of technical norms into law, since here reference is made to directive outside the legal system.

In the last chapter of the book supplying a great want the authoress deals with the problems of the transformation of technical norms into legal norms, with special attention to the circumstance that owing to the rapid development of natural science technical norms are often obsolete, or close to be obsolete, at the moment of their coming into effect.

Cs. VARGA

II[e] COLLOQUE DE PHILOSOPHIE DU DROIT COMPARÉ: LA LOGIQUE JURIDIQUE. Toulouse, 1967. 262 p. Annales de la Faculté de Droit et des Sciences économiques de Toulouse, tome XV, fascicule 1.

Under the sponsorship of the Centre de Philosophie du Droit comparée led by Dean Gabriel Marty, the second international colloquy on comparative philosophy of law was organized in Toulouse, from September 26 to 29, 1966. The subject-matter of the colloquy was to discuss the general problems of the logic of law. Members of the legal profession of six countries attended the colloquy, including the Soviet and Polish representatives of the discipline. The volume is a collection of the lectures taken in the colloquy, except, however, the papers of Thompson (England) and Zivs (Soviet Union) on the actual situation of researches in the field of legal logic. For technical reasons these were published in a subsequent volume of the "Annales".

The papers throw a light on the situation of research work in legal logic, its potentialities, and problems from a number of aspects. Blanché deals with the relation between the logic of law and modern mathematical logic. Husson discusses the fundamental problems of the logic of law whereas Villey analyses its historical background. Ziembinski reports on the situation in research work, by adding and commenting on, the relevant bibliography as far as Poland and Czechoslovakia are concerned. Foriers does the same for the "Belgian circle" whereas Puy renders account of Spain and Latin America. Poulantzas discusses the relations between Marxism and legal logic. A. David analyses its potentialities on the ground of a comparison to cybernetic researches. A study of legal logic in its relation to the foundation of law has been contributed by Parain-Vial. Gardies analyses the logical method as compared to the phenomenological method. Kalinowski discusses legal logic as a fundamental problem of formal logic. Brimo outlines aspects in their relation to the legal method, and Vellas analyses the essential limitations of the logic of law in the field of international law. To these papers is added the study of Ziembinski on the relations of the *analogia legis* and the extensive interpretation of law.

Essentially none of the attendants of the colloquy argued against the use of research work in formal logic in the field of the law, still most of the papers on the ground of mathematical logic, moreover also on that of cybernetics, pointed out the essential limitations of the applicability of the modern symbolical logical apparatus. As Dean Marty emphasized it on summing up the results of the colloquy "there is a case of composite determinations which by themselves defy the formation of axioms and symbols" as far as law was concerned. It was for this reason that later on in a rather malicious manner Marty remarked that "even if a deontic logic had to be created . . . this would merely fill the role of a servant", i.e. it could contribute to the legal process merely with the elements of checking and accuracy. Hence the potentialities of formal logic in law were clear-cut, still this clarity found expression in the first place in the recognition of the limitations, and in the recognition that a substantial explanation, or at least an approach to it could be expected only from a greater emphasis on the dialectical elements. In this sense the colloquy and the volume under review have contributed to the birth

of the conviction and also to its reinforcement that the fundamental problems of legislation and the application of law, ostensibly or truly of a logical colouring, cannot be approached or solved unless by complex research work based on a number of methods and equally extending to the analysis of a large number of factors.

Cs. VARGA

ETUDES DE LOGIQUE JURIDIQUE. Vol. II. DROIT ET LOGIQUE — LES LACUNES EN DROIT. Bruxelles, Emile Bruylant, 1967. 140 p. (Travaux du Centre National de Recherches de Logique. Publiés par Ch. Perelman.)

Similarly to the volume of studies on the logic of law published a year earlier (see Acta Juridica, 10, 1968, pp. 227—228) the second volume also comprises papers discussing the common problems of law and logic. In the present compilation three papers discuss the general problems of the logic of law and four others deal with the manifold problems of the gaps of law.

The paper of M. Villey (Paris) — *Questions de logique juridique dans l'histoire de la philosophie du droit* — draws a comparison between a "modern" and a classical Greek-Roman concept of law and analyses the nature of logic which would suit these concepts. He opposes the flexibility of the classical concept to the deductive character of the "modern" concepts having their root in natural law or legal positivism. In the classical concept the abstract rule serves as a stepping stone of the debate rather than as a premiss of an actual solution. The work of P. Foriers (Brussels) — *L'état des recherqs de logicheue juridique en Belgique* — offers a survey of the activities of the legal section of the Centre National de Recherches de Logique. The section has been from the very out set led by the thought of the rejection of any apriorism, or the claim at an empiric analysis of judicial reasoning. The essay of J. Horovitz (Tel Aviv) — *La logique et le droit* — wants to prove the unfounded character of anti-formalistic opinions rejecting the logic of law, since in principle all logical methods may be formalized. However, this formalization does not amount by itself to a change of the corresponding discipline to formalism. The following study of Foriers — *Les lacunes du droit* — refutes the theories according to which there may be no gaps in law, since what has not been brought under regulation, is a free area. The general practice of the first section of the Code civil and Swiss judicial law-making are demonstrated by E. Wolf (Basle) in his paper *Les lacunes du droit et leur solution en droit suisse*. In his writing *Observations sur le problème des lacunes en droit*, U. Klug (Cologne) offers a survey of the problem. In a surprisingly erroneous manner, he attributes the theory of the freedom from a gap in law, among others, to the Marxist theory of law. Then in a symbolized language he formulates the objective notion of the gap of law. Finally L. Silance (Brussels) demonstrates in his work, *Un moyen de combler les lacunes en droit*: *L'induction amplifiante*, a method of filling the gaps of law in the light of an analysis of legal practice. Here on the ground of an exemplificative enumeration of the institutions of the particular branches of law the judge concludes to the existence of a general principle of law by way of an incomplete induction.

The first three papers dealing with the potentialities of the so-called logic of law are, essentially, organically matched to one another in a harmonious form. As a matter of fact there is a certain theoretical relationship between the well-known central idea of Villey and the principles postulated by the "Belgian circle". This is expressed in the first place by the rejection of *a priori* deductive formalism and the stress laid on the Aristotelian rhetorical-dialectical elements. It is here where Horovitz tries to prove that to the logic of law so conceived formalization cannot be altogether alien. This by itself will not result

in formalism. In connexion with these researches the problem is implied rather in the circumstance that an empirical analysis of judicial reasoning cannot go without the study of the economic, social and political factors which, more or less consciously, yet necessarily and at all times permeate the thoughts and conduct of those who apply the law. As a mater of fact these circumstances are decisively which equally mark out the potentialities and limitations of logic and its function in the application of law.

Cs. Varga

Hauriou, A.: DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES. Paris, Editions Montchrestien, 1966. 826 p.

A large number of works bearing the title "Constitutional law and political institutions" (in this, or in the reversed order) have already been born in France from the intercrossing of the art of politics and constitutional law. After G. Burdeau, M. Duverger and M. Prélot recently a book of André Hauriou has appeared dealing with this subject-matter (André Hauriou is not identical with Maurice Hauriou who between the two world wars was one of the most prominent French constitutional lawyers). The book sets out from the assumption that the constitution is but the legal framework of political phenomena. Consequently, constitutional law cannot be cultivated without the study of political phenomena and their understanding, states the author and, had he adhered consistently to this statement, he would have certainly risen to more uniform standards in his work. So well-written sections alternate with bad stuff. In particular a feeling of want will empower us, when reading Chapter 3 on socialist society and socialist political institutions. Here the author pronounces judgements of the most important questions of socialist constitutional law and the discipline of socialist constitutional law by relying on the general political works of bourgeois authors, whereas socialist works on constitutional law are simply ignored. The comparison of the various bourgeois constitutional system and their presentation are of a by far higher standard. Obviously the author is better versed in this field. The sections on the various phases of French political and constitutional evolution absorbing more than a quarter of the work have turned out well.

A comparison of this work to other French textbooks covering the same topic prompts to the statement that although there is very little new material in the book, and even this little is mostly the presentation of certain less known phenomena of political life in the form of stories, it is nevertheless a work attracting interest and deserving attention.

L. Lőrincz

Plantey, A.: TRAITÉ PRATIQUE DE LA FONCTION PUBLIQUE. Paris, 1963. Vols. I—II. 637 p.

Actually there are over one million persons on the payroll of the civil service in France. This figure does not include about 300 000 persons who have chosen the Army as their profession. This large number of civil servants may perhaps account for the growing number of monographies published in France analysing the civil service. Whereas earlier publications dealing with this topic hardly went beyond the study of the legal position of civil servants (see e.g. Henry Puget et Georges Maleville, Bibliographie de la

fonction publique, André de Laubadère, Traité élémentaire de droit administratif, Paris, 1957, 653, pp.), the present author makes an attempt to analyse the political, social and sociological aspects of civil service.

The work of two volumes, divided into seven parts, begins with a definition of the notion of civil service. The author comes to the conclusion that the notion of civil service may, and has to, be defined from a dual approach. Under a misleading heading suggesting the discussion of the political problems of the civil service, Part Two is essentially confined to an analysis of the relationship between the legislative and executive powers. Within the framework of this relationship the author delimits the position of the civil service as a legal institution within the executive power. Part Three offers a detailed analysis of the legal position of civil servants. After casting a retrospective glance the author, by relying on the Statute of Civil Service of 1958, examines seriatim the legal status of the central and local agencies of the civil service. He publishes rather interesting details of employment in, content, and termination of, the civil service, and the consequences of its termination.

Part Four on the professional obligations collects the rules of subordination in civil service, the substantive and procedural rules of discipline in the service. The reader may perhaps be most interested in Part Five. Here he will become acquainted with the mechanism of the management of civil service. Within the framework of this part the author presents the various types of the central and local agencies of personnel management organized on a decision-taking and consultative base at part, and describes the most important functions of these agencies. The organization of the French civil service and the training of its personnel look back to a long tradition. Therefore we believe that special attention should be given to the parts where the governmental needs, the training of functionaries, their selection, their extension training, and the order and course of their office career are outlined and analysed.

The social position of civil servants finds expression in the salary system and the order of other emoluments or disbursements. For this reason Part Six devotes special attention to this problem. And if it also holds for France that professionals working at private enterprises enjoy in general higher salaries than their fellow workers in the civil service, it also holds that the social insurance scheme and other social prerogatives indemnify the civil servants for this deficiency to a great extent.

The closing part deals with the rights of civil servants in legal procedure, and also those of the agencies coming forward with claims against them.

This voluminous work is a manual for practical use. This circumstances forestalls a number of objections which may be raised. The want of a deep-going theoretical analysis, the slipshod presentation of historical evolution, the almost total want of a comparative study, are on the whole peculiarities of manuals for the practice. The fact that the author approaches this problem of a practical significance from a number of aspects may already be greeted as a remarkable achievement. L. LŐRINCZ

BOCKELMANN, P.: STRAFRECHT DES ARZTES. Stuttgart, Georg Thieme Verl., 1968. VIII, 135 p.

Recently a work was published by a Hungarian author on the civil law liabilities in the medical profession. A monography dealing with the protection of life and corporeal safety discusses a number of questions affecting the criminal liability of physicians.

Hence the special problems of the liability of medical practitioners are not entirely unknown in legal literature, so that the present work discussing the criminal liability of members of the medical profession not merely on the basis of statutory provisions of a single state but by alloying the special traits of the profession with the general rules of legal liability may justly lay claim to special interest. The six sections of the small monography to be reviewed lead the reader from the definition of medical activity under administrative law through the analysis of the relevant provisions of the criminal codes to the problems implied in the transplantations of organs that, properly speaking, will only emerge in the future.

The author devotes the first section to a criticism of the effective legal regulation of the qualification for healing activities. According to the statute of medical activity promulgated in 1939 the term healing activities denote professional or gainful activity directed to the diagnosis of human diseases, pain, or bodily lesions, their curing or mitigation. The author subjects this definition to a criticism because under this definition healing activities without a valuable consideration would be permissible even in want of professional knowledge, a circumstance involving heavy risks for public health.

The second sections deals with the obligation of members of the medical profession of rendering help. Under the statute a physician is free to deny treatment only when legally he is otherwise not obliged to render help. Still, such an obligation is created by penal sanctions imposed on the neglect of the obligation to render help. Everybody is under an obligation to render help, this obligation has, however, a special sense as far as the medical profession is concerned. As a matter of fact the term "accident" also implies the manifestation of a disease demanding instantaneous medical interference. The omission of this interference by itself constitutes a criminal offence. In this section the author deals with the conditions on which a doctor is bound to attend to an ill person, and in this connexion points out the particular obligations of a doctor on duty. Finally the author speaks of problems like euthanasia and procured abortion.

The third section discusses the professional secrecy and offers a thorough-going dogmatic analysis of the relevant statutory provisions. The author defines the notion of the secret, delimits the sphere of persons bound to professional secrecy, draws a line between publicity and scientific publication, and deals with the cases of a release from professional secrecy.

In the fourth section the author discusses in conjunction the problem of a surgical operation, the consent of the patient to it, and the obligation of the doctor of informing the patient of his condition. This he has done because in the present practice of judicature each surgical operation may be treated as assault, and only the consent of the patient as a circumstance defeating culpability guarantees impunity for the doctor. After a criticism of this opinion the author analyses in detail the circumstances in which a consent may be given, names the person authorized to consent and puts down the cases in which the consent is to be regarded as given. He emphasizes that only a consent not conflicting with good morals has a legal effect. Anything immoral in public opinion is in conflict with good morals. Therefore a consent to a cosmetical operation or to sterilization must be considered as having a legal effect. The limits of the obligation of the doctor of information are drawn to the extent necessary for the formation of a consent to the operation.

The fifth section deals with cases of the negligence of a doctor. The omission of careful and professional treatment provides the ground for negligence. The expert has particularly important functions at the establishment of negligence. The doctor is responsible also for the selection and control of his assistance and not only for his own activities.

The sixth section discusses the criminal implications of the transplantation of organs. In this section the author deals with the conditions on which a transplantation

may be carried through, and also with the organs which may be transplanted at all. He analyses in detail the problems cropping up at the transplantation of certain organs of living and dead persons, at the establishment of the moment of exitus and speaks of the consequences of a transplantation of an organ of a dead person without consent. At the end of the section a survey is given of the statutory regulation of transplantations of organs abroad. A. I. WIENER

TRATAT DE DREPT CIVIL. Vol. I. PARTEA GENERALĂ (Manual of civil law, Vol. I, General part). Bucureşti, Ed. Academiei RSR, 1967.

As it is known there exists no comprehensive codification of Rumanian socialist civil law. Civil law in Rumania still relies on the Civil Code of 1864, compiled on the pattern of the French Code civil. Naturally, several supplementary and amending provisions have been built up on the fundamental enactment. Hence a summary of the actually effective civil law is of extreme importance also on practical considerations, hereincluded also the application of law and legal training. Even beyond these practical considerations the present volume has, however, as its objective the systematic presentation of socialist Rumanian civil law, with all problems of theory. The volume sponsored by the Institute for legal sciences of the Academy discusses the general part of civil law. In the collective of authors there figure, by the side of the academicians T. Ionascu and E. A. Barasch, A. Ionascu, S. Bradeanu, M. Eliescu, V. Economu, Y. Eminescu, M. I. Eremia, E. Roman, I. Rucareanu and V. D. Zlatescu.

Chapter One of the work deals with the subject-matter of civil law. It defines the place of civil law in a socialist system of law, and delimits it from other branches of law. The discussions on the sphere of property relations subject to civil law regulation, pp. 31 to 35, further those relating to the problems of economic law pp. 46 to 53 deserve special attention.

The following chapter presents the sources of civil law. Among others, the statements on the normative character of the fundamental conditions and "blueprint" contracts, pp. 65 to 67, may have a claim to interest. Of the abundance of problems of Chapter Three on the effects of civil law rules in time and space, and in this connexion of the conflict of norms, the survival of earlier legal rules, the problems arising from the limitations of an adaptation to the circumstances created by building socialism should be emphasized. Here special stress should be laid on the section which analyses the conflicts between bourgeois law essentially incompatible with the fundamental principles of a new, socialist, structure of the country, and the statutes expressly defining these principles, pp 123 to 127. Chapter Four discusses the problems related to the construction to be given to civil law norms.

Chapter V presents the notion of a civil law relation, its peculiarities and elements, i.e. its subjects, content and subject-matter, the following chapter deals in detail with the problem of chattels. Among problems of detail deserving interest those of the legal personality, pp. 168 to 176, the significance of subjective rights pp. 183 to 187 and their limitations, pp. 205—206, further of the legal character of funds accumulated within the means of production, pp. 211 to 221, should be mentioned.

Chapters VII to IX deal with the legal facts creating concrete civil law relations, i.e. in the first place with legal acts. Here the parts on the "causa" pp. 265 to 281, further the errors of will, pp. 281 to 289, are of special interest. Of Chapter IX devoted to the voidness of a transaction the parts dealing with nullity and voidability, pp. 321, 322,

nullity and non-existent transactions, pp. 339 to 342, together with partial voidness, pp. 352 to 355, further those dealing with the potential confirmation of an invalid legal act pp. 357 to 371, may attract interest. Chapter X on evidence is followed by the last chapter dealing with statutory limitation.

The manual relies extensively on judicial practice, it makes use of the results of socialist and other, in the first place French, legal literature, commenting and criticizing them at the same time. As regards Hungarian literature the manual often quotes the textbook of Világhy–Eörsi, further the proceedings of the civil law conference held in Szeged, in 1965. E. LONTAI

PLANK, K., OSOBNÉ UŽIVANIE BYTOV (The personal right of use of homes). Bratislava, Obzor, 1967. 288 p.

The work discusses in fifteen sections the theoretical and practical problems of the right of use of homes. The author relies on effective statutory law and judicial practice which, in addition to the practical use of the work in the author's own country, is significant from the point of view of a foreign reader, because a clear picture is offered of the Czechoslovak schemes for the promotion of the satisfaction of this primordial need of the citizens. For that matter this is helped by the system embodied by the work. Here the clear-cut systematic division, the precise delimitation of the problems in this subject-matter of so many ramifications, guarantees an easy survey of the problem.

The author sets out from the fact that the personal right of use is a new institution of civil law. By way of the right of use the citizens may acquire a number of things for personal use not limited in time. In general these are things the acquisition of whose ownership is not practicable for the citizens, nor is it necessary from considerations of the society. In general, the case is one of the satisfaction of two primordial needs of the citizens, viz. the need for a home (hereincluded premises not serving as homes, such as car-sheds, studies, etc.), further the need for an area for the construction of a family home, garden building, weekend houses, etc. However, personal use does not exclude the acquisition of ownership of these things by the citizens, provided they are in possession of the necessary financial means, p. 8.

The author deals in detail with the problems of the statutory regulation of the personal right of use of homes. He continues with the analysis of the notional elements of the legal relation of a personal right of use of a home. He states that a legal relation implying the right of use of a home can be established only between a citizen and a socialist organization which manages housing property, or owns such property. This implies that the right of a personal use of a home is tied to certain subjects. The object of a personal use of a home is a home which is in the ownership of a socialist organization, or is managed by it. The citizen receives a home for a predetermined end, i.e. to satisfy his needs for a home, for an indefinite term and against a valuable consideration, pp. 28 et seq.

The author reminds that the birth of a personal right of use of a home depends on the realization of several legal facts, in the first place on the flat or home allocation of the local council or any other competent authority. Under this allocation the citizen may sign a contract with the organization for the transfer and acceptance of the home. The right of use of a home will then come into effect by way of a contract signed between the organization and the citizen for the transfer and acceptance of the home. The relevant legal provision specifies no particular form for the validity of the contract. All that has

been decreed is that minutes have to be drawn up of the contract, p. 67. The personal right of use of a home may further come into being by other methods, *ex lege* (under the right of use of a home acquired by a partner in marriage also the other party acquires a right, acquisition of the right of use of a home on the decease of the user of the home, etc.).

In the following sections the author deals with the problems of the participants of a legal relation implying the use of a home. A peculiarity of this relationship is that one of the parties is a socialist organization, the other a citizen. Only socialist organizations may assign homes to the personal use by citizens, and conversely, only citizens may acquire a home for personal use, pp. 78 et ssq. Part of the obligations of the organization is before all to transfer the home to the user, then to maintain the home in a habitable order, the maintenance of the dwelling and its equipment, finally to render the services associated with the use of the home (cold and hot water supply, heating, removal of refuse, chimney sweeping, lighting of common premises, etc.). The obligations of the user of the home imply partly his own obligations (payment of a valuable consideration for the use of the home, etc.), partly the obligation of a cooperation with the organization at the discharge of its functions. The rights of the user of the home correspond to the commitments of the organization, pp. 95 et ssq.

The author emphasizes that the right of use of a home cannot be terminated unless for reasons seriatim enumerated in the statute. In addition, the author calls forth the attention to the circumstance that when the right of use has to be terminated for reasons of the organization, or in a wider sense, for social reasons, in all cases the decision of a governmental agency, of either a court of law or a local council, is needed. It is by this way the law wants to protect the citizens against arbitrary, one-sided decisions of the organization, e.g. to terminate the right of use by notice. For that matter the civil code knows several ways of terminating the personal right of use of a home (termination by a legal transaction, by a decision of the court, by a decision of the local council, on the ground of facts specially enumerated in the statute, etc.).

In the following the author discusses the institution of a joint use of homes. Essentially, several persons jointly and severally have a right of use in respect of the home simultaneously. The relationship among joint users is similar to that of co-partners, p. 184. A specific form of joint use of a home is that of partners in matrimony. This type of joint use is discussed in a separate section, pp. 199 et ssq. The author then discusses some of the problems involved in the assignation of part of the home and the exchange of homes, pp. 199 et ssq.

The closing sections of the work deal with home building cooperatives, the questions of family homes, houses in private ownership and homes in personal ownership, pp. 239 et ssq.

L. TRÓCSÁNYI

SCHUMANN, K. F.: ZEICHEN DER UNFREIHEIT. ZUR THEORIE UND MESSUNG SOZIALER SANKTIONEN. Freiburg im Br., Rombach Verlag, 1968. 181 p.

The title of the book is somewhat unusual. At the first hearing it is even inconceivable how the want of freedom comes up for discussion, when the question is one of the sanctions of unlawful acts. The author himself is aware of this. He opens the work as follows: "In this book the social sanctions are discussed. It is not exactly a cheerful topic, on the contrary: it is serious enough to justify the title. I conceive the social sanctions as the signs of a want of freedom and I believe this is not a superfluous dramatization of the topic of the author. Sanctions are signs of a want of freedom of man, of

man who depends on the society in which he is living. The sanctions are the socially obligatory consequences of the activities of man, consequences which as the external interpretation of individual existence react on action." (p. 11). Then so to say unorthodox statements follow, such as: "If there is a case of sanctions, then by this we have to understand the concrete acts of consent and censure, which somebody will experience from others as the consequences of his own action. Sanctions are the characteristic phenomena of a society organized by values, interests and objectives, and accordingly a moral one. Who is society? Society is non-existent. Still there exist values which are carried by causes, before all by the common conviction of persons disposing of power . . . The content of meaning of the word 'sanctus' within the concept of social sanction is that a foreign power endows the action of the individual with a certain dignity, or merely with authority. Man acts on moral credit. The party on whom sanctions are inflicted becomes the victim of an act of valuation, he will be placed under a guardian. Why is it this way, why are there sanctions at all, why cannot everybody judge his own conduct? Has not each man his own sovereign categories of values and objectives, which lead his acts and in respect of which transmit a corresponding judgement? Surely there are. Only these are not authoritative: they are not exactly insignificant or secondary, they are merely ineffective. Whatever ideas a man may have, if he wants to live up to them, he will have to carry them into effect. Since, however, a particular man does not live on some sort of an isolated island, where he may act at his own pleasure and since the potentialities of a realization are not exclusively within the own sphere of authority of man but the individual ends affect also the ends of other people and their possessions, man depends also on the opinion of others, on the order of value of others." (pp. 11, 12). And the combined order of these, their reference to human activity, constitute the essence of social sanctions.

2. It would lead us too far, if we went on to follow the original, or occasionally only ostensibly original, way of the author of putting his on intellectual grounds in all cases provocative questions, or to analyse it critically, from the approach of socialist jurisprudence. Obviously there are many sham problems among those mentioned by the author. There are even such as cases that are really not problems in socialist literature on liability. Nevertheless, the work deserves attention, partly because, as compared to the often rather formalistic Western ideas of law, it represents a new approach to the social-legal problem under review, and partly because with a praiseworthy sociological empirism in general, it attempts to reshape the known classical or mostly traditional opinions of legal sanctions, often in fact only commonplaces and in the course of this process to introduce a number of new elements into the system of our theoretical and practical opinions on sanctions. Their approval or rejection after an appropriate valuation will in any event enrich the differentiation of our experiences.

3. In the first part of the book, Theories of Sanctions, the author expounds the elements of his theory of the intrinsic criticism of the theories of Homan, Parsons, Geiger and Dahrendorf. The author formulates his theory of sanctions by stating that this is "the general theory of social participation". Accordingly, sanctions may be conceived within this sphere of participation in society as an element of the loss or profit mechanism. When, as compared to the order of values of society, the individual is lagging behind, he may have to suffer drawbacks through the different sanctions of the legal and moral order. On the other band, when considering the general expectations he takes part in society with a surplus, then he will participate of emoluments through the legal and moral mechanisms of society, when the term emoluments does not necessarily denote financial enrichment.

In the second part, under the heading "Sanction, Standard, Domination", the author expounds his own notion of sanctions. In the new approach referred to earlier

he analyses the concepts of reward and punishment, in relation to the standards of the various levels of power and the limits of arbitrary force.

Part Three bears the sub-title of the book "Appraisal of Sanctions". The principal merit and point of interest of this section is that here the author takes the first step from theory to practice. He outlines a few experiments in the quantification of the weight of social sanctions, then he exposes certain measures of sanctions which in his idea provide means for a relatively exact comparison of the various sanctions and for establishing optimum relations between them.

4. Schumann believes that while he conceives the sanctions as the form of manifestation of an alien power, as the symptoms of a want of freedom, he will be able to grasp their intrinsic sense and explore it. According to this belief the positive and negative sanctions "manage" the chances of the members of society of a participation in society. Schumann does not intend to use his ideas as some sort of a social or political attack against the system of bourgeois thought. All he has in mind is to elaborate a method for the measurement of the social coercion manifesting itself in the sanctions irrespective of whether there is a case of legal or conventional sanctions (e.g. notice, boycott, oral admonition, praise, distinction, or reward). From what has been set forth it is clear that the element of his theses and the position he takes is in fact appropriate for a scientific exposition of the scope of problems with greater precision than otherwise usual in bourgeois legal literature. Changing over abruptly to the approach of socialist legal literature we should remember the principal theoretical statements in the work of Gyula Eörsi, Fundamental Problems of Legal Liability (1961), or of László Asztalos, The Cicil Law Sanction (1966). In the opinion of these two authors sanctions also appear as the elements of the effect of a social and generalized order of value on the individual human activities. Also the need for a complex analysis of the sanctions is one of their fundamental theses. Another thesis of theirs is that sanctions have to be studied as placed in the set of motives of human consciousness. Both Hungarian authors, with a considerable scientific apparatus, expound theoretical theses in the field of civil law for an optimum calculation of the sanctions. Compared to the firm theoretical bases and framework of these two works the theoretical statements of Schumann are somehow unintegrated, for the very reason because their author only loosely refers them to some sort of a not sufficiently outlined social theory. Still it is not a Marxist work and it should not even be censured on this account. What is a true advantage of it is that with its empirical and sociological theory the work descends to the cases of everyday life and even if not without contradictions, it wants to become a concrete guidance for practical purposes. All those who in either theory or practice want to deal with the law of liability more thoroughly, will consult this work with benefit. F. MÁDL

FIKENTSCHER, W.– HOFFMANN, G.—KUGLER, K. F.: RECHTSFRAGEN DER PLANIFIKATION. Stuttgart, Ferdinand Enke Verlag, 1967. 111 p.

Recently even in the capitalist world increased attention is given to the problems of planning. A symptom of this interest is the volume with four studies, one written by G. Hoffmann and K. F. Kugler, and two papers by W. Fikentscher. The studies of the former two authors comprise with certain modifications the subject-matter of lectures written for a colloquy on the legal problems of planning. Professor Fikentscher joins them with two studies written to be read on other occasions.

K. F. Kugler on relying almost exclusively on the experiences accumulated in French practice of planning deals with the emergence of the idea of planning, the targets set in the indicative plans, the process of drawing up plans, then he touches some problems which, in general, crop up in connexion with planning and, to conclude, raises the question when a beginning of planning might be expected partly in the German Federal Republic, partly in the Common Market countries.

G. Hoffmann analyses from the point of view of the Common Market, whether an economic system based on competition can be reconciled to planning at all. He offers an explanation of this basic problem by way of discussing two questions. The one is whether the method of planning developed in French practice conforms to the system of the Common Market, and, secondly, to what extent there exists a harmony between the medium-range economic policy of the Common Market and the principles of the economic system of the Community.

Also W. Fikentscher discusses problems similar to those tackled in the previous papers: the compatibility of planning and free competition. However, in one of his studies he wants to give preference to the considerations of legal technicality of French planning practice. Here he analyses two topics, viz. first, he makes an attempt to make clear the features of French planning (in the course of this analysis he deals also with the French planning authorities), secondly, he discusses the possible collisions between a planning system of the French pattern and competition. In the second study Professor Fikentscher analyses planning as an institution of economic law. Here too he distinguishes two parts. The first part deals with economic law, and the place of planning within the framework of economic law, while in the second part the relations of planning and competition are analysed within the limitations of planning. A. HARMATHY

КЛЕЙН, Н. И.: ЗАКОНОДАТЕЛЬСТВО О ПЛАНИРОВАНИИ ПРОИЗВОДСТВА ТОВАРОВ НАРОДНОГО ПОТРЕБЛЕНИЯ (Legislation relating to the planning of the production of consumer goods). Москва, Издательство »Юридическая литература,« 1967. 142 стр.

The plan is an institution of fundamental significance in the system of economic management of the socialist states. For this reason works dealing with the problems of planning are of importance in legal literature, and may always reckon with public interest. Still a work dealing with the problems of planning will be of yet greater interest when it analyses the consequences of the reform of the Soviet system of economic management manifesting themselves in the field of planning. Kleyn's work confines itself exactly to the group of problems associated with the statutory regulation of planning where the reform has brought about substantial changes, namely the planning of the production of commodities meeting the needs of the population, and the legal problems associated with this planning.

The first part of the book analyses the character of the relevant legal regulation. In this connexion the author mainly deals with the relations cropping up in the various phases of planning and with a general description of the relevant effective statutory provisions. He then continues with a summary of the new requirements forthcoming from the objective defined by the meeting of the Central Committee of the Communist Party of the USSR in September, 1965. The second part discusses problems of the market survey for defining the demand for consumer's goods, and the statutory regulation of this survey. He specifies the commitments of commercial and productive enterprises in

this sphere, studies the relationship between a preliminary survey of the demand and plan drafting. Whereas the second part approaches the problem of a harmony of the plan and the needs from the side of the enterprises satisfying the demand, the third part tackles the problem from another angle and examines how the users could have an influence on the compilation of the production schedules. In this connexion the author treats two questions in which no uniform position has been reached in Soviet literature as yet. The problem partly consists in the function and nature of orders and demands, partly in the role of the delivery contracts in plan drafting. The author supplements the theoretical discussions with an analysis of the forms of contracts established in the practice of wholesale enterprises. In the following fourth part the author deals with the process of making the plan, the terms, the competences of the planning authorities, the relation between producers and the managing agencies of trade and, to conclude, with the problems of a modification of the plan. The last section analyses the guarantees granted to enterprises in planning. A. HARMATHY

CHAMAS, S.: L'ÉTAT ET LES SYSTÈMES BANCAIRES CONTEMPORAINS. Paris, Librairie Sirey, 1965. 362 p.

The author of Volume 13 of the Bibliothèque de Droit Commercial, as Professor R. Houin, editor of this series underlines it in his preface, luckily combines both the theoretical and practical qualification for a treatment of this subject-matter. He is professor in the Faculty of Law of the University of Beyrouth, and bank solicitor at the same time. To this we have to add the atmosphere of Lebanon and its traditional role in credit and banking life, circumstances generally considered favourable for the acquisition of the appropriate experience.

The well proportioned book discusses the subject-matter split up into three main sections. Here a light is thrown at the same time also on the principal spheres of governmental interference. The first section deals with the methods of legislative influence, and analyses the statutory definition of the status of a bank. The second section discusses the more dynamic methods of interference, i.e. the state supervision of banking activities. Finally the third section of the work analyses the phenomenon of a "banker state", i.e. the direct participation of the state in banking activities.

In Section One the author presents the historical development of banking, speaks of the lack of statutory regulation of banking in the 19th century, discusses the birth of the conditions for a regulation and the headway interventionism had made in theory and historical growth, and its particular role at the time of economic crises and wars. He discusses the content of a bank statute in detail, its sphere of regulation in which, among others, he specially mentions the statutory definition of banking activities, the moral and other conditions for a proper exercise of the profession. He defines incompatibility in banking, and discusses the significance of a regulation of the organizational structure of the banking trade. Within this latter group and by way of examples reference has been made to questions like the foundation of banks, in particular the corporate form of banks, the administrative licencing procedure, the organizational changes, namely the possibility of opening branch offices, the merger of banks, and the winding up of banks.

Within the second main part of the book the author presents the agencies in charge of the control of banking activities, in the first place and in a most detailed form, the institution of central banks, their function, economic and legal structure, and future. The problem of the function of specific, often internal, controlling agencies, their relation

to the central bank, their development from a corporate status to a managerial one, throw out a number of extremely interesting problems. In this sphere the author discusses the organs of professional associations, their types, and also their variants. In the following passage specialization so characteristic of modern banking activities is analysed. The author examines its underlying principles, with special regard to the traditional scopes of banking, namely deposits and the granting of credits, and other criteria of classification. The section concludes with the methods of control, namely with discount control, open-market policy, etc.

In the third part, the most exciting of the work, the author demonstrates the banker state. After a review of the semi-governmental system the author treats the birth of communal banks (in particular the transfer of banks to public ownership), their organization, legal character, forms, the international banks, their financial, organizational and control problems. He analyses the genesis of the bank monopoly in the socialist countries, and the Arab countries of the Near East in detail, deals with the relations between specialization and bank monopoly, the functions of the bank monopoly in planned economy, partly at granting credits, partly at controlling money circulation, and enterprisal control.

Although the author cannot be familiar, as a matter of course, with the changed and extended functions of the socialist banking system in the partly still incomplete ideas of the reform of economic management, at presenting the various expedients and solutions he strives, however, for modernity, and skilfully explores the tendencies prevailing in socialist banking (for that matter he quotes the works of Liberman and Leontiev, and also the plans associated with the reform).

In his conclusions the author expresses his hope that the growing international character of banking activities and the increasing strength of the relations between banks will contribute to a policy of *rapprochement* not only within the one system or the other, but also among nations belonging to different systems.

The pithy, terse formulation of the theses, the logical layout of the work, the extremely copious comparative matter exploited with a steady hand, as regards both statutory regulation and practice, offer a useful and vivid survey of an economic and legal institution of time-honoured traditions. E. LONTAI

FROSSARD, J.: LA DISTINCTION DES OBLIGATIONS DE MOYENS ET DES OBLIGATIONS DE RÉSULTAT. Paris, Librairie générale de droit et de jurisprudence, 1965. 319 p.

Ever since Demogue, with a lucky hand, drew a line for the first time in 1925, between the "obligation de moyens" and the "obligation de résultat", both theory and mainly, practice make use amply though not beyond dispute of these categories. As Professor Nerson notes in the introduction this distinction may help to a good approach of the problems of contract law provided that the distinction itself is accurate enough. It is a well-founded delimitation of this kind which the monography of Frossard attempts to put down.

In the introduction the author analyses the relationship of the system of liability and the distinction between the obligations of results and means. He points out that a need for this distinction together with the respective possibility have grown in intensity at the rate of the growth of an objective system of liability by the side of the relevant subjective system or, more precisely, the distinction of these two categories of obligations has come to life as the reflection of a bifurcation of the system of liability. He briefly

treats the antecedents and roots of the delimitation in the history of law, on the ground partly of Roman law (*custodia* liability), partly of old French law.

In the first part of the work the author analyses the theoretical and practical functions and the significance of a delimitation of the two types of obligations. In this connexion he also gives a survey of the use of other delimitations and divisions, namely those of the contractual and delictual liabilities. He puts the question, to what extent the distinction between the obligations of result and means may be useful for the purpose of delictual obligations. His positive reply is, among other factors, supported by an emphasis on the pre-existent obligation. The exposition of the author which underlines that the division here discussed does not affect the composite character of the particular contracts as institutions, i.e. the coexistence of both types of obligations within the subject-matter of one and the same contract, is extremely instructive and convincing. In the following passage the author defines the content of both the obligation of means and result, the former as "a conduct directed to a single end". The analysis of the content successfully answers a number of questions cropping up in connexion with liability and obligations in general. In the following the author analyses and criticizes some other attempts of a classification, namely those based on guarantee. He analyses in a particularly detailed manner the relations of the distinction here discussed to the system of evidence. The first part concludes with a discussion of the controlling activities of the Cour de Cassation, and the practice established there in the matter of a delimitation of the obligations of result and means.

The second part deals with the criterion of the distinction. The author presents the various objective and subjective criteria of distinction as developed by jurisprudence and particularly the role of risks. Then he exposes his own doctrine on the criteria of a delimitation. According to Frossard, distinction relies on the definite or indefinite character of the performance. On the ground of his theory, he analyses in the following the particular groups of obligations in detail. First he presents the groups of performance definite or indefinite, on the ground of their nature, in the sphere of both delictual and contractual obligations. Within the framework of this presentation the author deals with the specific obligations associated with safe-keeping, commissions and labour contracts, further the services associated with the medical profession, and the liability of parents, etc. A delimitation of services may directly rely on statute, or on the agreement of the parties. The former group comprises provisions enacted for the safeguard of public interest, namely national economy, so the limited liability of the leaseholder or of carriers or e.g. the peculiar regulations in force governing contracts without a valuable consideration. The latter group includes contractual stipulations directed to an exclusion or limitation of liability.

Frossard copiously draws from latest French judicial practice in cases of contractual and extra-contractual liability. In addition to the abundance of the material reviewed in his work, the lucid style of the author and his clear logical reasoning contribute to the use of the work. E. LONTAI

DALHUISEN, J. H.: COMPOSITIONS IN BANKRUPTCY. Leiden, Sijthoff, 1968. 160 p.

1. In an economic organization in which the fate of a particular economic unit depends on how it thrives, how it can prevail in the race for profit, bankruptcy or economic and financial insolvency is of frequent or often of mass occurrence. Therefore the conclusion could appear to be justified that for the community or the state the success or failure of the particular economic units or enterprises is a matter of indifference. Still, it

is well known that this is not quite the case. Whatever the situation may be, however indifferent the state or society may be to the fate of the enterprises unblessed with success, which is less possible in particular as far as enterprises or ventures of major importance are concerned, a legal protection of certain public or private interests will nevertheless be called for. Already in the age of classical capitalism the commercial codes laid stress on the safeguard of the legitimate interests of third persons when owing to bankruptcy the enterprise concerned had to be wound up. The safeguard of the interests of the executives of the enterprise or the company came to the fore with even greater emphasis. Moreover it was an underlying principle of the statutory regulation that a capitalist entrepreneur also deserved protection against unreasonable financial losses when an unsuccessful venture had to be wound up. Finally a marked tendency manifested itself to save the whole enterprise by a reorganization for the benefit of national economy, in particular when momentous economic, political, or social interests were attached to such a reorganization. The provisions of commercial law and the opinions in economics according to which priority should be given to a reorganization of enterprises of major importance instead of a liquidation, appeared in this century, e.g. in the United States in the thirties. Without a far-reaching analysis of the circumstances it is obvious that the indifference of the *laisser faire, laisser passer* of the age of liberal capitalism in this scope has been gradually superseded by the element of governmental and social interest, and the entire sphere of problems is being brought under statutory regulation to an ever growing extent. This new tendency manifests itself, among other factors, in the ever more compulsory character of governmental or public control of the procedures of rehabilitation or reorganization. The intensity of a regulation of problems coming within this scope naturally varies by countries, and statutory regulation progresses on different paths in the various legal systems. For the time being, the survey of the solutions arrived at in the various countries requires an extensive research work.

2. For what has been set forth in the introduction, the work of the author deserves particular appreciation because of the comparative method he has resorted to in his analysis of the problems associated with bankruptcy and the reorganization of economic enterprises. In this discussion he covers the scope of legal regulation in the developed capitalist countries, so in the first place in the countries of the Common Market and the United States.

a) In a praiseworthy manner the work also offers a historical survey in the form of a monographic study. In the first chapter the author summarizes in an interesting form the results and solutions of Roman Law. As the most developped law of private property and commodity relations, Roman Law obviously specifies the relevant provisions for the cases of an insolvency of the debtors. At the time of the Mediaeval revival of Roman Law and in response to needs forthcoming from European, and mainly North-Italian, commerce and trade, comtemporaneous practice and literature still further developed the institutions of classical and post-classical Roman Law. Simultaneously and partly in response to the direct or indirect reception of Roman Law, the early prototype of modern bankruptcy law began to take a shape.

The second chapter reviews the modern bankruptcy laws of the legal systems concerned from the comprehensive commercial codifications to the present day. In certain sections of this chapter the changes in the approach may already be discovered which as regards capitalist economic ideas have passed from the period of classical capitalism to the age of present-day capitalism. The point is that under the pressure of various social and political factors the state has taken an ever growing interest in the method of winding up economic enterprises or securing their further operation by virtue of the appropriate statutory provisions.

The third and last chapter of the book is an attempt to summarize the general tendencies prevailing in the given scope after offering a thorough and accurate picture of the statutory position.

b) Among the tendencies which may in the opinion of the author be considered, being of general validity, is the legally more defined formulation of the sphere of the parties directly or indirectly concerned, pp. 98 et ssq. Here the thesis is expressed that the economic and financial insolvency or bankruptcy is in rare occasions restricted only to the interests of the creditor and debtor: in fact, it concerns society as a whole. Moreover, bankruptcy is in the interest of the creditor and society as little as in that of the debtor, p. 98. Then follows a generalizing analysis of the evolution of statutory law governing the position of the directly or indirectly concerned parties, and that of parties under contractual or social obligations. Although it is by no means a new element, the close state supervision of the procedure of rehabilitation or reorganization is yet one growing in importance. The author devotes a special section to this question, pp. 102 to 109, and pays particular attention to the problem of public interest in its relation to the winding up or reorganization of the different economic enterprises. It is by no means accidental that in most of the developed capitalist countries the entire scope has been brought under legal regulation on new lines during the last years, so in France and in the German Federal Republic new legislation governing commercial companies has been enacted. The provisions of the new codes relating to bankruptcy, the procedure of rehabilitation and reorganization are those which most tersely formulate the ideas of economic policy of the capitalist world.

3. After perusing the book the following opinion may be advanced by way of summing up. It is a study written in a good style which luckily combines the statutory and practical facts and the policy-making theoretical views to the end. It offers a fairly complex picture of the latter. A merit of the book is the consideration given to actual social and economic realities. The historical approach saves the author against an unscientific display of sham original ideas. It is only to be pitied that in connexion with the legal institutions in question the author fails to come to a deep-going political analysis in the given scope of problems, notwithstanding his autonomous critical handling of the material, and omits a comprehensive criticism of the here too close negative features of the capitalistic system of economy. It is true though that the thorough analysis on the ground of statutory regulation would not have become superfluous for this reason, on the contrary.

The work is a useful reading for those who are somehow interested in a familiarity with civil law or capitalist commercial law. Moreover, it is an excellent source of materials for the historical exploration of a rather practical institution of private and commercial law. Perhaps even from a practical aspect the fact deserves attention that owing to the reform of economic management, when the economic units will be exposed to the movements in the market and the regularities of market operations more than before, the recent legal evolution of the socialist countries reckons with a quasi bankrupt position of certain economic units, the need for rehabilitation or the reorganization of the enterprises in question. Hungarian legislation already faces this problem, when the contingencies here referred to have been brought under regulation by Decree 3/1968. PM. At the shaping of practice or perhaps in an amendment of earlier legislation it would perhaps be worth-while by the side of own experiences to remember those of comparative law, even when it has to be borne in mind that under different conditions of production socialist economic policy will have to set out from the intrinsic commands of the socialist system of economic organization even in the sphere of rehabilitation and reorganization.

F. MÁDL

ПРОБЛЕМЫ ТРУДОВОГО ПРАВА (Problems of labour law). Москва, Издательство »Юридическая литература«, 1968. 224 стр.

The monography has been compiled by a collective of authors whose members are V. I. Smolyartchuk, L. Ya. Ginsburg, O. V. Smirnov, Yu. P. Orlovski, I. A. Tishtchenkov, N. N. Borodin. The authors discuss the actual problems of Soviet labour law one by one, insofar these are of significance from the point of view of the evolution of the discipline of labour law.

The contributor of the first chapter is Smolyartchuk who raises the problems of the labour law of the present phase of evolution in a rather comprehensive manner. In the introduction he advances the statement that Soviet Labour law is the most important controlling agency of employment. Labour law guides relations under it to a succesful performance of the plan, the improvement of productivity, and besides guarantees the manysided safeguards of the rights of workers. The author points out the dependence of labour law on the general laws of social evolution. This is the reason why each phase of socialist construction entails a modification of the content of the various normative acts. He offers a survey of the phases of evolution of Soviet labour law and of the features of these phases. He specially emphasizes the growing function of the trade unions in the formulation and enforcement of the rules of labour law. In his opinion it is about time to bring under regulation the rights of the trade unions, or at least the rights associated with employment, in a uniform manner. He mentions the continually growing functions of the collectives of workers in the regulation of matters of employment. The economic reform has affected the activities of the producing collective in many respects, and, among other factors, it has insisted on momentous changes also in the statutory regulation of employment and the activities of the collectives of workers. So the economic reform has demanded a supervision of a number of normative acts applicable to wages and salaries, financial liability and labour contracts. In this connexion the author quotes the latest provisions, and then points out that the desire for an improvement of the living standards thrusts into prominence the needs for a rational exploitation of the sources of labour force. The solution of this problem guarantees the enforcement of the right to work and promotes also the settlement of the question associated with the reduction of the number of workers at the one enterprise and their employment by another. In this sphere the author deals with the question of minimum wages and holidays, and the rise of pensions the reduction of the taxation burden on wages, and the special benefits of workers on duty in the remote North of the Soviet Union. The author also raises the question of a wholesale recodification of labour law, and believes that this has become a pressing problem. He deals with the increasing importance of the discipline of labour law when it comes to observe social processes, and outlines the problems whose significance urges an early solution on the part of the discipline of labour law.

The *second chapter* reviews the principal phases of the evolution of Soviet labour law. The author of this chapter is Ginsburg who outlines the five phases of this evolution, viz. 1917/1920, 1921/1928, 1929/1938, 1939/1955, and the one lasting since 1956. The documents he quotes in his work may reckon with the interest of those exploring the history of labour law.

In the *third chapter* Smirnov speaks of the growing perfection of the guarantees of the right to work. In this connexion he discusses the notion of the right to work and its character, the differentiation of the statutory guarantees and their classification, further the efficacy of the statutory guarantees in association with the enforcement of the right to work and finally the function of society in the enforcement of the right to work.

In the *fourth chapter* Orlovski deals with the statutory organization of man-

power economy. He casts a retrospective glance at the past, analyses the notion of manpower economy, then reviews the particular aspects of it, among them the problems of the employment of juveniles or invalids.

The author of the *fifth chapter* is Tishtchenkov who discusses the actual problems of agreements by collective bargaining. He analyses the essence and notion of these agreements, he makes it clear that agreements by collective bargaining are the form of participation of the workers in the management of production. He emphasizes that this type of agreement promotes the interests of the enterprises, and is a means of the improvement of the material and cultural welfare of the workers.

In the *sixth* chapter Ginsburgh raises the various problems of the working hours. He casts a retrospective glance at the various phases of the regulation of working hours in the Soviet Union, and continues with an analysis of the problem from three aspects viz. duration, structure and order of realization. He points out that the legislator has not brought all questions of the working hours under uniform regulation. Regulation is perhaps most complete as regards the duration in time of the working hours. The order of realization and even more the structure of the working time are controlled only imperfectly. He concludes that a wholesale statutory regulation of the working hours has become indispensable.

In the *seventh chapter* Borodin analyses the relations of labour law and the training of the workers to labour discipline. He reviews the principles of incentive measures and the reprisals to be held out to an infringement of labour discipline.

In the *eighth chapter* Tishtchenkov enlarges on the actual problems of the legislation on the financial liability of the workers. In the course of this discussion he deals with the essence, and the types of financial liability and certain problems of disputes in labour law in connexion with financial liability.

The significance of this volume of studies finds expression in the fact that through it the reader may become acquanted with the most ardent problems of Soviet labour law at present and the ways of finding a solution for them. Those interested in both the theory and practice of labour law may turn the pages of this work with profit.

L. TRÓCSÁNYI

Bibliographia

HUNGARIAN LEGAL BIBLIOGRAPHY 1968 2nd PART

This bibliography is the continuation of the former one published in our issue No 3—4 of 1968 (Tomus 10, pp. 430—445.). It contains legal works issued as monographs in Hungary between the 1st of July and the 31 of December 1968, material of periodicals (articles and book reviews) and studies published in collective works.[1]

This bibliography gives the English and Russian translations of the original titles, too. If the work listed has a summary in foreign language, it is also indicated.

The bibliography is edited by Lajos *Nagy* and Katalin B. *Veredy*.

The periodicals and their abbreviations

Acta Budapest	=	Acta Facultatis politico-iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae. Bp. 1968. Tomus 10.
ÁI.	=	Állam és Igazgatás [State and Administration] 17. year. 1968. Nos 7—12.
ÁJ.	=	Állam- és Jogtudomány [Legal and Administrative Science] Vol. 11. 1968. Nos 2—3.
AJurid.	=	Acta Juridica Academiae Scientiarum Hungaricae. Tomus 10. 1968. Nos 3—4.

[1] The material for the period 1945—1965 is resumed in the following publication: *Bibliography of the Hungarian legal literature.* 1945—1965. Budapest, Akadémiai Kiadó 1966. 315 p.

ВЕНГЕРСКАЯ ЮРИДИЧЕСКАЯ БИБЛИОГРАФИЯ 1968, 2-ая ЧАСТЬ

Настоящая библиография присоединяется к библиографии опубликованной в нашем журнале в 3—4 номерах 1968 г. (стр. 430—445.) и содержит в себе самостоятельные юридические издания, материалы, опубликованные в сборниках за время с 1 июля до 31 декабря 1968 г.

В библиографии наряду с заглавием мы даем английский и русский перевод заглавий. Если имеется резюме на иностранном языке, это отмечается особо.

Библиографию составили Лайош *Надь*—Каталин *Б. Вереди*.

Разработанные журналы и их сокращения

Acta Budapest	=	Acta Facultatis politico-iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae. Bp. 1968. Tomus 10.
ÁI.	=	Állam és Igazgatás [Государство и управление] 17. том. №№ 7—12. 1968 г.
ÁJ.	=	Állam- és Jogtudomány. [Наука государства и права] 11. том. №№ 2—3 1968 г.
AJurid.	=	Acta Juridica Academiae Scientiarum Hungaricae. Tomus 10. 1968. Nos 3—4.

[1] Материал от 1945 до 1965 гг, содержит: Bibliography of Hungarian legal literature. 1945—1965. [Библиография венгерской юридической литературы. 1945—1965.] Budapest, Akadémiai Kiadó, 1966. 315 p.

JK. —	= Jogtudományi Közlöny [Law Journal]. 23. year. 1968. No. 7—12.	JK.	= Jogtudományi Közlöny [Вестник юридических наук] 22-ой год изд. №№ 7—12. 1967 г.
OVPr.	= Обзор венгерского права [Hungarian Law Review] 1967. [1968.] No. 2.	OVPr.	= Обзор венгерского права [Hungarian Law Review] № 2 1967. [1968 г.]
TSz.	= Társadalmi Szemle [Social Review] 23. year. 1968. Nos 7—12.	TSz.	= Társadalmi Szemle [Общественный обзор] 23-ый год изд. №№ 7—12. 1968 г.

The collective works and their abbreviations[2] *Разработанние сборники и их сокращения*[2]

Annales Tomus 8. = Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae. Sectio iuridica. Tomus 8. 1967. Red. Commissio scientiae. Bp. Állami ny. 1967. [1968.] 179 p.

Jogtört. tanulm.2. = Jogtörténeti tanulmányok. 2. köt. A dualizmus korának állam- és jogtörténeti kérdései. Szerk. *Csizmadia* Andor—*Pecze* Ferenc. [Studies on the history of law. Vol. 2. Problems of the history of state and law in the age of the dualism. Ed. *Csizmadia* Andor—*Pecze* Ferenc. [Очерки по истории права. Ред. *Чизмадиа* Андор — *Пеце* Ференц. Том 2. Вопросы истории государства и права периода дуализма.] Bp. Közgazdasági és Jogi Kiadó, 1968. 333 p.

Quest. int. law, 1968. = Questions of international law, 1968. [A collection of studies.] Ed. *Haraszti*, György. [Вопросы международного права. 1968. Сборник статей. Ред. *Харасти* Дьердь.] [Publ. by the] Hungarian Branch of the International Law Association. Bp. Állami ny. 1968. 335 p.

Other abbreviations — Другие сокращения

Bp.	= Budapest [Будапешт]
compil.	= compiled by [составил]
Dt. Zusammenfassung	= Deutsche Zusammenfassung [German summary] [Немецкое содержание]
ed.	= edition, edited by [издание, под редакцией]
Eng. summary	= English summary [английское содержание]
изд.	= издание, издательство [edition]
köt.	= kötet [volume] [том]
ktár	= könyvtár [library] [библиотека]
ny.	= nyomda [printing house] [типография]
összeáll.	= összeállította [compiled by] [составил]
перераб.	= переработанный [revised]
publ.	= publication, publicated by [публикует]
публ.	= публикует [publication, publicated by]
Rés. franç.	= Résumé français [French summary] [фразнцузское содержание]
rev.	= revised [переработанный]
Русск. содерж.	= Русское содержание [Russian summary]
szerk.	= szerkesztette [edited by] [издание, под редакцией]
сост.	= составил [compiled by]

[2] Here we deal only with those collective works, which belong to several legal branches. The works pertaining to one single legal branch only are included in their proper branches. The collective works have been analysed, too, and have been placed in the proper legal branch.

[2] Туда зачисляютсь только сборники конспектного характера относящиеся к различним отраслиам права. Материалы одной отрасли права находятся там. Сборники мы разработаем тоже аналигически и стати находится в соответсвующей отрасли права.

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Some Borderline Problems of Copyright with Special Regard to the Protection of Industrial Property and the Law of Competition

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The author discusses the historical relations and the common aspects of copyright and the protection of industrial property in a paper bearing the title "Relations of Copyright and the Protection of Industrial Property" published in No. 11—12/1968 of Jogtudományi Közlöny, Budapest.

In the scope of the legal protection of intellectual property problems have emerged in large numbers whose solution cannot be derived in a clear-cut manner from the peculiar rules of either copyright law, or the law of the protection of industrial property. A borderline problem of this type is e.g. that of the classification of industrial or ornamental designs. Here legal practice is still in search of new underlying principles. Another problem of the hour is that of the protection of the programmes of electronic computers. Yet another question of practical importance is that of the segregation of the protection to be extended to the exploiters of intellectual products in trade and industry from the protection of the copyright of the author himself. And finally there is the question of the social recognition of scientific discovery work, which so far cannot be subsumed in anyone of the classified forms of protection of intellectual products. The present study has been written with a view to contribute to a solution of these problems.

I

1. Momentous problems of classification have cropped up in the borderland of copyright and the protection of industrial property in connexion with the statutory protection of industrial or ornamental designs.

The shaping and moulding of the outward form of industrial products (the so-called industrial or ornamental design[1]) add appreciably to the marketableness of the products in question, and at the same time help to distinguish it from other, similar products. The industrial and commercial function of the industrial design is to individualize the product for marketing purposes in relation to its maker, and by this to give rise to an aimed demand in order to step up the turnover. Therefore in general statutory provisions guarantee the exclusive use of an industrial or ornamental design for a period justified

[1] Industrial designs, ornamental designs (design patterns), dessins et modèles industriels, Geschmacksmuster.

by the time necessary to introduce the product into the market, on precisely defined terms and by holding out sanctions.[2]

In conformity with its purpose at the same time an industrial design has to satisfy the good taste of the customers, it has to impress the sense of colour and form pleasantly. This even in want of statutory requirement necessarily calls for the application of aesthetic means at their creation and possibly may entail a claim to a protection under copyright.[3]

[2] In Hungary on the ground of *§. 84 of the Civil Code* and *Section 2 of the Appendix to Decree-Law No. 11 of 1960* the *Regulation of the Ministry of Commerce No. 107709/1907* on the legal protection of industrial designs and their registration is still in force. Accordingly, "by design a specimen of a formation or delineation concerning the shape of an industrial product, and applicable to this product shall be understood". A design may be plain or three-dimensional (§. 2). Anybody who makes a new design, or has one made by others for his use, is solely and exclusively authorized professionally to market an industrial product according to this design or fitted with it (§. 3) for a term of three years at most reckoned from the day of the deposit of the design. (A so-called design of use, which is a structural element of the product, and not only an external form cannot be considered an industrial design.) Exclusive right is acquired by the registration of the design at the Office of Inventions, which has to take place before putting the product into circulation (§. 7). In the proper acceptation of the term registration has a constitutive effect, contrary to the opinion of Elster, who believes that the right to protection is born together with the creation of the design but reinforced to fully effective with the mere declarative registration. (Volle Wirkung.) Elster mistakes the claim to registration which in fact comes into being with the creation of the design, for the proper right to design protection, which is constituted only by the fact of registration. (Cf. ELSTER, A.: *Urheber- und Erfinder-, Warenzeichen- und Wettbewerbsrecht.* 2nd edition, Berlin/Leipzig, 1928, 263 pp.). At registration the specimens or drawings, photographs, or other kinds of true copies of the design have to be deposited (§. 9). If the designs are of great size a photograph is all that might be capable of being deposited. A design may be deposited also in a sealed envelope (§. 10), which will then be opened a year after depositing (§. 17). At the filing of the application for registration no inquiry takes place for prior art. As has already been pointed out registration has no preclusive effect, and protection is barred by the circumstances of imitation only. If later on the design proves to be an imitation, registration will be null and void (§. 4). The prohibition of plagiarism refers also to cases where the plagiarist has merely changed the size or the colour of the design (§. 31). Also the application of the design to another industrial product must be regarded as an infringement (§. 30). Protection ceases when the design is not put into circulation within a year from registration (§. 29). The exclusive use of the design is assignable to others (§. 3; a provision segregating right in design from on the whole unassignable copyright).

In foreign, non-Hungarian, legal systems the term of protection of industrial designs is in general a longer one. In conformity with the German Act of 1876, still in force in the German Democratic Republic, this term may be extended to fifteen years. In Switzerland under the Act of 1900 the term of protection is also fifteen years. In the United Kingdom under the Registered Designs Act of 1949 the shortest term of protection is five years which may be extended to fifteen years. In France the first term of five years may be extended by another of twenty, then of twenty five, so to fifty years altogether (Act of July 15, 1909). In the Soviet Union and in Yugoslavia the term of protection is ten years. In conformity with the Hague Convention of 1925 protection based on international deposit is according to the revised wording of 1954 for secret deposits five years, which in the form of a public deposit may be extended by ten years. The revised wording of 1960 restricts the maximum term of protection to ten years, when the extension of the protection to fifteen years is made conditional on the signature of a special protocol.

[3] In the Hungarian Copyright Act III of 1969 under the title "works of fine arts, architecture, applied arts, technical establishments and artistic photographs" section 47 contains special regulations concerning copyright protection of creations of industrial designing art that serve the purposes of industrial production.

In certain cases an industrial design may also qualify as a product of applied arts.

However, copyright protection is by far more extensive as regards both its duration in time and content than the protection of industrial designs in the frame of industrial property. Which are now the considerations which determine the rules which have to be applied in the one case and in the other, or are the two types of protection mutually excluding each other, or are they applicable cumulatively for the benefit of the same of different claimants?

The problem is a living one. The number of industrial patterns or designs filed for registration is growing continually, and so also their choice is growing richer.[4] The new Hungarian method of economic management, by shaping the appropriate forms of competition in the market, will in all likelihood lay a stress on the significance of industrial designs and the protection of same. By the side of enterprisal interests also the efforts of the creators of the design to enforce their claims to copyright may have to be taken into account. In this connexion in judicial practice a proper definition of the relation between the protection of designs as industrial properties and the copyright protection is likely to become a crucial problem.

In the first place the cases will have to be specified in which industrial or ornamental designs may come under the ruling of copyright law. Then the manner will have to be settled of the application of competing legal rules, whenever the protection of a work classifiable under two statutory provisions at the time has become a matter of argument.

A claim to copyright may be brought forward only in respect of a work of art. The form of artistic expression is indifferent, and so also whether or not the work is one of fine or applied arts. Given the knowledge of everyday practice the statement may be advanced that the notion of art as generally conceived and instinctively used can be applied to an insignificant fraction only of industrial or ornamental designs. Still in certain actual cases the enforcement of a properly substantiated classification with all its legal and financial implications will be anything but simple. What is the criterion which objectively classifies something as a product of art, where should the line be drawn

[4] In the National Office of Inventions in Budapest 310 applications were filed for the registration of industrial designs in 1965. In the same year the number of living designs was 793. In 1966, 351 new applications for registration were filed, and the total number of living designs rose to 843. There is a rich choice of registered designs. In addition to various forms of toys, furniture, rubber tyres there are heels, spectacle-frames, hats, luminous bodies, machine hoods and covers, etc. Among the photographs of large-size designs there are three-ton cranes, transport vans, telephone booths, exchangeable tractor cabins, portable carsheds, the models of weekend bungalows. Also the number of foreign applications is increasing. Hungary extends protection to designs registered by aliens in Hungary under the wording of the Paris Union approved in Lisbon on October 31, 1958, and entered on the Hungarian Statute Book as Decree-law No. 7 of 1967. Hungary has not as yet signed the Hague Convention of November 6, 1925 on the international deposit of industrial designs and patterns. For details see: BATTA, J.: *Az ipari termékek nemzetközi formavédelme (International Protection of the Design of Industrial Products)*. A series of publications on the legal problems of international economic relations. Edited by SIMON, Gy. Budapest, Közgazdasági és Jogi Könyvkiadó, 1963. pp. 221 et ssq.

beyond which an industrial design will at the same time satisfy the requirements of art?

Kohler even draws a line according as the product is figurative or pictorial, or only ornamental. In the latter instance he considers only protection of designs as industrial properties justified.[5] *Belinski* in his writing "The Event of Art" approaches the essence of art from a similar angle. "Art is the direct approach of truth, i.e. thinking in pictures."[6] However, figurativeness in certain respects cannot be a criterion of art, because in this case it would even embrace instances of simple "imitation".[7] Pictures may occur also as elements of unpretentious industrial or ornamental designs. Photographs which do not satisfy the notion of artistic products in the different national copyright laws enjoy protection within appreciably narrower limits than products of art. On the other hand a juxtaposition to ornamentation seems to restrict figurativeness to the sphere of figurative expression, a limitation which even from the aspect of abstract art makes the taking of one's bearings difficult.

In literature, and also in the administration of justice, the limiting consideration of usefulness has also emerged in respect of the fine arts. Some of the recent authors on the subject-matter have also adopted this idea.[8] This approach, in a negative manner, draws a line between artistic creation and any other form of shaping beyond doubt. As a matter of fact the process of the artistic representation of reality cannot be limited by functional restrictions or such of convenience which it is always the case with industrial products, and which of necessity determine the trend and scope of activities of creative fancy. Still usefulness as a criterion of classification may be disturbing also where primarily artistic creation determines the substance of the articles of use, which here as its ultimate essence becomes the material tool of artistic expression, so e.g. in popular art or in the applied arts (here we should bear in mind tapestry work, vessels of chinaware, the products of goldsmith's art, etc.), or when a product of art is applied on an article of use and the product of art has changed into an ornamental element of the industrial design.[9] The

[5] KOHLER, J.: *Musterrecht*. 1909. pp. 42 et ssq.

[6] BELINSKIY: *Collected Works*, Vol. II, Moscow, 1948, p. 67; quoted by LUKÁCS, GY.: *A különösség (The Peculiarity)*. Budapest, Publishing House of the Hungarian Academy of Sciences, 1957. p. 186.

[7] According to Lukács, the weakness of the term "picture" lies in the fact that the boundary line between individuality and peculiarity is blurred, for both may equally be considered as pictures (op. cit. p. 187). The picture-like character segregates art merely from the mental (scientific) reflection.

[8] So e.g. RUNGE, K.: *Urheber- und Verlagsrecht*. Bonn–Hannover–Stuttgart, 1948/1953. p. 289 et ssq.

[9] Here a striking landmark in the evolution of United States law is the judgement in *Mazer vs Stein* (347 U.S. 201/1954). Plaintiff acquired copyright in his statue representing a dancer. He then incorporated this statue in a lampstand. Defendant copied the statuette and against the plaintiff's claim to copyright he pleaded that the statuette had been made for use. The United States Supreme Court gave judgement for plaintiff and

usefulness of the material carrier of the artistic product does not therefore suppress its artistic value in all events. This is substantiated by the evolution of both the national and international laws when protection of the products of applied arts has been made institutional.[10]

In order to forestall disputes *Riezler* suggests that copyright should be extended to all industrial designs.[11] Naturally this pragmatic position could not prevail. Such an extension of copyright would blur the line which otherwise can be drawn between a product of art and industrial designs or design patterns, and at the same time bring to naught the advantages developing industry derives from the limited protection of industrial designs.

On these considerations henceforth for both the administration of justice and jurisprudence a discrimination of industrial designs and products of the applied arts according to their aesthetic level has appeared to be the only practicable expedient. *Ulmer* on analyzing the judicial practice of the German Federal Republic, points out that the standard of the administration of justice is whether or not the aesthetic content, or surplus of the design comes up to the level where according to opinion prevailing in life there may already be talk of art. In the beginning judicial practice has given a fairly unassuming construction to public opinion and e.g. accepted stylish table utensils as products of the applied arts. Recently it has raised the norms to a fairly high level and refuses the protection of copyright e.g. to merely fashionable forms. *Ulmer* too admits that an appeal to public taste is unfounded and assailable. Instead he suggests insistence on an artistic creative level.[12] Still even so we can hardly get beyond the unjustifiable and therefore only subjectively enforceable postulate to draw the line of a quantitative difference. Essentially we are where in his time *Elster* was, who in like could differentiate only by the divergent degrees of the aesthetic contents.[13] On the ground of a quantitative approach a satisfactory decision can never be achieved: the position taken by the artist, the opinions of the public and of the industrial designer may be extremely divergent when it comes to decide whether a car body should be judged as a product of applied arts, or merely considered a form creating a pleasing impression.

held that when some sort of an object was artistic work the fact that it also had a value of use did not preclude protection under copyright. For details cf. SILVERMAN, A. B.: *Copyrights and Design Patents.* ASCAP Copyright Law Symposium, No. 12, New York—London, 1963, pp. 152 to 201, and NIMETZ, M.: *Design Protection.* ASCAP Copyright Law Symposium, No. 15, New York—London, 1967.

[10] The Brussels wording of the Berne Union has expressly taken up the products of applied arts in the list of protected works.

[11] RIEZLER, E.: *Deutsches Urheber- und Erfinderrecht.* München/Berlin, 1909, p. 459.

[12] ULMER, E.: *Urheber- und Verlagsrecht.* 2nd ed., Berlin—Göttingen—Heidelberg, 1960, p. 131; *Künstlerische Gestaltungshöhe.* Cf. p. 411 et ssq.

[13] »Geschmacksmusterschutz kommt vom Kunstschutz . . . und unterscheidet sich von ihm nicht stark, wohl aber graduell.« ELSTER, op. cit. p. 253.

Still art is segregated from a non-artistic moulding not merely by quantitative differences. A work of art, as a specific manner of the reflection of reality, differs qualitatively too from an elegant shaping of the objects of reality. At the classification of some sort of a work on legal grounds we have to set out from the very same recognitions as have been achieved by the discipline of aesthetics on a general level. Scientific statements cannot be replaced by special considerations of legal technicality, by the side of the general notion of a work of art no separate legal categories of "art" can be formulated. As long as we do not accept scientific aesthetics as the basis of a delimitation of an industrial design and a work of art, our administration of justice and legal practice will be accidental, and the achievement of the specific legal objectives of copyright protection and the industrial property right in design will become uncertain, a contingency which has to be prevented also in the interest of socialist legality.

In this scope the uncertainty of jurisprudence and the administration of justice is closely associated with the circumstance that the scientific theory of artistic creation is lagging behind artistic practice. It is only by the way of a dialectical analysis of the reflection of reality that the aesthetic essence of art could be explored in a practicable manner also on considerations of classification.[14] Let us try to find a solution of the problem on this line.

2. It is the underlying peculiarity of a work of art that it reflects reality in a definite manner. Whereas the process of scientific cognition advances from particular phenomena towards possibly completest generalization, only to proceed from the general categories again to particular facts (induction and deduction), in the artistic reflection cognition and representation takes place between the categories of particular reality and generality, on the level of *peculiarity*. Whereas in theoretical cognition peculiarity is merely an intermediary category between a particular phenomenon and complete generality whatever the trend of scientific thinking may acutally be, in art peculiarity itself is the specific sphere of reflection. Art reflects both general, and individual in a peculiar form. It suppresses the distinctness of the phenomenon of observation, preserves its particular character raised to a higher, more general level, shapes it in the sphere of the peculiar without, however, resolving it in a purely mental universality. On the contrary: artistic reflection is adequate also for mental abstraction, or the pictorial reflection of the universal, in like way on the plane of peculiarity. Hence in art the trend of cognition always tends

[14] Here the investigations of LUKÁCS are of fundamental importance. In particular cf. *The Peculiarity* (already quoted), Budapest, 1967 and "*Az esztétikum sajátossága*" *(The Characteristic of the Aestheticum)*, Vol. II. Budapest, Publishing House of the Hungarian Academy of Sciences, 1965.

towards peculiarity, be the object of artistic reflection particular phenomenon or generality.[15]

Artistic reflection happens in the appropriate artistic form. However, there may be talk of the artistic criteria of this form only when "the processing of the content has taken place in conformity with the principles of the aesthetic reflection."[16] Just because it represents reality on the plane of peculiarity at a given moment, the truly artistic form will resist the changes of time, for historically it will be true even when what it reflects, and the technique of how it reflects it will both become antiquated.[17]

Reflection on the plane of peculiarity is an essential characteristic of the aesthetic quality. Therefore we may speak of an aesthetic quality properly only in association with art. A work that fails to satisfy the postulates of artistic reflection, still it impresses our sense of form and colour in a pleasant way belongs according to György *Lukács* to the group of "pseudoaesthetic formations on the plane of pleasantness." These formations too will "put in motion the aesthetic means of reflection and expression . . . still with all this plenty they will nevertheless keep the recipient subject in the captivity of the immediacy of everyday life . . . the image of reflection . . . will become stuck on the human level of everyday and here, and not owing to the primarily formal criteria, aesthetic quality will be delimited in a clear-cut manner from the pleasantness."[18]

When now all that has been set forth above is applied to the classification of industrial designs, the statement may be advanced that the primary objective of these patterns is not the reflection of the one phenomenon or the other of reality on the level of peculiarity, but on the contrary, the greater emphasis of the particular character of a definite product of industry. The objective of a sightly car body is not the reflection of the reality given in a motor car to the level of peculiarity, but the marshalling of attention to an actual particular type in a manner pleasantly affecting the sense of form and colour.[19] (The proliferation of the particular form, or its reproduction in large series, will not of course alter the particular character of the design or the type of good, in the same way as in another connexion the reproduction of a work of art will not affect its individuality.) Industrial designs do not even reflect

[15] LUKÁCS: *The Peculiarity.* Chapter V, *The peculiar as the central category of aesthetics*, p. 128 et ssq.

[16] LUKÁCS: *The Peculiarity*, p. 223.

[17] LUKÁCS: speaks of aesthetic survival by which he understands the artistic effect of the artistic work *(The Peculiarity*, p. 193).

[18] LUKÁCS: *Az esztétikum (The Aesthetic Quality)* p. 553 *(The sphere of problems of the pleasing)* pp. 484 et ssq.

[19] LUKÁCS remarks that "there are cases of course where the cognition of a particular reality by isolated signs is possible and sufficient. However, here there is mostly a case of recognition in the sense of identification, rather than one of cognition". (*The Peculiarity*, p. 89). "The artist goes beyond . . . the directly given particular reality of the phenomenon." (ibid. p. 182).

the products of industry they incorporate. They are merely a component of them, and amount to the completion of the design and manufacture of the product of industry in question. (Without a body a motor car is incomplete, and without a handset there is no telephone. The design pattern is also part and parcel of the product, even if not a technical structural element such as the so-called patterns of use.) The tendency of *giving particular form to series* and the *component character* of the form prohibit the acceptance of an industrial design as a work of applied arts by itself. Accordingly industrial designs are of necessity short-lived, and will impress the taste of the public only until together with the actual product they too become obsolete. Nobody would think of looking for a work of art in the forms of early motor cars exhibited in the museum of transport, although in their age the designer called them into life with a pretence to a high degree of artistic taste and would have even put forward claims to copyright on the plea of creating a work of applied art when the royalties would be paid to his heirs for many years after his death.

Hence as for their nature industrial or ornamental designs belong to the category of pleasingness and as a rule their protection should be restricted to the protection afforded to a pattern. An industrial design cannot become a work of art unless beyond its function to clad the product in a novel, particular form and to hold together its structural elements and exercise a pleasant effect on the public taste it affords something also of the artistic reflection of reality which at the same time guarantees the continuation of its aesthetic life even after the product has become obsolete.[20]

3. An attempt has been made to draw a line between an industrial pattern or model and a product of applied arts. It is only on the ground of such a difference that a form can be made subject to the rules of the protection

[20] Thus in the author's opinion the judgement of the Supreme Court of Budapest. Pf. IV. 20448/1966/17 (published in Bírósági Határozatok, 1967, No. 4, Item 5252.) is rather doubtful. Here the Court granted copyright to the design of a tractor in connection with the simplified adaptation of the form of the tractor for toy manufacture. The Court held that the design of the form of the tractor was a product of applied arts and established a case of an infringement of copyright. In conformity with Section 67 of the Copyright Act protection may in fact be extended to the design of the tractor as a mere design against the unauthorized executor or copier. However, in the present instance the problem of the protection of the original design was not even a matter of discussion. Copying took place on the finished industrial design, the tractor then manufactured in series. On the other hand the form or design of the tractor was a characteristic example of individualizing a product in a way affecting pleasantly the sense of form and colour, which no matter how novel it was, remained as car body short of an artistic product, and in its fundamental features was of necessity tied to the technical exigencies and the tracks of earlier forms of tractors. Later types of tractors will necessarily thrust it out of the market, and consequently there can be no case of an independent aesthetic survival. Consequently the design of the tractor cannot be granted the same protection as some sort of a statue. Considering the facts at issue at most the tractor manufacturing enterprise could have laid a claim to design protection provided it had had registered the design in due course and marketed it. An action for unfair competition cannot be brought either, because with the manufacture of toy tractors there is no risk of a confusion of the products, nor is the goodwill of the tractor factory jeopardized in any other form.

of industrial designs or of the works of art. If an industrial pattern, wholly or in its parts qualifies as a work of art, there may be a case of parallel running protection. The owner of the industrial design may lay a claim to protection within the temporal limitations and content of the protection of industrial designs and exercise his exclusive rights in respect of the pattern as a whole. In this case the author of the pattern under statute assigns also his rights of use of the pattern as a work of art to the customer, and may vindicate a claim on the plea of authorship himself only in the event of an exploitation of the pattern beyond the scope of the protection of industrial designs. On the cessation of the proper protection of the pattern or design as industrial property all rights of an exploitation of the work of applied arts is the due of the creating artist.

The proper protection of industrial designs applies to finished products only and specimens of the product or its photographs have to be deposited simultaneously with setting up a claim to protection. The design of a pattern by itself is *de lege lata* protected against unlawful execution or reproduction by the provisions of copyright applicable to designs in general, even when there is case of the creation of an industrial design or pattern only.

The concept of a potential parallelism of copyright and the protection of industrial property has proved to be more effective than the alternative protection developed by English law, when copyright was not granted to an industrial design or pattern once it was protected under the Registered Designs Act of 1949, namely on the plea that it had been properly registered, or applied to a commodity in circulation reproduced in more than fifty copies. A recent Act of Parliament of October 25th 1968 admits parallel protection under copyright law of products of applied arts within the term of fifteen years allowed for the protection of industrial designs. A cumulative protection is even today barred by the relevant statutory provisions of Japan, Australia, Canada, India, Pakistan, Israel, Italy and Norway.[21] Parallel protection is in all events more to the point than the systems in force in the Netherlands, Turkey, Greece and Luxemburg, where industrial designs and patterns are protected only under copyright law.

The discrepancies in the various systems of protection has justified the extension of the Brussels wording of the Berne Union to the international protection of industrial designs. Clause (5) of Article 2 leaves it to the signatories to define the scope of application of their statutory provisions affecting products of the applied arts, further industrial designs and patterns, and to stipulate the terms under which protection can be granted to these objects. However, the convention stipulates that for works protected in their country

[21] Lecture given by SAINT-GAL, in the Institute for the Protection of Industrial Property in Budapest, on October 24, 1968. Also cf. BAPPERT, W.—WAGNER, E.: *Internationales Urheberrecht*. München—Berlin, 1956, p. 59.

of origin exclusively as industrial designs or patterns, in other countries only a protection granted to industrial designs or patterns can be applied for.

A wholesome evolution of copyright and the protection of industrial property equally demands that copyright should not be extended beyond the products of literature and art. Any extension would necessarily entail a watering down of copyright, jeopardize the efficacy of protection, add to the number of marginal cases on the one hand, and on the other unjustifiably hamper industrial development and the establishment of a desirable market mechanism. It would act as a brake on the unfolding of a wholesome competition, and would not encourage the creation of new, improved industrial patterns.

II

4. During the latter years technical development by leaps and bounds has thrown out a new problem of classification, whose significance will grow proportionally to the spread of the use of electronic computers. The question is, how specific programmes drawn up for the mechanical solution of definite problems, to be fed into computers, can be protected for the benefit of their makers?

As is known with appropriate programming digital computers are capable of solving any scientific problem formulated with the proper precision. The largest of these computers are in the present phase of technical development capable of receiving and processing data at the rate of 10^{12}.[22] Also the number of computers in operation is growing rapidly, and at the same time their handling has been simplified.

For the purpose of the subject-matter of this study the different sorts of their use may be classified in three principal groups, viz. (1) The storage of a body of knowledge for the transmission of information. (2) Creative work on the ground of regularities coded into them (electronic music - giving forth sound by means of synthetizers, making of drawings, translations, texts of various types). (3) Continuous solution of data fed into the computer, in this connection retroactive correction of errors, the cancellation of intermediate data (oblivion), the use of new experiences in respect of the stored material, and in the last resort the creation of the conditions of learning and self-programming.

The first two groups of cases will throw out a number of copyright problems. Recording in a computer for further reproduction or partial use means a specific case of mechanical transmission. Mechanical poetry, translation,

[22] According to certain estimates the recorded body of substance of knowledge stored in all the libraries of the world could be fed into two or three giant computers.

music and figurative creation raise problems of authorship, and the problem of a segregation from traditional intellectual creation and the relation of the person programming the rules to the final product of the machine, to the "aleatoric" music composed on the ground of statistical probability, and to the various texts so composed.[23] We do not intend to discuss these copyright problems within the scope of the present study. Still we have to deal with the problem whether protection under copyright or the protection of industrial property, or both can be extended to the drafters of such individual and original programmes on the ground of which the mechanism of the computer will produce a solution of the problems.

With the data and instructions fed into the computer natural and social structures of highest complexity may be built up. By the side of workshop units or complex economic mechanism a fictitious model of the human brain might as well be composed. On this gorund the computer will explore regularities and by making use of these check up hypotheses on their correctness and offer solutions. Let it be assumed that the problem to be solved is the establishment of the most favourable conditions of life and proliferation of a unicellular being. In the computer a functional model of this unicellular being and its environments will have to be created, i. e. the relevant anatomical, biological, physiological, chemical, etc. stock of knowledge, the regularities of the interaction with the environment will have to be fed into the computer in the form of several hundred or thousand data, then an instruction will have to be given for the fictitious start of the vital processes and their recoring, when the operator of the computer will in the meantime be waiting for the indications of results: The fictitious model of the unicellular will react differently to the fictitious dosing of nutritive and poisonous materials. The "sustenance" of the unicellular may replace otherwise unfeasible, or at least extremely lengthy laboratory experiments and lead to results which may then be turned to good account.

For the execution of the task a properly considered programme extending to an as large a number of potentialities as possible and permitting continuous operation has to be fed into the computer. The drafting of the programme begins with an analysis of the problem, a survey of all possible considerations and then continues with the drawing up of the possible method of a solution. Then the process of the programme has to be recorded in all its details. In

[23] Some of the recent publication on the subject-matter: RINGER, B. A.: *Gewerblicher Rechtsschutz und Urheberrecht.* (GRUR) Internationaler Teil, 1967. ZURKOWSKY, P. G.: *Post-Gutenberg Copyright Concepts.* (USA Congressional Record 1968, Vol. 114, No. 102, pp. 6/7 uses the designation "Multimedia Publishing Era" with regard to the new technical facilities of reproduction.) GREENBAUM, A.: *Copyright and the Computer* (ibid., pp. 8/9). MÖHRING, PH.: *Können technische, insbesondere Computer-Erzeugnisse Werke der Literatur, Musik und Malerei sein?* (Archiv für Urheber-, Film-, Funk- und Theaterrecht (UFITA) 1967, Band 50/C, pp. 835–843). HIRSCH-BALLIN, E. D.: *Zufallsmusik.* (UFITA, 1967, Band 50/C, pp. 843–853).

general this "script" is then broken down by professional programme drafters into elementary operations digestible by the computer, and then coded into "instructions" composed of digits or letter symbols.[24] Finally these are fed into the computer by a variety of methods. The original punched cards are actually being gradually superseded by magnetic storages. The computer carries out the instructions and then communicates the results, often typed out, or possibly in the form of synthetized speech.

Obviously the coding of the programme cannot be considered to be original intellectual work.[25] However, the drafting of the proper programme in cases other than a routine-like use of overwhelmingly existing programme elements it must beyond doubt be regarded as individual and novel intellectual work. On what ground can protection be given to the maker of the programme?

5. Computer programmes are scientific conceptions put down in writing, for mechanized use, for the solution of definite problems by means of existing technical equipment.

If the content of the programme is individual and novel, the reproducible form of their presentation will establish a relationship to scientific writings. On this plea programmes of this type may be considered to be literary works.[26]

The circumstance that in their final, coded form the programmes cannot be read off directly like a traditional text does not alter the situation. In fact programmes may receive several coded forms. The evolution of copyright has in a clear-cut manner got beyond the classical concept of copyright merely in

[24] Among the best known computer languages System FORTRAN (FORmula TRANslating System) of IBM or System ALGOL (algoritmic) known mostly in Europe, should be mentioned. The coded formulae of programme fragments which may be used for a number of duties, the so-called sub-routines (e.g. for the calculation of circular functions, etc.) have since become elements of programming used as public property.

[25] The breaking down of the programme into elementary operations before coding is more than mechanical work. However, this intellectual work presupposing a thorough training and familiarity with the subject-matter by itself does not justify protection under copyright law. Copyright may be claimed only when a new work is brought to life. Setting out from the sphere of idea of the protection of efficiency the Pole EMPACHER, A. B. suggests the development of a "Law of the Programme Calculators", so to say as an allied law of copyright law and the law of the protection of industrial property. (*De la nécessité de la création du droit de calculateurs.* Warsaw, 1966; Polish published by PRETO, as MS). Quoted from NAWROCKI, B. ("*Machines électroniques et création intellectuelle*, from the MS of a lecture given in the XXVIth Congress of CISAC, Vienna, 1968). However, calculations of high complexity are necessary also in other spheres of design work, and do not require protection going beyond the conditions specified in the labour contract or by labour law. At the present stage of development it seems to be causeless to grant protection to the performance of the programming calculator in the form of a special category of the rights.

[26] Similarly ULMER, E.: *Der Urheberschutz wissenschaftlicher Werke unter besonderer Berücksichtigung der Programme elektronischer Rechenanlagen.* (Bayerische Akademie der Wissenschaften, Philosophische-Historische Klasse. Sitzungsberichte 1967/1, München) and MÖHRING, PH.: *Die Schutzfähigkeit von Programmen für Datenverarbeitungsmaschinen.* (GRUR 1967, Heft 6, pp. 267–278.) The Copyright Office of Washington was the first to register programmes as author's products, in 1964. (Announcement of the Copyright Office, The Library of Congress, Washington, SML-47 (5-64, 150)). In French see *Le droit d'auteur*, 1964, p. 213.

the form, and surveys the identifiable work in a unity of subject-matter and form. It is an internationally recognized rule that a work published in translation comes under the same consideration as the original. With the appropriate code designations even works of chorcography may be published. Latest legislations do not consider recording an essential criterion at all and extend protection to oral lectures, or against the unauthorized use of unrecorded works of choreography too.

Protection under copyright is not even barred by the fact that the programmes have been formulated for definite methods of use and consequently their style will contrast with the explanatory style of conventional publications. Their structure combining data into a system of instructions is obviously more than a simple sketch or instruction for use and so the programmes are the embodiments of finished creative work. Here the scripts should be borne in mind whose protection is not excluded by the fact that they have been written in a manner adjusted to the requirements of screening, as a preliminary phase of continued creative work.

However, in the case of programmes a certain complexity has been introduced by the circumstance that they discharge their function by defining the operation of technical equipment, and that their definitive sense is not given by itself, as is in general the case with scientific writings.

Troller distinguishes between copyright and patent law in a sense that the protection given to inventions is directed against their unauthorized practical application rather than granted to the mental concept embodied by them. On the other hand as regards works coming under copyright the law prohibits their presentation as intellectual products, whereas it permits the practical exploitation of knowledge imparted by them. On this plea Troller relegates programmes whose end and characteristic is the control of computers to the realm of the protection of industrial property. It is the exploitation by mechanical devices where the proper use of programmes lies. When the programmed rules are intended for the application of the forces of nature then according to Troller the programme will qualify as an invention. As regards mere operating instructions it will be indefensible.[27]

In the opinion of *Huber* patent rights may be granted to a programme when with its help technical problems can be solved.[28]

[27] TROLLER, A.: *Urheberrecht und Ontologie.* (UFITA 1967 Band 50/B, pp. 417/418.)

[28] HUBER, E.: *Patentrechtliche Probleme auf dem Gebiet der elektronischen Datenverarbeitung.* (Mitteilungen der deutschen Patentanwälte, 1965, p. 21.) It is worth while to note that in the United States originally it was sought to protect programmes under patent law, however, for the time being without success. The practical significance of the relegation of programmes to the scope of the protection of industrial property would be implied in the fact that for the time being the statutory foundations of the copyright protection of programmes are still uncertain, secondly, on the ground of patent law even the Soviet Union would join the international programme protection scheme, whereas on copyright grounds for the time being this is impossible, the Soviet Union being outside the multilateral international copyright unions.

On the other hand *Möhring* points out that until the subject-matter of a literary work is of a purely intellectual character, its technical exploitation will not create a claim to patent rights. At programming the intellectual work afforded is not directed to the construction of the computer, nor to the technical modalities of its operation. The feeding in the programme means the proper use of the computer and not its continued technical development.[29]

How do matters now stand in the light of Hungarian statute law? Under Hungarian law an invention to be patented is a new solution of technical nature representing progress insofar this solution may be applied in practice.[30]

Hence under Hungarian law it is the solution embodied by the invention that has to be of a technical character and not the problem to be solved. This postulate is not satisfied by programmes. Furthermore under Hungarian law the postulate of the possibility of practical exploitation has to be understood directly,[31] whereas the programmes may lead to exploitable solutions only indirectly by way of the existing technical apparatus of a computer.

However, we cannot declare with general validity that any programme is unpatentable. As a matter of fact there are cases when for tackling a specific problem specific computers have to be designed and for them special programmes drawn up with the purpose that the solutions found by means of them should be applied in the very same turn in practice too, and also this process should be controlled by the same programme, e. g. within the controlling mechanism of a space rocket. In this case the programme may be conceived as a proper structural element of the computer, which for the solution of the specific programme may be used directly as part of the computer: it continuously takes care of the automatic control of the rocket. In our opinion a programme of this type may be protected by patent rights.[32]

For a satisfactory answer to the question with the rapid advance of computer technics in all likelihood there will shortly be more facts to rely upon.

III

6. Since in the overwhelming majority of cases intellectual property will be accessible to the broad public by way of industrial and commercial exploitation, in the course of evolution even in connexion with the exploitation

[29] MÖHRING, PH.: *Die Schutzfähigkeit . . .*, p. 272.

[30] §. 1 of the Hungarian Act II of 1969. According to §. 3 of the Decree of the Council of Ministers of the Soviet Union an invention is an essentially new solution of some sort of a technical problem producing a positive effect. In this connection it should be noted that a programme by itself does not solve a problem, it merely gives instructions as to the methods by which the solution of a problem through the agency of a computer may be attempted.

[31] Conf. VILÁGHY, M. – EÖRSI, GY.: *Hungarian Civil Law*. Budapest, 1962, Vol. II, pp. 302/303.

[32] Similarly NAWROCKI, op. cit.

of works of authorship the valuation and possible settlement of problems of the protection to be granted in the drift of economic competition, have become matters of urgent consideration.

Competition is an economic and market phenomenon and primarily a non-legal category. Forms of legal institutions it has assumed only in the course of regulation of the competition, in connexion with partly a safeguard of the chances of competition (provisions against monopolies in restraint of trade), partly the suppression of the noxious growths of competiton (statutory provisions prohibiting unfair competition in general and in its special forms of manifestation). In the last resort both branches of the law of competition protect the public representing demand and the interests of the entrepreneur drawn into the drift of market competition, mostly by protective provisions independent of the character of the enterprise, i. e. as regards the content of the practice of trade and industry by non-specific rules. These forms of protection are suitable partly to supplement certain specific protective rules (provisions of ownership, contract law, speficic criminal facts at issue, etc.), partly to lead in the practice of non-specific protection to subsequent specific categories of protection. (Essentially such specific institutions motivated by the law of competition are the special cases of the protection of industrial efficiency as brought under regulation as the so called neighbouring rights of copyright.)

Since the introduction of rules governing competition both theory and judicial practice are equally concerned with the question, to what extent the provisions of the law of competion may supplement the specific protection of intellectual property, and within it copyright. In the twenties *Elster* thought of including the whole sphere of intellectual creation in a uniform system, and was looking for the ultimate essence of copyright and the protection of industrial property in their competitive functions. By way of summarizing he discussed copyright, the right of inventors, trade marks and competition under the heading "gewerblicher Rechtsschutz" or protection of industrial property. He wanted to discover the accomplishment of subjective copyright in competition: in his opinion the underlying personality rights transform to such of a financial interest by way of the element of competition.[33]

The doctrine of Elster was born under the effect of the capitalist theory of competition and amounted to a formal alloy of the legal institutions here

[33] ELSTER, op. cit. "The risk that others might at will exploit considerable performances, for want of the allurement of a consideration in terms of money would paralyze intellectual creative work. Hence the protection of intellectual industrial products is a protection in competition." (p. 23) "The protection of industrial property has an end not in itself . . . it is the counterpole, i.e. competition that lends a sense to it . . . It is only the competitive purpose of the achievement that leads it over to the law of financial interests, which at the same time . . . are subsequent-supplements to the original moral law," (p. 24). "The work character implies the value element of priority, which calls for exclusiveness for a commercialized competitive reproduction" (pp. 25/26). "For marketing the will element has to be directed to competition . . . it is by this way that the ring of competition is drawn on the so far neutral work." (pp. 23/24).

discussed with elements of political economy, and their commingling with factors of the economic base and the superstructure. Therefore the conclusions Elster had drawn were open to attack, and they did not even promote the appropriate evolution of anyone of the special branches of law here touched.

The law of competition cannot be a specific component of the content of the subjective law arising on intellectual property, and this for the very reason because a subjective right of competion is non-existent. As has already been pointed out competition is an economic chance whose exploitation is brought under regulation by prohibitive provisions, or only permitted within these. To discover an element of the law of competition between personality rights and rights of financial interests leading over to the latter is a contradiction in terms. As has been made clear industrial competition historically contributed considerably to the birth of exclusive copyright. Still the law creating function of the economic base cannot turn by itself into a legal content element in the form of some sort of a "will directed to competition".

Accordingly also the statement of Elster that the pursuit of competition turns a right existing on a literary work into one of financial interest, is erroneous. The causal relation is just the reverse: the existing market value of the intellectual work may bring about competition in its exploitation. Exclusive financial rights in respect of the same work will exactly cause the elimination of competition. Elster mistakes competition for demand. Competition is a definite market mechanism of the age of commodity production, which by influencing the relation of demand and supply may affect the price of the different products, still it will not become the source of the value in use and the trading value of substantive and intellectual works.

In addition the competition approach even narrows down the chances of a proper formulation of the contents of rights applicable to the various peculiar types of intellectual products, because the sphere of the interests to be protected is tied to a definite form of the process of marketing, i. e. the form of competition. Yet the protection of the moral and intellectual interests attached to the unchangeable character of the work, the right to decide on its publication, i. e. just the right of the seclusion from competition are all esential features of copyright. This approach further ignores the protection of interests forthcoming from the personal process of creation. It further fails to notice that even the most primary rights of personality are intertwined with rights embodying financial interests, so e. g. the right of deciding on the publication of a work. The unity of personal and financial interests imélied in copyright is in opposition to the doctrine of Elster, that rights of a financial character represent a surplus only resulting from competition in the content of the originally "neutral" copyright. Copyright in a work has not some sort of a sterile phase, which would achieve full value only through the agency of competition.

And finally the concept of competition is unsuited for the segregation of the law of intellectual products from other sphere of law. The theses of Elster, i. e. competition as reason of protection — and the tendency of competition, competition as a content element shaping financial interests, may be extended to any sector of merchandise production and applied with equal reasoning e. g. in connexion with the ownership in things. As has already been pointed out the institutions of the law of competition are in their bulk non-specific.

7. Hence what relations exist between the specific protection under copyright and the non-specific rules of the law of competition?

The problem may be approached first from the prohibition of a limitation of competition, or of the restraint of trade. Economic competition is concomitant of merchandise production and the market mechanism. Under socialist conditions owing to the public ownership of the means of production and the existence of a central economic plan, the regularities of competition and its effects differ from those under capitalist conditions. However, the restrictions imposed on competition to suit the specific forms of production cannot constitute a bar to the unfolding of a wholesome competition justified under given circumstances in the interest of a development of the forces of production.[34] Therefore it is not void of any interest to explore the relationship existing between the postulate of a restriction of the economic monopolies suggested by the economic management and the exploitation of certain copyrights through institutions enjoying a monopolistic position.

Public musical performances, the transmissions of broadcast and television programmes, the channelling of these programmes to another public through the receiving sets, etc. have in their manifoldedness frustrated the direct sale of the rights of certain composers on non-theatrical musical compositions and at the same time the extensive supervision of the exploitation of such rights. On the other hand a *bona fides* user of the right cannot be expected either to apply to each composer for an authorization of the performance of compositions if only in a single programme. Consequently of necessity organizations have come into being on which the particular authors confer the right of a profitable exploitation of their non-theatrical works (in the beginning only as far as musical compositions and their words were concerned, today in certain countries also in respect of literary products). These organizations on behalf of the composers authorize the performances or emissions by the partic-

[34] Cf. MEZNERICS, I.: *A gazdasági verseny jogi szabályozása (Legal Regulation of Economic Competition)*. Jogtudományi Közlöny, 1967, No. 8, pp. 471 et ssq.

[35] The first company of this type was the French SACEM (Société des Auteurs, Compositeurs et Editeurs de la Musique), one of the latest relevant organization is WORT in Munich, which is engaged in the centralized exploitation of the right of performing literary products. In Hungary the Office for Copyright Protection (ARTISJUS) takes care of the protection and exploitation of the right of muscical performance and mechanical recording. Actually over thirty countries have similar organizations. Most of them under reciprocity agreements represent the interests of authors of the other party.

ular users, when licence fees are in general guaranteed by contracts stipulating the payment of a lump sum, and distributed among the composers in the manner defined by the statutes of these organizations against refunding of their handling charges.[35] As a matter of course these organizations have gradually acquired a monopolistic position: both authors and users cannot profitably exploit the performing rights unless through them. By way of reciprocity contracts signed with foreign organizations they exercise monopolistic rights in their spheres of activities for practical purposes extending to the world production under copyright.

The exclusion of competition in this spehere of the profitable exploitation of rights means that the value judgement of the market taking shape in the process of demand and supply will influence the rate of the royalties within narrow limits only. In fact royalties are defined by the agreements of the copyright companies and the users without making allowance for alternatives, further the authors themselves will have no choice when it comes to entrust somebody with the safeguard of their rights. It is for this reason that the operations of enterprises engaged in the profitable exploitation of copyright have to be governed by specific legal provisions and call for special supervision.[36] In the course of regulation provision has to be made for guarantees of a free access of all authors living in the jurisdiction of the institution organized for the profitable exploitation of copyright to this institution. Furthermore the right of performance of all works of the authors represented by the protecting body corporate should on appropriate terms be equally accessible to the users without discrimination.

Supervision of the monopolistic companies or institutions organized for the exploitation of copyright differs qualitatively under capitalist and socialist relations of production. In this connexion the statement of Jenő Wilcsek viz. "in a capitalist society the monopolies hold power, in a socialist society it is popular power that owns economic organization if in a monopolistic position"[37] is valid. In the relation of socialist demand and supply it is the function of the central socialist copyright institutions to promote the proper use of the works of authorship within as wide a scope as possible and to increase the royalty incomes of the authors by the encouragement of social exploitation in parallel to the organization of a perfect system of control and collection. The monopolistic position of the copyright societies cannot bring about a drop in the creative activities of the authors by a disinterestedness in the wake of the inadequacy of the royalty incomes and their collection. On the other hand a

[36] Actually the operations of the Hungarian Office for Copyright Protection are governed by Decree 106/1952. (XII. 31) M. T. The Minister of Cultural Affairs exercises the right of supervision.

[37] WILCSEK, J.: *A gazdasági verseny helye és szerepe az új gazdasági mechanizmusban (Place and Function of Economic Competition in the New System of Economic Management)*. Közgazdasági Szemle, 1967, Nos. 7–8.

monopoly cannot suppress the unfolding of use on a social scale by unilaterally dictated unjustifiably high royalties. The withdrawal of the demand for use is as noxious to the authors as to the public.[38]

8. By the side of the defence of the health of the market against the harmful effects of monopolies the other branch of competition law, viz. the legal regulation purposing the suppression of unfair competition, is not void of interest either. Essentially the statutory provisions governing unfair competition sanction the general rules of the game of competition and in certain respects expressly refer to problems of the profitable exploitation of works protected by copyright. A proper construction of the functions of the rules governing unfair competition makes it clear that on the one part these have been introduced for the benefit of the public wishing to enjoy the literary products, inasmuch as they protect the specific products of literary pursuit against a mistaken recognition and false ideas as to their content. On the other hand however, the rules also serve the interests of the profitable exploiters in trade and industry. Here protection is extended to the interest of the exploiters attaching to the profitable exploitation of their own accomplishments against unfair acts committed by others and frustrating the profitable exploitation of the accomplishments of the author. Hence fundamental considerations of the segregation of the rules of unfair competition from copyright indicate that the provisions fighting unfair competition primerily and fundamentally protect the lawful exploiter of the work and his customers at any time in their market relations, and not the author in his capacity as creator against the infringement of his exclusive copyright or any other violation of it.

Hence in the correct opinion the author may derive a protection of his interests from the statutory provisions dealing with unfair competition only insofar as he acts as the exploiter of his own work, as "competitor in the market". Since an author can be considered a "competing enterprise" on the rarest occasions only, in the overwhelming majority of the cases the provisions of the statute of unfair competition will protect the trading person exploiting copyright, i. e. a person other than the author. These provisions can in no circumstances be construed for the benefit of the author in a manner extending or expanding the protection specifically given under copyright, by resolving its statutory limitations.

[38] In the German Federal Republic the monopolistic company, Gesellschaft zur Verwertung von Leistungsschutzrechten m. b. H., i.e. the organization taking care of the rights of the performers, in 1966, one-sidedly raised the earlier fees to about their tenfold. In response to this the West-German broadcasting companies discontinued the transmission of protected discs in order to evade the payment of royalties on performances so recorded. The shortage was made good by performances of domestic orchestra or by the transmission of foreign recorded music not encumbered by protection of performers. Hence the exaggerated demands of the monopolistic company for a long time injured the interests exactly of the performers and the record manufacturing companies whose interests the raise of tariffs was meant to protect. Eventually a compromise was reached on a level making about one fifth of the exaggerated fee originally demanded.

For that matter this restriction is valid also for market exploiters within the sphere where their rights rely on copyright. If e. g. in conformity with the law of copyright a work may be considered the object of free exploitation (either because the term of protection has expired, or the law authorizes free exploitation within a definite sphere), neither the competing enterprise may advance a claim to protection on the plea of an infringement of the provisions of unfair competition. So e. g. no publishing house may plead that the public has become acquainted with the literary product in its edition when on the expiry of the copyright another publisher would like to draw profits from a new edition of the work. Nor can a protest be lodged against the free borrowing of simple news items, nor can a publisher prevent the exploitation of a work by another publisher within the limitations of free quoting from a work as guaranteed by the copyright act.[39] With the expiry of the specific legal protection of certain works on the ground of the infringement of the provisions of unfair competition a claim to legal protection cannot be laid unless new facts at issue specific on considerations of the law of competition may be produced, i. e. facts of which the special branches of law dispose in neither a prohibitive, nor a permissive sense. (So e. g. when on the expiry of the right in a design another enterprise exploits the now free industrial design in a way that the customers are induced into the belief that the original product has been put on the market.)[40]

Marginal problems emerge in a rather specific form in the sphere of the protection of a title of a work. The provisions on unfair competition, so also §. 12 of the Hungarian Act V of 1923 on unfair competition still in force expressly disposes of the protection of the title.[41] The reason of a regulation under competition law is given by the dual character of the title of a literary product, viz. the title is partly part and parcel of the author's work, and in definite

[39] The rules of protection against unfair competition may come into question at most in respect of the length of the quotation and the permissibility of a possible specific method of quoting, e.g. as explanatory rules, where copyright law proves to be rather vague. This function of the rules prevails in particular where the statutory copyright rules do not bring under regulation the right of quotation at all, like in the United States. There the Common Law institution of the right of quotation therefore took a shape with the *a contrario* construction given to the likewise Common Law ules of unfair competition, in the form of the doctrine of *fair use*, an essential requirement of which is that the adoption of a length otherwise justified by the character and purpose of the work of the adopting author should not create competition for the original work in the market. (*Toksvig vs Bruce Pub.* Co. 181 F. 2d. 664667, 1950; for more details see LEACH, M. and FELDMAN, C.: *Copyright and Unfair Competition.* Copyright Law Symposium, No. 10, New York, 1959).

[40] Cf. §. *9 of Act V of 1923* on unfair competition.

[41] Hungarian law extends the rule that "industrial products shall not be circulated under a designation . . . by which in trade another competing company is recognized (§ 9) to the titles or designations of books, brochures in book-form, periodicals and periodical publications, further to the title page of such printed matter, to price lists, catalogues and posters as far as their characteristic external design is concerned, and so also to the illustrations and texts of advertisements, to the titles or designations of dramatic pieces, musical compositions and cinematographic films" (§. 12).

cases it may be considered a literary product by itself; partly the means of identification of the work and of its segregation from other similar products of art, a designation emphasizing the uniqueness of the work. This latter function of the title brings the protection of title into an association with the law of unfair competition.

The protection of the title under copryight law extends to the protection of the connexion between the work and its title and of the interest attached to the intact unity of the work. The title cannot be changed unless by authority of the author and in addition the title has in all cases to appear on the reproductions of the work. The author may insist on the indication of the original title even in translations.

Furthermore the protection of the title under copyright law also implies a prohibition of adopting the title for another work. However, the use of a uniform title may be prohibited when the title is new, original by itself and for the idea expressed in its content may be considered a unique product of literature. Still this is a case of rare occurrence, as in the majority of cases the titles of the most valuable works are simple combinations of words, which are of value only because they are part of the product. By themselves they are not protected by copyright in the same way as the adoption of certain combinations of words from the work itself.[42]

The protection regarding the title under the law of unfair competition is granted to the exploiter of the literary product against damages arising from a mistaken identification in the market in his capacity of a competing enterpreneur. Accordingly this type of protection extends also to titles which cannot be considered literary works, or which do not designate a definite lierary product. The titles of dailies, periodicals, of series published by publishing houses identify products of the publishing trade and not particular literary works. (Accordingly, in the correct acceptation titles may be registered as trademarks consisting of words, or combinations of words and figures.)[43] Similarly protection under competition law deals with a title in its special function even if it is a case of of literary product: a title receives protection not as that of a work of literature, but as the distinguishing designation of the product (book, theatrical performance, etc.) of industrial or commercial exploiting activity.

[42] The authorship of a new, original expression or combination of words expressing a specific content calls for recognition even if it is not the case of a title. In the sphere of law reference may perhaps be made to many a picturesque expression to the point of B. GROSSCHMIED, which in Hungarian literature even after so many decades are in general quoted by mentioning the name of their author.

[43] KUNCZ assigns the title of a periodical to the category of the firm signs. KUNCZ, Ö.: *Magyar kereskedelmi és váltójog (Hungarian Commercial Law and Law of Bills).* Budapest, 1932, p. 51. However, the title of a periodical primarily designates a definite product and not some sort of a firm and it is only indirectly that it refers to the trader too.

There are legislations on copyright which blur the dividing line between specifically copyright protection and the protection under competition law, i. e. essentially the codifications grant protection under competition law as a category of protection of allied rights. So e. g. the "copyright" in title of the Hungarian Act LIV of 1921 differs essentially from the protection under competition law only in that it insists on the existence of an intention of misrepresentation as distinct from the absolute prohibition of Act V of 1923. However, the insistence on an intention does not by itself marshal protection from the sphere of competition law to the channels of copyright. Both types of facts at issue have been defined by Article 5 of the French Act of 1957. In its first section it is made clear that provided the title of a literary product has an original character the same protection is granted to it as to the literary product itself. (Protection under copyright law.) On the other hand the second paragraph decrees that even if the work is no longer protected under copyright, no one may utilize a title in order to distinguish a work of the same kind under conditions capable of leading to confusion. (Protection under competition law.)

The definition of the French act at the same time specifies the cases when a claim may be advanced for protection under competition law at all after protection under copyright has expired. As has already been pointed out, whereas no action may be brought even under competition law against the circulation by others of a literary work unprotected by copyright[44], the original publisher may protest against the use of the title of a work become known through his agency and still in the market, by another publisher on *another* work in a mistakable form.

A sharp line has to be drawn between copyright interests and those of a competing enterprise irrespective of the title under which the relevant rules have been codified. In conformity with the correct opinion under the international copyright agreements only claims to copyright protection of the title can be advanced even in cases where also the protection of the title under competition law has been incorporated in the copyright act.[45] The international protection of a title under competition law is conditional on the regulation of reciprocity under competition law, or on the provisions of the conflicts rules of competition law.

By way of summing up the problem from the aspect of claims to a copyright in the title the statement may be advanced that correctly under copy-

[44] A classical example is that of the use of the title "*Brehms Tierleben*". The Bibliographisches Institut, the original publisher of the work, continually published the revised editions under the same title. When the copyright expired the firm Reclam published the original version, in like way under the original title. Since the copyright of the work expired the Bibliographisches Institut could not institute proceedings against the free reprint on the ground of unfair competition, so that the two editions could be circulated under the same title.

[45] Cf. BAPPERT, W.—WAGNER, E., op. cit. p. 53.

right only new titles expressing an original and independent idea can be protected against unauthorized use by others and only within the term of the copyright protection. In the event of a mistakable representation the author may advance a claim under competition law only when he himself exploits his work as competing enterprise and his is the right to the differentiation of the product of the exploiting activity too. Otherwise he may only require of his publisher to take action against other enterprises comitting acts of unfair competition and so to save the interest in an as profitable exploitation of the copyright as possible. As a matter of course in the event of a violation of his personal rights the author may directly insist on a remedy of a personal injury.

For that matter the use of a title may in a given case be lawful under copyright law (e. g. when the author has agreed to the use of the title of a work of his for a TV adaptation), and unlawful under competition law (the transmission of a TV adaptation under the given title may at the same time infringe interests attached to the circulation of an adaptation to the screen by agreement of the author under a uniform title). In this case the claim under competition law will have priority, inasmuch as the author cannot exercise his right in a manner infringing lawful interests of others.

IV

9. Hence not even the protection afforded against unfaire competition can embrace the gaps left between the specific forms of the legal protection of intellectual products. Many of the individual products of mental activity have remained outside the scope of protection merely for the very reason that the products in question cannot be assigned to the scope of either copyright or the protection of industrial property. An original idea exploitable by a variety of methods remains unprotected. In order that it might qualify as a product under copyright law it has to be put forth in the one way or the other and cast into a definite form. In order that it might qualify as a patentable invention, it has to be constructed in a technical form exploitable in trade. Many an ingenious method is unprotected, although it may be exploited as a means of the creation of new works of literature or of inventions. Here only the methods of teaching languages, the systems of symbols of programming, the outlines of shorthand, or the methods invented for choreographic recording should be remembered. Their function consists exactly in their unrestricted widespread application for the shaping of new protected intellectual products, whereas their inventor has no claims whatever to a protection based on exclusiveness.[46]

[46] See VIDA, S.: *A szellemi alkotások és a jogi senki földje (Intellectual Products and No-man's Land in Law)*. Magyar jog, 1960, pp. 312 to 316.

The scopes of mental efforts unprotected by law obviously encourage to an expansion and an extensive application of the spheres of existing protection. In the scope of the law of inventions the laying of the foundations of the legal protection of relative novelties, the evolution of socialist law of innovations, the protection of feasible innovations in clerical work and their reward cannot be ignored.

Even in the sphere of copyright a loosening of the rigid form of protection adhering to external criteria, a unified concept of content and form and the trend to protect the works on basis of their communication by any identifiable method, may be traced in the acts of legislation.[47] Screen, television and sound recording today equally permit the recording of eurhythmics[48] and the protection of musical improvisations. However, by the side of the positive elements of an evolution on these lines a temptation manifests itself of a dilution of copyright or of the formulation of a legal concept of copyright in a manner independent of the literary and artistic value of the work in question. Naturally this cannot be the end of legal policy.

In the following merely the problems of the scope of scientific discoveries left without adequate legal protection, i. e. the most specific borderland of copyright and the protection of industrial property, will be discussed. In 1898 the Curies discovered the radium. Their discovery has since become the substructure of a number of profitably exploited inventions. Large branches of industry have come into being on the phenomenon of atomic fission, scores of inventors have been granted patents to protect a series of profit-yielding inventions. Writers on science exploit the copyright on their works dealing with the discovery. It is only the discoverers and their successors who have no claim to a share in the financial results. In exceptional cases a Nobel Prize may be awarded to the researcher.

Relying on the French theory of intellectual property after the First World War the committee of intellectual cooperation of the League of Nations commissioned Professor Ruffini of the Faculty of Law of Torino to draw up recommendations for the protection of the "propriété scientifique". The experts' committee convened in 1927 on the ground of these recommendations composed the so-called Paris Draft. Although this draft did not grant exclusive rights on a discovery, still it tried to guarantee a fair share in the financial results of the industrial exploitation of a scientific discovery. However, no practicable programme could be drawn up. In general in the manufacture of industrial products many a scientific discovery is exploited. Some of these

[47] For more details see Boytha, Gy.: *Some Problems of the Development of Copyright Law with Special Regard to Television.* Acta Iuridica, Budapest, 1966, Tomus 8, pp. 298--299.

[48] Nizsalovszky, E.: *Az előadóművész jogállása (Legal Position of the Performer).* Állam- és Jogtudomány, 1963, Vol. VI. No. 1.

discoveries rely on earlier ones, some have been born side by side. There further development takes place within the sphere of the most extensive exchanges of ideas on an international scale irrespective of frontiers. How can the person or persons entitled to a share be established, and how can an organized international distribution of the profits be guaranteed?[49]

The UNESCO in 1952 again put on the agenda the problem of the "droit de savants". This time rather the guarantees of the moral interests of scientific priority were given prominence. The ideas of a financial recognition rely on these guarantees. In industry appropriate funds have to be formed and then the proceeds of these funds should be distributed among discoverers, when no investigation would be made into the rate of exploitation of their achievements in particular industrial products. *Heymann* suggested that remuneration should be granted in collaboration with an independent corporation. The diplomatic conference convened in Stockholm in 1967 for the revision of international agreements on the protection of intellectual property made the promotion of the protection of scientific discoverers the function of a world organization to be established for the protection of "intellectual property".

The recommendations and their reaction all indicate that the problem of a social appraisal of scientific discoveries point rather to the creation of the organized social foundations of a financial recognition of the scientists rather than to the establishment of institutionalized exclusive rights. This tendency is welcome, as actually a regulation of the exploitation of intellectual work in the form of exclusive rights appears to be justified for the time being only within the scope of the historically developed specific branches of law. A pulling up of legal ramparts round the many other forms of creative activities runs counter the requirements of evolution and is for this reason impracticable. The free communication of ideas and the mutually fertilizing traffic in them is a fundamental postulate of social existence and the condition of the evolution of all superstructures. It is also here where the warning note is sounded: in the borderland of the law of intellectual work proper caution has to be applied at the institutional establishment of legal protection.

This applies in particular to the primary achievements of scientific thinking, which still defy pigeonholing in the form of any objectivized intellectual work and which must therefore be allowed free action in the productive stream of cognition from generation to generation and master mind to master mind. The recognition of the priority of mere ideas and the results of thinking is in the first place an ethical problem rather than one of law and in addition

[49] RUFFINI's recommendations were soon made subject to criticism. So HEYMAN, E. (Deutsche Juristenzeitung, 1924, pp. 762 et ssq.) and in Hungarian literature GYÖRGY, E. in *"The Legal Protection of Scientific Work"* (Jogtudományi Közlöny, 1925, pp. 130—131) pointed out that not even the recommendations of Ruffini would permit the construction of subjective law applying to scientific discoveries (Gedanken sind zollfrei). Instead there may be a case of the satisfaction of equitable and social demands.

a postulate of an orientation in the system of ideas which a scientist will have to respect also from an appreciation of his own art lest the drift of the fair exchange of ideas of the other scientists should cast him ashore. However, independent discoveries and the achievements of thinking have no freezing effect like e. g. the patents. The definite laws of objective reality may be explored many times. An independent discovery will always produce a new colour, a new approach and the existing may be exploited in new connexions too.

It will perhaps be not in vain when as the conclusion of a study on the development of the legal protection of intellectual work the words of Goethe are quoted, pronounced to Eckermann on the relation of the priority of ideas and the exploration of the original sources: " . . . a well-nourished man might as well be held to render account of the oxen, sheep and pigs which he has consumed and which have given him strength. Although we carry with us abilities, still we owe our evolution to the thousands of effects of a wide world, of which we appropriate what we can and what suits us . . . My theory of colours is not just a new theory, either. Platon, Leonardo da Vinci and other excellent persons independently discovered it and told the same before me. Still that I have again discovered it, to tell it once again, and that I was intent to . . . make truth again accessible, is my merit".[50]

Gewerbe- und wettbewerbsrechtliche Grenzgebiete des Urheberrechts

von

GY. BOYTHA

Im Kreise des rechtlichen Schutzes der Geistesschöpfungen kommen zahlreiche Probleme vor, deren Lösung weder den spezifischen Regeln des Urheberrechts, noch denen des Gewerberechts zu entnehmen ist.

Ein solches Grenzgebiet bildet auch die Frage der Beurteilung der sog. Geschmacksmuster in der Industrie, für die die Rechtsprechung geeignete Anhaltspunkte sucht. Eine andere immer mehr brennende Frage ist der Schutz der Programme von elektronischen Rechenanlagen (computers). Eine weitere praktische Frage ergibt sich bei der Abgrenzung des wettbewerbrechtlichen Schutzes der Benützer von Authorenwerken im Handel von dem rechtlichen Schutze des Verfassers nach Urheberrecht im allgemeinen und in Verbindung mit dem Titelschutze im Einzelnen.

Eine noch zu lösende Frage ist endlich eine entsprechende institutionelle Anerkennung der wissenschaftlichen Entdeckungsarbeit. Der Author wünscht durch seine Abhandlung zu der wissenschaftlichen Lösung dieser Probleme beizutragen.

[50] *Goethes Gespräche mit Eckermann*. Leipzig, Insel, 2nd ed., 1908, Vol. 2, pp. 71—72.

Смежные области авторского права с правовой охраной достижений техники и правовым регулированием соревнования

Б. БОЙТА

В кругу правовой охраны произведений умственного труда возникает много таких проблем, разрешение которых не вытекает ни из норм авторского права, ни из своеобразных правил по охране достижений техники. Такой смежной областью является вопрос квалификации *промышленных эстетических образцов*, в отношении которых безопасность юридической практики ищет новые опорные пункты. Вторым наболевшим вопросом является *защита программ электронно-вычислительных машин*. Следующим практическим вопросом является отграничение охраны *по правовому регулированию соревнования*, предоставляемой промышленно-торговым субъектам использования авторского произведения от защиты, которой пользуется автор по авторскому праву вообще, в особенности в связи с охраной заглавий. И, наконец, ждет своего разрешения соответственное, более официальное, чем это было до сих пор, признание работы по научному открытию, не подводимой ни под одну из предусмотренных законом форм охраны произведений умственной творческой деятельности. Настоящая статья желает способствовать научному разрешению этих вопросов.

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Проблемы развития советов в социалистических государствах

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Известно, что в последние годы в европейских социалистических странах пересматриваются прежние конституционные представления, в результате чего были разработаны новые конституции или же сделаны значительные шаги по подготовке новых конституций. Это привело к тому, что повсюду проводились значительные новые попытки, направленные на преобразование, развитие государственной организации или в рамках конституции, или путем подготовки новой конституционной модели. Само собой разумеется, что такая попытка распространяется на государственную организацию вцелом и что в таких случаях создание различных государственных органов определяется в основном единой основной идеей, основным принципом. Итак, речь идет не об обособленном государственном изменении, а о формировании связанных между собой организационных схем. Венгерская государственная практика также показывает, что нельзя определить независимо друг от друга компетенцию таких органов, как парламент — правительство, центральные и местные органы, министерства — отраслевые органы исполкома советов, органы государственного управления — суды и т. д. Отграничение и конкретизация компетенций одновременно определяет принимаемый во внимание действительный круг деятельности, компетенции, сферу свободных действий отдельных организаций. Поэтому очень рискованно ограничиваться исследованием развития только одного данного типа органов, ибо таким путем мы можем определить деятельность только одного сектора государственной организации, выхватив его из целого изменения.

Все-таки такое исследование возможно тогда, если мы одновременно следим и за общими основными принципами, относящимися к изменению модели всей государственной организации в данной стране, и в свете этого изучаем изменения отдельных отраслей государственной организации. Картина и в таком случае, естественно, не будет полной, но можно показать и более глубокие взаимосвязи.

I

Развитие местных органов не является изолированной проблемой ни в одном социалистическом государстве. Положение этих органов (в интересах краткости и единообразия в дальнейшем мы говорим вообщем об *органах советов*, хотя название и даже характер этих органов часто отличаются друг от друга) по существу определяется двумя основными разрешениями. Вопрос ставится так, что учредительное собрание представляет ли себе централизованную или федеральную государственную организацию, т. е. данное социалистическое государство строится ли «сверху» или «снизу». Очевидно, два, значительно отличающиеся друг от друга подхода скрываются за выражением «единое государство», которое употребляется в новых социалистических конституциях Чехословакии и Румынии, и которое указывает на

осуществление единой государственной власти,[1] или же в югославской конституции, согласно которой «политической основой единой общественно-политической системы является самоуправление граждан в общине.»[2] И хотя на XIII-ом съезде чехословацкой партии было принято решение, которое подчеркивает развитие самоуправления граждан в деятельности национальных комитетов, решение это понимает прежде всего так, что органы на своих территориях должны комплексно обеспечивать удовлетворение бытовых потребностей населения. (Это требование нашло своё отражение и в § 2 закона о национальных комитетах Чехословакии от 1967 г.)

Таким образом, к проблеме построения местной власти в европейских социалистических странах сейчас подходят с двух направлений. С одной стороны — и после принятия новых конституций — в большинстве социалистических стран местная организация является одной частью единой организации государственной власти, которая осуществляет правомочия, обеспеченные для неё центральной властью — в основном в области удовлетворения потребностей местного населения; а с другой стороны — соответственно югославской модели — основным звеном общественной организации является община, в качестве объединения этих единиц создаются другие общественные единицы как республики и федерация. (Характерно, что югославская федеративная конституция в V. главе об общественно-политических содружествах говорит вначале об общине и о её правах, затем о районе, после этого о социалистической республике и, наконец, о федерации, указывая этим самым на основной принцип построения снизу. Хотя эта проблема может показаться отвлеченной, но фактически из этих двух возможностей решения вопроса вытекают очень конкретные последствия для местных органов.

Вопросы компетенции зависят, в первую очередь, от обоих взглядов. В качестве примера мы можем сослаться на разрешение статутов сел и городов при этих двух условиях. В параграфе 98 югославской конституции говорится, что «каждая община самостоятельно устанавливает свой статут», (из чего, конечно, не следует, что эти статуты не имеют конституционной, т. е. законной связанности; эта же статья говорит и о том, что «статут общины права и обязанности общины устанавливает в конституционных и законных рамках»). Новый чехословацкий закон о национальных комитетах (который впервые предоставляет селам и городам право на принятие статута) подчеркивает руководящее значение для этих статутов примерного статута, изданного национальным собранием. (Примерный статут городских на-

[1] *Абзац 2 ст. 1 конституции* Чехословацкой Социалистической Республики *1960 г.; ст. 1 конституции* Румынии Социалистической Республики *1965 г.*

[2] *Ст. 73 конституции* Югославской Социалистической Федеративной Республики. 1963 г. (Следует отметить, что программа Союза Коммунистов Югославии формулирует ещё более остро: «Община как основное общественно-экономическое содружество, ячейка общественной организации...»)

циональных комитетов был принят национальным собранием 1-го декабря 1967 года). Из различия между этими двумя институтами ни в коем случае нельзя сделать вывод, что та или другая модель обеспечивает более широкую компетенцию для сельских или городских органов. Она показывает лишь тенденцию, из которой выделяется общее направление концепции.

Итак, указанные тенденции не определяют того, какой объем должна иметь компетенция местных органов, а определяют (по крайней мере в основном) то, кто определяет компетенции, откуда вытекают права органов местных советов. Теоретически можно представить три решения вопроса: а) все местные компетенции должны регулироваться в центральном порядке, т. е. без согласия центральных органов ни один местный орган не должен осуществлять регулирующие и ведомственные права; б) одну часть компетенций — здесь могут сложиться различные пропорции — регулируют центральные органы, но «оставленные свободно» центральными органами, не затронутые с точки зрения компетенции задачи можно было бы считать компетенцией советов местных органов; в) местные компетенции регулируются *местным законодательством* (что предполагает свободное, по существу, разделение компетенций, свойственное статутам).

Нет даже сомнения, что в чистой форме мы не найдем ни одной из этих крайностей в государственной организации социалистических стран. Но с другой стороны, также несомненно, что централизованная конституционная модель государственной организации благоприятствует скорее тому решению, которое предполагает в основном центральное определение местных компетенций, в то время как при общинной системе местного самоуправления преобладающую часть компетенций регулирует статут. (При этом регулировании компетенции возникает не только вопрос, располагает ли орган совета данного уровня компетенцией, но и вопрос о том, что в рамках организации совета, какой из организационных типов имеет право на принятие решения, в данной области решает представительный или же административный официальный орган.

Этим предыдущим вопросом я занимался с той целью, чтобы указать на две, существенно различные друг от друга модели местной организации, на их основную идею. С другой стороны, я хотел обратить внимание и на то, что между этими двумя крайними возможностями уже сейчас можно наблюдать переходные, можно сказать, компромиссные попытки. Это является хорошим примером того большого числа проблем, с которым в последние годы мы встречались как раз в области местных органов.

II

Большая часть различий в законодательстве последних лет с местной государственной организацией понятна, если учитывать требование общего обновления государственной организации, которое проявляется во всех

европейских социалистических странах, а также и то, что реформы легче всего начать именно с этой области. Первая попытка создания совершенно новой модели государственной организации, и в рамках этого местной организации, появились в 1953 г. в югославской конституции. В течение прошедшего с тех пор полутора десятилетия не прошло ни одного года без того, чтобы в какой-либо европейской социалистической стране не произошли более-менее важные изменения в законодательстве, касающиеся модели местной государственной организации. Но в то время как в законодательстве в 1957—59 г. больших изменений не произошло, а стремились устранить скорее внутренние противоречия, небольшие ошибки в законах и таким образом едва переступили рамки советской конституционной модели 1936 года (не считая югославской попытки), то за последние 5—6 лет произошли довольно значительные изменения. Можно сказать, что в каждой стране осуществили другие формы организации и компетенции, пытались строить на новых принципиальных основах правовое регулирование о местной организации. Не будет слишком смелым заявление о том, что в законодательстве о местных органах пожалуй наиболее ярко проявляются центробежные тенденции, теоретическое обоснование которых также заслуживает внимания.

Не сомневаюсь в том, что хорошие и плохие результаты попыток рано или поздно будут вновь укреплять центростремительные силы, т. е. результаты полезных попыток будут использованы законодателями других социалистических стран, а безуспешные, безрезультатные попытки будут отброшены без всякого национального пристрастия. Сейчас еще мы не замечаем следов этого, ибо ту или иную оценку экспериментальных учреждений можно было бы дать лишь путем точных политико-социологических исследований. Законодательные акты же слишком свежие, учреждения еще очень новые для того, чтобы организовать такие исследования; до сих пор возможно единственное такое исследование стремилось фиксировать результаты относительно старого, можно сказать, стабильного польского закона о советах.[3] Я должен сказать, что любой сравнительный материал, который обрабатывает опыты социалистической государственной организации, одновременно содействует лучшему понятию новых учреждений и началу диалога нового типа, в результате которого действительно успешные попытки можно использовать и в других социалистических странах, конечно, с учётом политических, культурных традиций и экономического положения данной страны.

[3] Теоретические основы и данные исследований этого были опубликованы в нескольких томах Институтом государства и права Польской Академии Наук под заглавием *Problemy Rad Narodowych — Studia i materialy* (Проблемы народных советов — Статьи и материалы), под редакцией С. Завадзки, В. Соколевич и Й. Свиеткиевич,) Варшава, Państwowe Wydawnictwo Naukowe

В настоящее время в европейских социалистических странах законодательство о местной организации во многом отличаются друг от друга. В отдельных странах законодательные акты издавались вскоре друг за другом. Так, например, в Чехословакии после всеохватывающего акта 1960 года в 1967 году был издан закон совершенно новой концепции о национальных комитетах; в ГДР нормы от 1961 года в связи с новой хозяйственной системой были заменены в 1965 году распоряжением государственного и собрания о задачах и методах работы местных народных представительств и органов. В других странах были приняты спустя более длительное время новые законодательные акты.

В Болгарии инструкция национального собрания об организации и формах работы народных советов, которая не лишила действия закона от 1951 г. о народных советах; в Румынии в октябре 1968 г. был вынесен на общественное обсуждение законопроект об организации и деятельности народных советов. Генеральная линия этого законопроекта была определена постановлением декабрьской партийной конференции 1967 года (среди этих принципов можно встретиться со многими такими принципами, которые противоречат прежнему правовому регулированию). В Советском Союзе в 1968 году был издан Указ Президиума Верховного Совета РСФСР об основных правах и обязанностях сельских и поселковых советов депутатов трудящихся, а также и постановление Президиума о примерном положении о сельских и поселковых советах депутатов трудящихся; вслед за ними следовали по данному предмету законодательные акты других союзных республик. Основой этих законодательных актов послужило Постановление Мартовского пленума ЦК КПСС 1967 года «Об улучшении работы в сельских и поселковых советах депутатов трудящихся», которое подчеркивало значение ведомственных правомочий низовых советов, а также и необходимость расширения их компетенций.[4] Следует отметить особую форму югославского регулирования. Здесь правомочия и организация местных органов регулируются, с одной стороны, федеративной конституцией и конституциями республик (а также и статутами двух автономных краёв), а с другой стороны, статутами отдельных общин. (Как мы уже говорили, содержание статута ограничивается только законными рамками иерархии источников права; между прочим, между статутами различных общин имеются значительные различия. В подробном регулировании других местных организаций нет необходимости, ибо на территории Югославии — за некоторыми исключениями — между общиной и республикой нет другой территориальной единицы. (Федеративная конституция и конституции социалистических республик были приняты в 1963 году, а статуты общин большей частью были приняты в 1964 году).

[4] «Правда», от 11 марта 1967 г.

Положение венгерского законодательства о советах гораздо сложнее. Закон X от 1954 года в свое время как по своей структуре, так и по возможностям его дальнейшего развития был современным и служил примером для законодательства других социалистических стран. Трудности в связи с этим законом возникали не из-за устарелости отдельных его институтов, а скорее из-за отсутствия необходимых распоряжений по применению, осуществлению закона после его издания (например, подробное регулирование компетенций). Поэтому как среди специалистов практики, так и в научных дискуссиях существовало единое мнение, что необходимо провести новую кодификацию. Но это не произошло. Вместо этого указ № 8 от 1965 года уполномочил правительство на то, «чтобы оно в отдельных, определенных им областях временно регулировало компетенцию, подведомственность и деятельность местных органов государственной власти и их комиссий в отличие от относящихся к этим вопросам действующих положений закона», и делать все это в интересах обоснования попытки нового законодательства. На основе этого правительство распорядилось о временном приостановлении деятельности исполкомов отдельных сельских советов. (Соответственно смыслу постановления правительства № 1027 от 28/XI 1965 года большая часть их компетенции перешла к сельскому совету, а другая часть вошла в компетенцию председателя исполкома сельского совета). Позже, в 1967 году было издано постановление Правительства № 2007, состоящее из нескольких распоряжений. В соответствии с ним в селах с численностью населения ниже 1000 человек прекращается деятельность исполкома совета, сессии сельских советов проводятся реже, раз в два месяца (за исключением сел, где деятельность исполкома приостановлена, поэтому сессии должны созываться ежемесячно); была упрощена особая функция председателя сессии сельского совета (эта задача перешла в сферу деятельности председателя исполкома сельского совета); было отменено проведение ежеквартального координационного заседания для всех руководителей важнейших органов, не подчиненных совету, и теперь они созываются исполкомам в силу необходимости. В отношении создания постоянных комиссий упрощены и существующие до сих пор лимитные предложения, оно стало полностью свободным; в селах с численностью населения меньше 1 000 человек вместо постоянных комиссий было предложено создать временные комиссии. Члены совета обязаны отчитываться один раз в год вместо ранее существовавших двух раз, а приемные часы стали обязательными лишь для членов исполкома.

Более важным было постановление Правительства, которое в принципе отменило двойную подчиненность органов отраслевого управления; в отношении их в дальнейшем центральное управление ограничивается тем, что министры могут издавать лишь распоряжения, нормативные инструкции, специальные директивы общего значения и принципиальные установки (Постановление Правительства № 1023 от 8/VIII 1967 года). Этим постанов-

лением была разрушена принципиальная линия управления по закону № X от 1954 года, после чего из закона остались лишь руины.

Если выше я подчеркивал сильно центробежный характер законодательства о местных органах, из этого ни в коем случае нельзя сделать вывод о том, что в этой области не существует никаких *общих линий* в различных социалистических государствах. Уже сейчас я обращаю внимание на несколько таких общих черт.

Характерным является за последнее время то, что проблема компетенции местных органов в законодательных актах везде была связана с *развитием социалистического демократизма.* С этой точки зрения заслуживает внимания уже упомянутое постановление ЦК КПСС, которое одновременно выступает против пустой организации масс, говоря, что «...массово-организаторская работа сельских и поселковых советом еще слабо подключается к разрешению конкретных задач экономического и культурного строительства... Следует обратить особое внимание на улучшение массово-организаторской деятельности сельских и поселковых советов с тем, чтобы эта работа оказывала большее влияние на разрешение экономических и культурно-бытовых задач.»[5] Подобную позицию занимает и решение XIII конгресса КП Чехословакии, которое говорит о таких мероприятиях, которые «обеспечивают широкий простор для развития самоуправления граждан, главным назначением которого является комплексное обеспечение на своей территории бытовых потребностей населения».[6] В основном подобные цели можно найти и в других социалистических странах, конечно, с довольно богатой и различной комбинацией форм осуществления.

Однако, совершенно ясно, что *нигде нельзя обнаружить такую тенденцию, которая желала бы ограничивать массово-организаторскую деятельность местных органов* (ибо это совершенно чуждо для местных органов типа советов), отклоняет лишь самоцельную, бессодержательную организацию масс. Процесс демократизации немыслим в социалистических странах без активного участия, помощи масс, без активизации этих больших резервов. Эта тенденция ярко проявляется в постановлениях о местных органах, а также и в новых законодательных актах.

Другим интересным и общим является то, что в последние годы почти во всех социалистических странах интерес законодателя обращен *к низовым (сельским и городским)* местным органам. Соответственно вышеназванному советскому постановлению партии «необходимо обеспечивать рост влияния сельских и поселковых советов на развитие колхозов и совхозов, предприятий местной промышленности, торговли и общественного питания, а также и коммунального обслуживания, на полное использование всех

[5] Разрядка моя: О. Б.
[6] Сравни с частью 1 этого постановления.

местных возможностей и источников силы в интересах поднятия сельскохозяйственного и промышленного производства». Одна из наиболее интересных советских научных статей, исходящая из материалов практики (основательного исследования, проведенного в Эстонской ССР и практики подготовки законодательных актов), приходит к следующему выводу: «На первое место выступал вопрос об укреплении роли и деятельности сельских советов, о расширении их компетенции в ущерб районным советам...»[7]

Решение XIII конгресса ЧКП говорит, что «в интересах расцветания наших городов и сел мы должны целеустремленно повышать роль и расширять компетенцию национальных комитетов городов и сел, повышать их самостоятельность, увеличивать их материальные источники и расширять их материально-техническую базу». (В то же время предлагают ограничить оперативную деятельность территориальных национальных комитетов). Генеральный секретарь Коммунистической Партии Румынии на партийной конференции в декабре 1967 года заявил: «Одной из основных идей проекта мероприятий, представленного конференции, является повышение роли и расширение компетенции городов и сел, потому что они являются основными единицами административно-территориальной организации, в которых граждане осуществляют свою экономическую, политическую и общественно-культурную деятельность... Села должны быть развиты в сильные административные единицы таким образом, чтобы они могли предоставить соответствующие рамки для использования материальных и человеческих ресурсов на местах.»[8] Не говоря уже об указанной в конституции Югославии роли сел, обеспеченной уже в результате упомянутой выше модели: § 96 конституции говорит об общине как об основном общественно-политическом сообществе, в которой граждане «обеспечивают материальные и другие условия для трудовой деятельности людей и развития производительных сил; осуществляют наиболее непосредственное общественное самоуправление, ...выполняют и другие функции общественного сообщества за исключением тех, которые конституция делает правом и обязанностью республики и федерации».

В различных социалистических странах в последнее время по разным причинам подчеркивается важность местных органов сельского (и городского) уровня. Однако и из этого проявляется требование, чтобы связь между государственными органами и населением стала как возможно проще, без излишних трансмиссий. В этом смысле укрепление сельских компетенций оказывает влияние на развитие социалистического демократизма. С другой стороны, нельзя забывать, что эти села уже в большинстве европейских

[7] *Какими должны быть законы о местных советах?* (Сост. коллектив сотрудников Института государства и права АН СССР), «Советы депутатов трудящихся», № 8, 1966. стр. 46).

[8] Газета Előre, стр. 5—6 от 7 декабря 1967 г.

социалистических стран не являются самыми мелкими поселениями, а *объединениями* таких поселений, сел, которые таким образом воплощают координацию местных интересов на более высоком уровне. Речь идет таким образом о территориальных единицах, жизнеспособных, приспособленных к самоуправлению, располагающих необходимой материальной базой, или по крайней мере о таких единицах, которые должны будут обладать всеми этими критериями.

Развитие компетенции сел (городов) не означает того, что в социалистических странах компетенцию других территориальных единиц хотят отметить хотя бы в перспективе. Одновременно с этой принципиальной линией сохранение и закрепление за органами среднего уровня — число которых вообще сокращается — правомочий по *координации и планированию*. Если резко сформулировать новое требование, то можно сказать, что возможности «более настоящего», т. е. более ощутимого местного демократизма открываются в селах, городах, в эффективности местных представительных органов средней ступени нельзя видеть больших возможностей. На этой ступени возрастает значение исполнительных органов, учитывая в особенности специальный характер задач.

Местную организацию села — низовой территориальной единицы — пытаются, конечно, сформировать в социалистических странах таким образом, чтобы она была способной осуществлять вышеуказанные задачи. Целью является не чрезмерное развитие отраслевого управления, а надлежащее построение представительных и демократических органов. Нет надобности подчеркивать, что для осуществления этого проводились и проводятся различные попытки, которые несмотря на единую политическую концепцию часто значительно отличаются друг от друга.

IV

Отличающиеся друг от друга элементы в законодательстве о местных органах, конечно, в той или иной стране составляют полную логическую цель. Поэтому было бы неправильным выхватить из общей и связанной между собой системы, ибо это ставило бы под сомнение их обоснованность. Правильнее будет ознакомиться с местными институтами или же запланированными их формами в данной стране совместно, и подчеркнуть наиболее характерные черты только при подведении итогов. Следовательно, мы подходим к этим институтам таким образом.

Известно, что в отдельных республиках Советского Союза в 1957—59 г. были приняты новые положения о местных советах. В советской юридической литературе уже до 1968 года всеобщим было мнение, что положения, принятые в кодификационный период после 1955 года, уже устарели и возникла необходимость нового регулирования. Условия для этого созрели как

в организационном отношении, так и в отношении компетенций. Подчеркивая большое значение этих вопросов, авторы нередко выражали мнение о том, что регулирование должно осуществляться на уровне закона.[9] Такой уровень регулирования отражал бы значение и роль местных советов в рамках государственной организации.

В отношении необходимых изменений в организации предложения выдвигали прежде всего те статьи, которые основывались на результатах *точных, т. е. эмпирических исследований.* Из этих статей особенно важной является работа руководителя кафедры В. А. Пертцик, в которой он публикует результаты социологического анализа, проведенного опытной лабораторией по науке о государстве, созданной при кафедре конституционного права и советского строительства в Иркутском университете.[10] Из вопросов деятельности советов прежде всего было исследовано отношение между депутатами и избирателями, и в ходе этого было установлено, что гораздо большая группа избирателей знает лучше тех депутатов, которые проживают или работают в их избирательном округе, чем других (40 и приблизительно 10%). На основе этого он предлагает изменить избирательный закон в этом отношении. В целях содействия постоянной деятельности депутатов в своих округах и в комиссиях было проведено несколько экспериментов. Было установлено, что в рамках совета целесообразнее заниматься организованно активизацией депутатов, а именно посредством постоянных комиссий, состоящих из депутатов. Такую постоянную комиссию для организации работы депутатов надо было бы сделать общей, как это показывает опыт исследований.

Другая статья, отражающая одну из фаз подготовки законодательных актов в Эстонской ССР (упомянутый выше отчет сотрудников Института государства и права) предлагает дополнить законодательство о советах в четырех отношениях: помимо того, что регулирование исключительной компетенции сессий считает особо важным, считали бы необходимым точнее урегулировать *ответственность исполкома* и его обязанность отчитываться перед сессией совета, а также обеспечение более широкой гласности деятельности советов. Что касается постоянных комиссий, рабочая группа предлагает расширить правомочия в двух направлениях: прежде всего расширить *правомочия по контролю* в интересах надлежащего активного влияния, а с другой стороны, право на *принятие решений* в отдельных — точно определенных и хорошо обдуманных — делах управления. Статья предлагает

[9] Сравни с цитированной выше статьей, опубликованной в журнале «Советы депутатов трудящихся», 8/1966, стр. 44—45;
Шеремет К. Ф.: *Вопросы компетенции местных советов,* «Советское государство и право» 4/1965. стр. 20.

[10] Пертцик, В. А.: *Пути совершенствования деятельности депутатов местных советов.* «Советское государство и право», 7/1967. стр. 17.

изменить и правовое положение депутатов: роль их необходимо расширять с одной стороны, как *представителей народа* (речь идёт о выполнении наказов избирателей, об обязанности отчитываться), а с другой стороны, как *воплотителей государственной власти*. И наконец, было выдвинуто и такое предложение, чтобы правила *общественного самоуправления* были разработаны также в этом законе.[11]

Основное направление советских исследований по государственному праву, связанных с местными органами, в последние годы пыталось выяснить *компетенции*. Сложилась единая концепция, что в ходе регулирования необходимо порвать с господствующим ранее определением единой и общей компетенции, и целесообразно разработать как можно точное разделение компетенций, как вертикально (т. е. между органами советов разного уровня), так и горизонтально (т. е. между пленумом совета и его органами). В. М. Лазарев уже в 1964 г. выразил в своей статье желание, что «было бы целесообразным там, где это возможно, поставить цель расширение *исключительной* компетенции каждого органа, и таким образом повысить ответственность функционеров всех органов за выполнение лежащих на них задач», ибо в отличие от метода, применяемого до сих пор, не достаточно определить функции, но необходимо закреплять конкретные компетенции.[12] Шеремет в одной из своих статей так же возражал против неурегулированности компетенций, вследствие чего понижалась активность советов, сессии стали реже созываться. «...как можно точнее необходимо было бы определить исключительную компетенцию советов (путем значительного расширения её) и те права, которыми пользуется непосредственно исполняющий комитет».[13] По его же мнению, уже сложился каталог тех компетенций, названных им чрезвычайными (в советской литературе обычно названных исключительными), которых в сельских советах придерживаются только отчасти. К ним относятся: помимо образования, прекращения, заслушивания отчетов своих органов, определения характера, состава этих органов утверждение социально-культурных планов, годовых и перспективных планов подчиненных предприятий, учреждений и организаций, а также планов застройки населенных пунктов, планов по выполнению наказов избирателей, далее, принятие бюджета и отчетов по его выполнению, принятие отчетов товарищеских судов и, наконец, принятие предложений вышестоящих органов по изменению границ, перенесению административного центра, по изменению названия населенных пунктов. По предложению Шеремета, у местных советов законодательную власть следует сконцентрировать в руках пленума совета, а исполкомы должны быть лишены этого права. В связи

[11] Цит. пр. стр. 47.

[12] Лазарев, Б. М.: *О компетенции органа советского государства*. «Советское государство и право», 10/1964 стр. 51 и 45.

[13] Шеремет, К. Ф.: цит. пр. стр. 24.

с этим он ссылается на то, что правотворчество никогда не может быть настолько срочным, чтобы не могли подождать до следующей сессии совета.[14]

Между прочим, в последнее время все чаще высказывается такое мнение, что компетенция местных советов неотрывно связана с укреплением необходимой материальной и финансовой базы. Наконец, не будет бесполезным цитировать высказывание Кириченко, в котором он пытался недвусмысленно показать тренд в сложении компетенции советов. «Кажется закономерным, что в ходе дальнейшего развития социалистической демократии, функции государственной власти все более будут исполняться непосредственно советами или их постоянными органами, в то время роль подчиненных им исполнительных и административных органов постепенно ограничивается».[15]

В Советском Союзе — после длительной подготовки — как это следовало ожидать, на уровне сел был принят первый такой законодательный акт, который поставил своей целью основательное регулирование компетенций. Особенностью этого законодательства является то, что в одном указе закрепило права и обязанности (т. е. компетенцию) сельских и поселковых советов и параллельно с этим постановлением Президиума был принято более широкое, содержащее в себе и организационно-функциональные вопросы, примерное положение, которое было предложено президиумами верховных советов союзных республик.

Пречень компетенций очень подробный и длинный, почти везде содержит частные вопросы администрации. Очень важное положение содержится в ст. 8 указа, в которой определяются *исключительные* права сессий совета по вынесению решений и принятию постановлений. Часть этих прав относится к внутренней организации и деятельности совета: удостоверение мандата, принятие отказа от мандата, решение на основе интерпеляций, избрание, изменение состава исполкома и постоянных комиссий, отчет о работе этих органов, избрание административно-уголовной комиссии исполкома.

Другая часть исключительной компетенции означает по существу новое в советском законодательстве. Эти права следующие: утверждение хозяйственных социальных, культурных планов, *планов* мероприятий (эти последние составляются на основе наказов избирателей), принятие *бюджета* и *годового баланса*, *распределение* финансовых средств, накопленных из перевыполнения *планов* по доходам и экономии расходов, *сводка и распределение финансовых средств*, обеспеченных отдельными органами, распределение замечаний, связанных с примерным уставом сельскохозяйственной *артели*, *назначение и освобождение руководителей* учреждений, предприятий, принятие таких предложений, которые должны быть представлены на рассмотре-

[14] Цит. пр. стр. 26—27.

[15] Кириченко, М. Г.: *Советская социалистическая демократия: пути и формы ее развития*. «Советское государство и право» 11/1965. стр. 131.

ние исполкома вышестоящего совета относительно создания, концентрирования, прекращения сельских, поселковых советов, изменения их названий, установления и изменения их границ. Кроме этого, в указе сказано, что законодательством союзных и автономных республик могут быть установлены и другие исключительные компетенции для сессий сельских и поселковых советов.

Вслед за этим союзными республиками были приняты подробные законы о сельских и поселковых советах, а в Украинской ССР — отдельные законы о сельских и о поселковых советах.

Советское законодательство подготовливает законодательные акты о районных и городских советах. Как из всего этого видно, законодательное регулирование советов происходит снизу вверх.

2. *В Болгарской Народной Республике* — несмотря на то, что и сегодня действует закон о советах 1951 года — нельзя сказать, что с тех пор не совершенствовали законодательство о местной организации. Совершенствование произошло в двух направлениях: с одной стороны, путем изменения закона (до сих пор было внесено 13 изменений), с другой стороны, Президиум Народного Собрания в 1965 году издал инструкцию об организации и формах деятельности народных советов.

Таким образом, закон о народных советах уже содержит в себе новые черты, в том числе многие из изменений поставили своей целью установление хороших связей с обществом, с его организациями, с избирателями. С этой точки зрения характерным является пункт 1 закона, который кроме того, что народные советы по традиции называет органами государственной власти, в определение включает и выражение «местные органы народного самоуправления», а также говорит, что эти органы «объединяют черты государственных и общественных организаций». Закон отличает эти органы по их характеру от органов исполнительно-распорядительного характера, т. е. от исполнительных комитетов и их органов по отраслевому управлению. В то же время, здесь о разграничении компетенций речь не идет. Как об этом говорится в пункте 9 с измененным содержанием, народные советы «вместе со своими органами обеспечивают исполнение распоряжений своих и вышестоящий органов». Закон уполномачивает народные советы, чтобы относительно «своей внутренней структуры и деятельности» принимали уставы; судя по тексту, эти уставы имеют организационный характер.

Некоторые, наиболее важные вопросы организации и деятельности по закону: а) Окружные советы должны созываться по крайней мере раз в три месяца, а остальные советы — раз в два месяца. б) Как правило, для деятельности коллегиальных органов требуется, довольно *высокий кворум:* для сессии совета необходимо присутствие 2/3 членов. в) Новый абзац 3 пункта 15 обязывает сельские народные советы *организовать всеобщее обсуждение избирателями* наиболее важных вопросов местного значения. С этим

же связана и обязанность народных советов отчитываться перед открытым заседанием о своей деятельности по крайней мере раз в год, и делать возможным, чтобы присутствующие задавали вопросы и критиковали деятельность советов. г) Компетенция *постоянных комиссий* с 1964 года значительно расширена, потому что помимо обычной их функции подготовительно-рекомендательно-контрольного характера они имеют право выносить решение по таким вопросам, которые относятся к деятельности предприятий, учреждений, подчиненных народному совету, если эти задачи не входят в исключительные компетенции совета и исполкома, и если они передаются советом этим комиссиям. В рамках этого комиссии могут издавать обязательные инструкции для управлений совета, руководителей отделов совета, руководителей подчиненных предприятий и учреждений и т. д. в случае, если ими было установлено нарушение, или неисполнение нормативов (распоряжений вышестоящего органа или совета, или их исполкома). Членами постоянных комиссий избираются в одной трети не депутаты, но остальная часть членов должна состоять из депутатов совета. д) Из закона вытекает *ограничение принципа двойного подчинения*, т. к. измененный пункт 65 уполномачивает совет министров, чтобы он решал по вопросу подчиненности: данный орган подчинен ли исполкому народного совета, или компетентному министерству, или же какому-то центральному ведомству. А в отношении назначения руководителей органов отраслевого управления двойное подчинение не существует: назначение относится к компетенции исколкома, а утверждение его — к компетенции народного совета.

Инструкция Президиума Народного Собрания содержит в себе дальнейшие интересные распоряжения. Так пункт 43 говорит, что депутаты нескольких избирательных округов могут организовать депутатские группы. В этих группах могут участвовать все депутаты народных советов различного уровня. Эти группы принимают участие в работе по территориальной организации и сотрудничают с местными комиссиями Отечественного Фронта и других общественных организаций. В отношении совместной работы с Отечественным Фронтом, профсоюзами, комсомолом и другими организациями трудящихся инструкция дает подробные директивы. И вообще одной их характерных черт инструкции как раз является стемление к расширению общественных связей народных советов.

3. Государственная организация *Чехословацкой Социалистической Республики* с принятия конституции 1960 года была изменена неоднократно и довольно значительно. Принципиальной основой изменений, прежде всего, можно считать то, что конститутция приняла то положение чехословацкой политической и юридической литературы, что «нет никакой разницы между осуществлением государственной власти и государственного управления», а в местной организации национальные комиссии являются »органами двойной компетенции,... территорией автономного управления..., и вместе с

тем едиными представителями государственной власти и государственного управления».[16] Таким образом, хотя абзац 2 ст. 2 конституции в осуществлении суверинитета важнейшую роль обеспечивает для «представительных коллегиальных», все-таки в какой-то мере сливается сеть национальных комиссий, выполняющих функции государственной власти и государственного управления, их советов и комиссий отраслевого управления. В этом случае конституционным основным принципом стало *единство принятия и исполнения решений*, и такое положение не изменилось и в ходе последнего местного законодательства. Несколько позже, в своей статье Бертельман единство принятия и сполнения решений обосновывает и тем, что спецификой национальных комиссий является не только установление общеобязательных нормативов, но и управление планированием, финансированием и коммунальными делами, а в этом отношении явно необходимо полное организационное единство между национальной комиссией и ее органами. Поэтому под понятием правомочий представительного органа следует понимать единство пленума со своими исполнительными и другими рабочими органами. Вертельман в этой своей статье уже указал на необходимость точного плана разделения труда.[17] Эта тенденция получила еще большее освещение в статье Павла Пешка, написанной в 1966 г., в которой он предлагает в ходе *разделения труда* обеспечить представительным органам как политическим государственным органам следующие, наиболее важные права: установление *перспективных планов* и *бюджета*, принятие *основных комплексных решений* и общественный *контроль*.[18]

Закон о национальных комиссиях 1967 года учел опыты исполнения предыдущего законодательного акта, изданного 7 лет назад, а также и важнейшие выводы научных дискуссий.[19] На основе этого в закон были включены следующие важнейшие новые распоряжения:

а) Новый закон в дальнейшем сохранил модель *двойного характера* ноциональных комитетов. Согласно этому, *национальные комитеты явля-*

[16] Bertelmann, K.: *Eine neue Etappe in der Entwicklung der Nationalausschüsse der Tschechoslowakischen Sozialistischen Republik.* Staat und Recht, 2/1961. 249. p.; Jičinský, Z.: *Les Comités Nationaux et la nouvelle Constitution de la République Socialiste Tchécoslovaque.* Bulletin de Droit Tchécoslovaque, 1—2/1960. 87. p.

[17] Bertelmann, K.: *K problematice pojetí orgánu státní správy.* Právnik, 8/1960 738—739., 741. p.

[18] Peska, P.: *Úvahy k perspektivní konstrukci zastupitelských sboru.* Acta Universitatis Carolinae Juridica Praha 4/1966. 225. p.

[19] Здесь следует упомянуть об одном законодательном акте, изданном в промежуточное время, об утвержденном советом министров постановлении от 10 марта 1965 г. (Принципы хозяйственно-организационной и культурно-воспитательной деятельности национальных комитетов в ходе осуществления новой системы планового управления народным хозяйством. Это постановление важно по двум причинам: во-первых, направляет внимание на хозяйственную деятельность национальных комитетов и пытается реально измерить по отдельным уровням экономические возможности местных органов; во-вторых, это постановление было первым подготовительным актом организационных изменений.

ются органами государственной власти и государственного управления (абзац 1 ст. I); к этому определению ст. 2 добавляет не употребляемые до сих пор слова «государственный орган характера самоуправления». Однако, закон в дальнейшем применяет как вертикальное, так и горизонтальное разделение труда и в ходе этого несколько больше прав сохранили за *пленарным заседанием национальной комиссии*, т. е. из этих прав был исключен совет национальной комиссии. Такими исключительными, т. е. закрепленными за пленумом компетенциями являются: определение концепции перспективного развития, установление перспективных и краткосрочных программ, оценка их исполнения; установление бюджета, утверждение годового баланса; создание, прекращение, слияние хозяйственных, бюджетных и других организаций; вынесение решений по вопросам изменения территории; определение числа депутатов национальной комиссии и избирательных округов и определение границ последних; создание, прекращение комиссий и отделов по отраслевому управлению и других их органов, установление разделения труда между ними; определение плана работы контрольной комиссии; избрание и отзыв председателя, его заместителя, секретаря, других членов совета, председателей, секретарей и других членов комиссий по отраслевому управлению; назначение и освобождение руководителей отделов отраслевого управления; принятие решений по просьбам депутатов о их освобождении; издание общеобязательных распоряжений, решение о получении и предоставлении займов; избрание председателей, заместителей председателя судов (районных и городских районных) и судей городского районного суда, обсуждение отчета о деятельности судов.

Из перечня перечисленных в законе функций (из пятнадцати) пять является очень важными экономическими функциями и можно сказать, они действительно влияют на основное направление развития данной территории. Необходимо сказать, что закрепленные за пленарным заседанием национальных комиссий права не совпадают с компетенцией, определенной в 1-й части третьей главы закона, поскольку эта последняя перечисляет правомочия местных органов без вертикального и горизонтального разделения (§§ 18—24); не совпадет и со 2-й частью той же главы, ибо здесь в отношении сельских, городских, районных и областных национальных комиссий довольно подробно дано вертикальное разделение труда, но относительно отдельных уровней нет различия в компетенции между органами (§§ 25—28).

б) Характерной и поучительной тенденцией закона является то, что подробно регулирует *экономическую деятельность*, хозяйствование национальных комиссий. Он определяет не только формы деятельности по планированию и финансовым делам (перспективный и краткосрочный хозяйственный план, бюджет), но и *аспекты и методы финансирования, средства, имеющиеся* в распоряжении национальных комиссий (§ 32). Такой подход, по моему мнению, является очень важным, потому, что только таким образом

можно представить осуществление — при надлежащей гарантии экономических средств — указанного в законе самоуправления. Закон очень правильно подчеркивает не только то, каким образом местные органы участвуют в осуществлении народно-хозяйственного плана, но и то, какой метод финансирования делает возможным осуществление местных целей и планов. (Следует особо подчеркнуть, что закон подчеркивает перспективное определение дотации из государственного бюджета, и из бюджета вышестоящих национальных комиссий,) (§ 32, 1-й абзац пункт e).

в) *В отраслевом управлении* закон создал новую модель, вернее, в известной мере возвратился к прежней. В то время как при принятии конституции существовала концепция, что отраслевые комиссии являются самими исполнительными органами, закон же называет их прежде всего органами инициативы, внесения предложений и осуществления контроля. Исполнительные правомочия обеспечивает им по существу только в отношении задач по бюджету. В то же время подчеркивает, что в тех селах и городах, где в данной отрасли не созданы отделы отраслевого управления, они осуществляют и функции этих отделов. Председатель и большинство членов отраслевой комиссии является депутатом (представителем) национальной комиссии, а другие члены могут быть простыми гражданами.

Отделы отраслевого управления являются типично ведомственными органами, во главе которых стоит ответственный руководитель. В городских районах, в районах и городах они создаются по отраслям, функциям, в то время как в селах создается только один или несколько и лишь в крупных селах.

Отраслевые отделы находятся в двойном подчинении: они подчинены, с одной стороны, создающему их совету, а, с другой стороны, вышестоящему органу отраслевому управления; они подчиняются и соответствующей отраслевой комиссии, но только в том случае, если они работают над осуществлением постановлений национальной комитета, её совета и отраслевых комиссий, или над разработкой специальных материалов для тех же органов.

г) Закон упоминает о двух особых органах, которые находятся в постоянной связи с национальным комитетом: *комиссии народного контроля*, которые избираются национальной комиссией и подчинены ей, — прежде всего в районах и городских районах, но возможно и в городах и в селах - комиссии граждан, избираемые гражданами в крупных городах, которые работают в качестве сети активистов национального комитета.

д) Управление национальным комитетом и его органами по старой модели осуществляется и в дальнейшем законами национального собрания, управляющей и контрольной деятельностью правительства и координационной работой министерства внутренних дел. В этом отношении министерство внутренних дел действует как особый орган правительства.

Обобщив все сказанное, чехословацкий закон о местных органах является одной из наиболее охватывающих и интересных попыток, направленных на новое сформирование этой части государственной организации.

4. Новые, полностью отличающиеся от вышеизложенных, попытки характеризуют правовое регулирование в Румынской Социалистической Республике. Развитие законодательства имеет ту особую черту, что местная организация, указанная в V-й главе конституции от 21 августа 1965 г., почти не отличается от традиционной модели советской конституции 1936 г.; в то же время различные подробные распоряжения значительно изменили ныне действующий законодательный акт. В том числе отменено двойное подчинение (по существу отраслевое управление осуществляется в рамках административной комиссии, предназначенной для управления местными органами), управление сельским хозяйством стало несколько самостоятельнее по сравнению с прежним положением (созданы особые местные сельскохозяйственные советы в подчинении вышестоящему сельскохозяйственному совету и народному совету того же уровня, а также создан союз сельскохозяйственных кооперативов), секретари исполнительных комитетов назначаются на неопределенное время и т. д.

Всерумынская конференция Румынской Коммунистической партии, проходившая в декабре 1967 года, определила несколько основных принципов для будущего законодательства. Среди них первым является новая система иерархии местных органов, которая, по существу, станет актуальной с изменением административно-территориального деления страны. Вместо ранее существующей трехступенчатой местной организации будет создана двухступенчатая: из крупных сел, т. е. городов и комитатов. Вторым основным принципом является то, что, интересно, желают восстановить прежнюю форму *двойного подчинения* с соответствующим специальным министерством по одной линии подчинения. Но все-таки наиболее важным основным принципом является то, что председателем народного совета комитата и города в будущем будут избираться *первые секретари партийного комитета* комитата и города. Отдельные секретари и другие функционеры партии будут выполнять руководящие функции в местных органах государственного управления. На уровне комитатов создаются экономические комиссии для выполнения задач координации, под непосредственным управлением комитатской партийной организации.

Руководство идеологической-культурной деятельностью будут осуществлять территориальные органы партии. В постановлении говорится и о том, что представители профсоюзов сотрудничают в деятельности комитатских и городских советов.[20]

[20] Отчет Николае Чаушеску на всерумынской конференции РКП Előre, № 7 за декабрь 1967 г. стр. 6—7.

Румынская модель содержит в себе полностью новые концепции, сравнивая с обычной до сих пор организацией в социалистических странах. Разделение государственных задач между государственными и партийными органами на верховном, центральном уровне, и в то же время личное сочетание руководства партии и государства на местах создаёт новое положение и, несомненно, преобразует деятельность местных советов.

В Румынии 24 октября 1968 года на всенародное обсуждение был передан законопроект о народных советах. Этот проект отличается от прежних тем, что в ст.ст. 22—26, 45—49 старается закрепить компетенции. Но это регулирование вряд ли идет дальше определения рамок, хотя отделяет друг от друга правомочия советов и их исполкомов.

Интересно, что относительно новой структуры государственной и партийной организации законопроект касается только территориальных экономических комиссий, как органов партии и государства. Не говорит о новом положении председателя исполкома и бургомистра.

5. *Германская Демократическая Республика* является государством, которое сделало очень много попыток в интересах модернизации модели местной организации. Вслед за регулированием общего характера 1957 г. в 1961 г. последовали правила по уровням. Эти последние были известными тем, что очень подробно перечисляли задачи и компетенции, но только таким образом, что при этом не проводили различия между органом народного представительства и его советом, а также и другими административными органами. Дальнейшее развитие отразилось, прежде всего, в законодательстве 1965 г., в ходе которого было исследовано влияние и требования новой хозяйственной системы в отношении местных органов народного представительства. Конечно, в распоряжении государственного совета доминировали хозяйственные мотивы, и прежняя модель местных органов по существу оставалась неизменной. В то же время, отдельные органы хозяйственного управления стали более самостоятельными, чем раньше, сохранив в известной мере двойное подчинение. Таким образом, окружная плановая комиссия стала органом Государственной Плановой Комиссии и окружного совета, районная плановая комиссия — окружной плановой комиссии и районного совета, окружной хозяйственный совет — Совета Народного Хозяйства и окружного совета, окружной сельскохозяйственный совет — Сельскохозяйственного Совета ГДР и окружного представительного органа, районный хозяйственный совет — орган окружного хозяйственного совета и районного представительного органа, окружное строительное управление — органом министерства строительства и окружного совета. Председатель окружной плановой комиссии одновременно является и заместителем председателя окружного совета; а председатель окружного хозяйственного совета, далее, председатель окружного сельскохозяйственного совета, а

также и руководитель управления производства и окружной строительный управитель стали членами совета; все они ответственны перед окружным представительным органом и советом. Аналогично и положение районных органов. Таким образом, члены совета все являются специалистами, которые должны выполнять эту свою функцию по службе. Прежние, неосвобожденные члены совета перешли в постоянные комиссии как и в округах, так и в районах. Значит, характерной чертой нового развития является специализация высокой степени и перфекционизм управления. Интересно, что в распоржении государственного совета от 1965 г. меньше всего говориться о компетенциях и задачах представительных органов и их органов общественного характера.

Если мы попытаемся свести тренд этого распоряжения, то можно установить, что здесь в центре внимания стоят районные и в особенности окружные органы координационного характера. Но эти органы в силу необходимости могут осуществлять свою деятельность по линии отраслевого управления. Другим направлением является постоянное развитие самостоятельности органов отраслевого управления по сравнению с органами народного представительства и их советов.

Конституция Германской Демократической Республики в ст. 81 и 83 занимается проблемами местной организации народного представительства. Местные представительства называются здесь органами государственной власти в округах и районах, городах, в городских районах, селах и сельских объединениях. Исполнительно-организаторским органом является совет, членами которого по возможности являются представители. В комиссии, выполняющие задачи по организации и контролю, могут избираться и не представители.

Югославская модель — как об этом уже говорилось — значительно отличается от моделей других социалистических стран. Взгляд на общины в принципе влияет на вопросы организации и компетенции. Для сравнения все-таки важно подробнее изучить организацию государственной власти в общинах, потому что эта местная организация показывает такую модернизацию местной организации, которая достойна внимания. Федеративная и республиканская конституция сама определяет рамки основ местной власти, основу системы скупщины — так, двухпалатную или многопалатную систему — характер подчиненных ей политическо-исполнительных и административных органов, характер мандата и ротации скупщин, а из форм непосредственной демократии — выборные собрания и референдумы, а также и характер местных содружеств. Подробные правила содержатся в статутах общин.

О территориальной организации общины ст. 95 конституции Сербской Социалистической Республики говорит: «Общины создаются на таких территориях, где имеются условия для развития её прав и обязанностей, её

материального и общественного развития, а также и для осуществления прав и обязанностей граждан». Вполне ясно, что такое требование к общине со своей стороны требует известной степени «самоснабжения» (хотя федеративная конституция экономическую помощь в виде республиканских дополнительных средств предусматривает для тех общин, которые не в состоянии покрывать из собственных средств расходы, связанные с осуществлением их задач. Вследствие этого, община является более крупной по территории единицей, состоящей из нескольких поселений (на территории всей федерации существует свыше 500 общин).

Статут общины содержит в себе, с одной стороны, права и обязанности общины как общественно-политического содружества, а, с другой стороны, права и обязанности ее органов; очень важной частью статута является определение средств (экономических средств) общины, в том числе определение фондов. Органы общины осуществляют свои задачи при помощи этих фондов.

В общинах самым важным органом является скупщина общины представительный орган, о котором статут говорит как о «верховном органе власти и общественного самоуправления» в общине. Эти скупщины обычно состоят из двух палат: из совета общины и совета трудовых содружеств. Совет общины избирается гражданами общины на основе всеобщего избирательного права, а совет трудовых содружеств — членами различных рабочих коллективов. Их число определяется статутом. Так например, в г. Суботица оба совета имеют по 70 членов, а в Пожареваце совет общины имеет 56 членов, а совет трудовых содружеств — 54; из этих последних 54 членов 41 человек избирается хозяйственными трудовыми содружествами, а именно: 26 — промышленной, 15 — сельскохозяйственной подгруппой, 4 — группой просвещения и культуры, 4 — группой по социальным делам и здравоохранению, 5 — группой по коммунальным услугам. Советы, как правило, работают и решают на совместных заседаниях, а в случае необходимости могут заседать и отдельно.

Органами скупщины являются: председатель скупщины, который заботиться об организации работы скупщины, о созыве заседаний, об исполнении постановлений, о координации, контроле и т. д.; различные комиссии, которые призваны для внесения предложений, для изучения вопросов, входящих в компетенцию скупщины (в Суботице функционируют следующие комиссии: комиссия по заявлениям и жалобам, комиссия по выборам, назначению на должности и по вопросам кадров, комиссия по делам о награждениях и комиссия по вопросам предложений (подготовки предложений); в то время как в Пожареваце: комиссия по кадровым делам, выборам и назначениям на должности, комиссия общественного контроля, комиссия по заявлениям и жалобам и комиссия по делам национальной обороны), советы скупщины общины являются политическо-исполнительными

органами, избранными на два года из членов скупщины и других граждан, а среди этих последних из таких, которые делегированы рабочими коллективами и другими общественными организациями. (В Пожареваце функционируют следующие советы: экономический, сельскохозяйственный и лесоводческий, совет по развитию города, совет коммунальных услуг и жилищного управления, совет просвещения, общий совет по делам культуры и спорта, совет здравоохранения и социального обеспечения, общественно-плановый и финансовый совет, совет внутренних дел и организации управления); административные органы для подготовки и исполнения законодательных актов и актов органов скупщины, для административно-технического делопроизводства (делопроизводство в рамках своей компетенции они осуществляют самостоятельно; работой их управляет секретарь скупщины, назначенный на 4 года, но после истечения этого срока он может быть снова утвержден в своей функции.).

В рамках общины на внутренних и внешних территориях, на заселенных территориях, в населенных пунктах на основе решения граждан на избирательных собраниях могут быть созданы местные содружества, которые имеют собственный статут. Органами этих содружеств являются: совет местного содружества и его контрольная комиссия. Внутри общины функционируют и институты непосредственной демократии. Одной из форм является собрание избирателей. Частью компетенции собраний избирателей является обсуждение отдельных вопросов, но по некоторым делам оно может непосредственно вынести решение (например, в г. Суботица собрание решало о создании местных содружеств, о введении добровольных взносов о предложениях относительно избрания или отозвания членов скупщины общины, об избрании и отозвании членов местного содружества.) Другой формой является референдум, в случае объявления которого граждане непосредственно решают по важнейшим делам общины. Статуты могут предписать обязательный референдум (например, в г. Суботица о подписе внутреннего займа или о введении на всей территории общины добровольных взносов на срок больше одного года. Решение референдума имеет обязательную силу.)[21]

7. Что касается *Польши*, то для нее характерным является не настолько изменения законодательных актов (закон о советах в 1963 г. был значительно изменен), как попытки по обеспечению как можно большей эффективности действующих законодательных актов. В интересах этого

[21] Содержание статута отдельных общин значительно отличается друг от друга. В качестве примера я цитировал статуты двух общин, Суботица и Пожаревац, расположенных на территории Сербской Социалистической Республики. См. статут от 1964 г. общины Суботица в издании серии изданий Сектора по Сравнительному Праву Института государства и права ВАН. (Законодательство о селах в европейских социалистических странах), Будапешт, 1966. стр. 201 - 257; а в отношении статута общины Пожаревац; *Les statuts de la commune de Požarevac*. Institut de Droit Comparé. Recueil des lois de la RSF de Yougoslavie, Volume XII. Beograd, 1965. 17—87. p.

уже в течение нескольких лет деятельность организации советов критикуют с помощью эмпирически-правовых и социологических исследований. Здесь я сошлюсь лишь на ценные сводные выводы о результатах исследований, данные профессором Сильвестер Завадски,[22] а также и на упомянутую выше серию исследований и публикаций, проведенных в рамках Польской Академии Наук.

8. *В Венгрии* наиболее значительное изменение в положении органов совета внесло постановление правительства № 1023 от 8/VIII 1967 г. *Двойное подчинение* органов отраслевого управления – в своей бывшей форме — было прекращено. Министр (руководители других центральных органов отраслевого управления) в своей компетенции может издавать распоряжения, нормативные указания, специальные директивы общего значения и принципиальные разъяснения. Органы совета по отраслевому управлению подчинены лишь исполкому, который имеет право давать указания для руководителя органом отраслевого управления в рамках закона. Но, с другой стороны, исполкомы несут ответственность перед правительством за осуществление отраслевой политики, и должны отчитываться перед министром о своей работе, – хотя министр не имеет права давать указания по конкретным делам ни для совета, ни для исполкома. Министр определяет круг задач, компетенции и ведомственные правомочия органа совета по отраслевому управлению, и – с согласия Отдела органов советов при Совете Министров — также и основные принципы организационной структуры.

Все это свидетельствует о том, что двойное подчинение уменьшилось в оперативном отношении и что и в венгерской системе советов подчеркивается возможность и важность управления путем законодательства и нормативов. В то же время отраслевое управление не упростилось, а значительно изменилось его направление. Нельзя говорить и о прекращении этим постановлением оперативного управления; эта форма управления просто перешла в руки исполкома.

Итак, венгерское законодательство в последние годы стремится к укреплению самостоятельности органов совета. Особенно относится это к развитию низовых (сельских, районных и городских) советов. Но вследствие отсутствия единого закона о советах этот тренд осуществить полностью пока еще не удалось.

V

Попытки европейских социалистических стран обращают наше внимание на некоторые проблемы, тем более, что несмотря на изменения в деталях, а возможно как раз вследствие этих изменений до сих пор дело не

[22] Завадзки, *Национальные советы и их комиссии в свете эмпирическо-правовых исследований*. Állam és Igazgatás, 1/1968. стр. 19—26.

дошло до действительной модернизации венгерской системы советов. На мой взгляд, эти проблемы заключаются в следующем:

а) Следует выяснить, какую роль будут играть советы в будущей нашей *хозяйственной жизни*. Многолетняя волокита с промышленностью советов оказывала отрицательное влияние на выяснение вопросов о коммунальных услугах и иных подобных хозяйственных вопросов, представляемых лишь в местных рамках.

б) С этим связано то, *каковы будут и из каких источников будут поступать доходы советов*. Если же этот вопрос не будет решен путем урегулирования законодательным актом высшего уровня, исходя из реальной почвы самостоятельности советов, то мы не можем расчитывать на значительную деятельность местных органов. А с другой стороны, если советы будут распоряжаться доходами, поступающими к ним из закрепленных в законе источников, но зависящими от результатов своей работы, будут значительно возрастать их самостоятельность, а также ответственность.

в) Развитие демократизма на местах зависит прежде всего от правомочий, оперативных возможностей *низовых советов* (советов районов столицы и других городов, советов городов на уровне района и советов сел). Поэтому следует обдумать, каким образом можно дальше развивать эти органы, и среди них прежде всего представительные органы и их связи с массами.

г) Компетенции должны быть закреплены как по *горизонтали, так и по вертикали*. Поэтому необходимо было бы опубликовать одновременно с будущим законом о советах и распоряжение о его исполнении, которое единообразно регулировало бы компетенции. Почти все недостатки до сих пор вытекали из того факта, что регулирование компетенций было всегда отложено на более позднее время, и в конце концов дело до этого не дошло. Особенно важным является определение *исключительных правомочий* совета и исполкома по различным уровням.

д) Следует обеспечить возможность *для граждан* (в особенности для избирателей в селах и городах), чтобы они по наиболее важным вопросам, в особенности по вопросам материального характера, могли высказать свое мнение как *политическая коллегия*, а по отдельным делам могли даже решать. Этот институт может служить действительной основой связи граждан с местными органами власти, т. е. складывания живых связей с массами.

The Problems of the Development of Local Councils in the Socialist Countries

By

O. Bihari

In the last years the earlier conceptions permeating the constitutions of the European socialist countries and thus also the trend of the evolution of local organs has been carefully studied. It has become a matter of debates whether a centralized or a

federal state organization be adopted, that is, whether a given socialist state be built up "from above" or "from below". It is the solution of the problems of the scope of authority of the different state organs which depends on the conceptions relating to this issue. Three solutions may be conceived theoretically: a) the scope of every local authority should be regulated, that is, no legislative or administrative function should be exercised by any local organ without approval by the central organs, b) certain scopes of authority should be regulated by central organs but powers "left free" that is, unaffected by the regulation of central organs should be included in the scope of authority of local organs, c) the scope of authority of local organs should be defined by these organs themselves (essentially through the unhindered distribution of the scopes of authority to be laid down in bye-laws issued by local organs). As a result of experimentation in the past 5—6 years centrifugal tendencies have become stronger. A political-sociological research work is required to find the right solutions in this context. A comparative analysis of these problems and those connected therewith is provided by this paper.

Entwicklungsprobleme der Räte in den sozialistischen Staaten

von

O. Bihari

Die europäischen sozialistischen Staaten haben die früheren Vorstellungen über die Grundsätze der Verfassung, so auch die Entwicklungstendenz der örtlichen Organe einer gründlichen Prüfung unterworfen. Es entstand die Diskussionsfrage, ob eine zentralisierte oder föderale Staatsorganisation begründet werde, d. h. ob der sozialistische Staat »von oben« oder »von unten« aufzubauen sei. Beide Auffassungen setzen in erster Linie Kompetenzfragen voraus. Theoretisch sind drei Lösungen vorstellbar: a) alle örtlichen Kompetenzen werden geregelt, bzw. kein örtliches Organ kann ohne Bewilligung der zentralen Organe rechtssetzende und behördliche Kompetenzen ausüben; b) ein Teil der Kompetenzen wird durch die zentralen Organe geregelt, die von den zentralen Organen »unbesetzt gelassenen«, also kompetenzmässig nicht berührten Aufgaben können als Rechtskreis der örtlichen Organe betrachtet werden; c) die örtlichen Kompetenzen werden durch die örtliche Rechtssetzung geregelt (in wesentlichem mit Hilfe der in den Statuten erscheinenden freien Kompetenzteilung). Im Zuge der Versuche der letzten 5—6 Jahre sind die zentrifugalen Kräfte stärker geworden. Die richtigen Lösungen setzen politisch-soziologische Untersuchungen voraus. Die Abhandlung bietet eine vergleichende Bearbeitung und Analyse dieser Versuche und der mit ihnen zusammenhängenden Fragen.

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The Hague Conventions of 1964 and the International Sale of Goods

by

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I

Introduction

1. A smooth and safe operation of foreign trade no doubt would be much expedited if as large a part of foreign trade as possible would be governed by a sole, uniform law. Such an arrangement would render the activities of foreign trade companies easier, would narrow down the opportunities of taking advantage of the power inherent in a superior economic position and would free foreign trade companies from mishaps which may always be involved whenever foreign law is applied. Such a uniform law would be beneficial particularly for less well-to-do states or enterprises which are in a less favourable position to engage the services of legal experts trained in international and comparative law and which are more exposed to an exploitation by the other party of superior economic power.

Besides a uniform law may involve a favourable effect also on business contacts between enterprises of states with differing socio-economic systems: it may be susceptible of removing the mistrust in the law of the party which belongs to another socio-economic system and of providing an increased protection against eventual one-sided adjudication of legal disputes.

However, several objections are also raised or various problems are given expression to in respect of such a uniform law. The doubling or, in countries where a distinct Commercial Code is in force, the trebling of the national laws' rules on sale — it is suggested — may involve certain disadvantages and that

is why there are some writers who are willing to go only as far as the unification of *conflict rules* at most.

There are again some who object to a unification of law on account of their favourable position in being able to stipulate the application of their domestic law in the majority of instances and are therefore unwilling to give up the concomitant advantages. People in charge of such matters in countries which have unified their laws on a regional compass or are near to accomplish such a unification are often guarding the results attained, the routine of transacting their contacts against a unification of laws laying a claim to universality. There are others who think to perceive a magic circle: until unified law will not reach the stage of universality it will share the plight of the *Esperanto* which, instead of eliminating or reducing language difficulties, means an addition to the languages already existing. This is the reason why they are reluctant to accept a uniform law; this reluctance will however have the result that law will not be capable of attaining the level of universality at which it could discharge useful functions. The problem has also been encountered whether the best way of achieving the unification of laws is the adoption of statutes by legislative bodies and would it not be more conducive — it is suggested — to advance towards this goal through unifying usages or rest content modestly with adopting model laws.

All these objections however have no bearing on questions of *content* namely to what an extent are the unified laws susceptible in respect of their substance of being adopted by states of differing socio-economic systems; what is a unified law capable of offering for states without taking away too much of what they have been accustomed to; to what an extent is a unified law capable of meeting the requirement of having regard to the technical solutions usual in various legal systems in a way that such solutions could be acceptable also for others. However international are the substantive elements of international sale, the difficulties are not solved thereby, for as it is appropriately suggested by *Kahn-Freund* in law "the ends are determined by society, the means by legal tradition".[1]

The conditions being as they are it is entirely possible that a state may approve in principle of a unification of laws on a universal scale in the sphere of sale, consider the advantages involved outweighing the disadvantages while refusing to adhere to the respective convention for the substance or the technical devices of the given unified law proves unacceptable for it.

This will be the framework within which the Hague conventions on international sale ("ULIS") and the "Formation" of contracts of international sale (the two together: "Uniform Laws") will be dealt with subsequently.

[1] Kahn-Freund,O.: LQR (Jan. 1966) p. 45.

II

Three artificial problems

Regional versus universal unification of laws

2. It is a fairly widely spread view that at present it is only a regional unification of laws which appears to be practicable but states will be thereby bound to a regional law and the road towards reaching a universal unification of laws will thus be blocked. It follows from this that it is only regional unification of laws which is worth the efforts.

This view is hardly acceptable. There is no conflict between regional and "universal" law unification. The regions covered by a regional unification of laws mean not merely geographical regions, and may link very distant countries. On the other hand a unification of laws on a universal scale results in most instances also in creating a quasi-regional law: the respective conventions are adhered to by a rather limited number of states.

It follows from what has been said that the problem is not one of a *rivalry* between regional and universal unification of laws but much more it is about whether a useful purpose is served if a state participates *in more than one* "regional" unification of laws. This is, in turn, a practical question: the problem is determined by the foreign trade structure of the state concerned. In case a substantial part of the foreign trade of a state is carried on with countries belonging to one region and another considerable part with those belonging to another region it will be *expedient to adhere to the conventions on law unification of several regions*. Hungary e. g. carries on a substantial part of her foreign trade with countries parties to the Council of Mutual Economic Assistance and applies a uniform regional law within this scope, the General Conditions of Delivery, 1968. At the same time a not insignificant part of her foreign trade is directed towards Western and developing countries. Should in these countries or in a considerable part of them a uniform law on international sale be created it might be in Hungary's interests — disregarding for the moment other conditions and circumstances — to adhere to such international instruments. In this way an extended area of her foreign trade were governed by a more or less "neutral law" and the province of laws to be taken into consideration were narrowed down.

Such a course of action however involves a prerequisite: the possibility must be secured that adherence to a region should not affect adherence to another one. A provision on this point is found in the Hague conventions of 1964 on the uniform law; under Article II opportunity is provided to make a declaration in which states are authorized to declare that other, specified states or state shall not be regarded different on account of their laws being completely or in part identical in respect of sale. In case such a declaration

is made the scope in which the CMEA's General Conditions of Delivery are applied remains unaffected by the adoption of the rules of the Uniform Laws. It should be added that in the actual contracts the non-application of the Uniform Laws can be stipulated even in an implied manner at that (see point 11/a below) and therefore the declaration as laid down in Article II is not indispensable although to make that reservation appears to be useful.[2]

Unification of conflict rules versus unification of substantive laws

3. A somewhat similar problem is involved in the rivalry brought about by the unification of substantive laws in regard to unification of conflict rules. It is known for all concerned that the Convention on the law applicable in the international sale of movable property concluded on June 15, 1955 has been favourably received and has entered into force since. The view has been spreading that there would be no point for a state to adhere both to a convention on the unification of conflict rules and substantive law. This view were acceptable in case the unification of substantive laws were achieved on a universal or quasi-universal scale. In case unification of conflict rules were attained on a universal level this conclusion were not unequivocally correct for the unification of substantive is a unification of a higher level,[3] a more perfect one than that of conflict rules and therefore in the contingency now assumed efforts should be made to reach the level of the unification of substantive law. In the present situation none of the conventions is near to attain a universal character. In such a situation it should be pointed out again that it is determined by the foreign trade structure of each country would it be conducive to adhere to both conventions or only one of them. *The existence of both side by side is justified*[4] *and therefore it may be conceived that one and the same state be a party to both conventions.*

This solution however presupposes that the two conventions are compatible. It has been mentioned that such a concerting with regional conventions has been effected in the 1964 conventions. There are certain attempts discernible — in Art IV — of the convention on uniform law to concert the unifications of conflict rules and substantive laws in the case where a state seeks to be a party to both law unifications. The gist of the problem in this context lies in the rules of the law on the unification of substantive law, Art. 2, para

[2] KATONA, P.: *A nemzetközi vételi jog egységesítése (Unification of the Law of International Sale)* in: *Jogi problémák a nemzetközi kereskedelemben (Legal Problems in International Trade)* Vol. II. Budapest, 1959. 163–192, at 179, EÖRSI, G., The Journal of Business Law, April 1967. pp. 144–150, at 145–146; for *Scandinavian* states see HELLNER, J.: 16 A. Journ. Comp. L. 1–2 (1968) pp. 88–106, at 105.

[3] EÖRSI, in: *Unification of the Law Governing International Sale of Goods*, ed. J. HONNOLD, Paris, 1966. pp. 293–294, ZWEIGERT-DROBNIG 29: RabelsZ 1/1965. pp. 146–165, at 153, 161.

[4] EÖRSI: op. cit. in No 2. pp. 302–304.

9 Article 1 under which the application of the rules of private international law and thereby the application of a uniform law of conflict rules is precluded. But it is also doubtful whether the law could validly do so for the legal source of the unification both of the conflict rules and substantive law is an international instrument; the application of conflict rules is both allowed and precluded by international conventions which have become parts of the law of the land. That is why Art IV provides for the possibility of including the convention on conflict rules in the form of a reservation; this solution however does not yield satisfactory results (see point 9 below). *Zweigert-Drobnig* adopts a really correct stand when holding that the convention on conflict rules which effects a rudimentary unification of laws should have contained provisions on the smooth transition towards reaching a higher level and not to allow subsequently in a law unification of a higher level of coming down to a lower level through including the law of conflict rules in the application of the uniform law.

The solution has been suggested that in default of a possibility serving explicitly this purpose states should avail themselves of the opportunity provided by the adherence to the conflict rules convention to make a reservation allowing of adherence to the convention on the unification of substantive law. This solution is suggested by evoking the analogy of the public international law doctrine of rival treaties: unification of substantive laws should be preferred by virtue of its overwhelming substantive import to unification of the laws of conflict rules.[5] This however may appear as a rather adventurous undertaking just as is the reference to the *rebus sic stantibus* clause: the argument is namely used that the 1955 convention on conflict rules law could not contain provisions on an authorization to make reservations because such a unification was non-existent at the time. Things being as they are in a state which is a party to the unifications of both levels enterprises have hardly other choice but to stipulate in their contracts to preclude the application of the conflict rules convention *in the contingency where the ULIS or Formation of contracts are applicable to the contract in question.*

Other problems of the interrelation between substantive law unification and conflict rule law unification will be dealt with in point 6.

International usages versus unified laws

4. It is asserted particularly in common-law countries that unified laws are too abstract, do not provide solutions for the problems, they are in the nature of legal notions and are rather unfamiliar to business; the law of sale progresses on the road of unification mostly through resorting to usages. In fact, mutually exclusive conflicts should not be assumed at this juncture either.

[5] ZWEIGERT-DROBNIG: op. cit. pp. 159—161. DÖLLE holds that it is not a legal tenet but merely a postulate of legal policy, but as a result of a discussion based on the interpretation of will he comes likewise to this conclusion (32 RabelsZ 3/1968. pp. 438—449 at 444—445).

A useful framework is afforded by laws for usages as well and the laws prevail directly in spheres where no usages can be encountered. After all the law of sale was laid down in statute law in Great Britain at the end of the last century, in the US the Uniform Commercial Code has become a uniform law. Even if these laws differ in many respects, as regards the methods of codification from codes in continental countries, they bear out that legislation is needed which contains rules on the level of sale of goods and not merely on the level of single commodities. *Schmitthoff* comes to the conclusion too that "standard contracts and international legislation are not mutually exclusive". He cites *Lando* who holds that "even the most explicit contract form can only be properly understood against a legal background." If that is so—*Schmitthoff* goes on—it is better if the legal background is not national but international; one of the obvious advantages implied by such a solution is that it is only in this way that the mandatory provisions of national laws can be disregarded.[6]

It is therefore not unavoidable to see mutually exclusive inimical relations between the Uniform Laws and the contractual conditions drafted by the ECE of the UN. Unification of laws should be sought simultaneously on both fronts wherever the requisite conditions are extant.

III

The mechanism of the application of the Uniform Laws

Which forum is to decide

5. The preclusion of the private international law conflict rules results in the Uniform Laws being applied *where these conflict rules* have become part of the law of the land of the *forum*. This solution means a Pyrrhic victory for the tenets held by *A. A. Ehrenzweig*. It is a victory because *Ehrenzweig* places the application of the *lex fori* into the foreground[7] but a Pyrrhic one because the *lex fori* will not be the national law proper but a uniform law on the statute book. This may provide some comforting thought for those who, like *de Winter* have misgivings about the application of the *lex fori*.

After the two uniform laws will have come into force they will be applied in given cases in legal disputes submitted by a party whose government has not ratified these laws; moreover it may happen that the governments of either party have not ratified the two laws nevertheless these will be applied in their litigation.[8] It may happen therefore that in default of ratification by Hungary

[6] SCHMITTHOFF, C. M.: ICLQ, July 1968. p. 551, at 568—569, LANDO, 10 Scandinavian Studies in Law p. 129, at 132—133.

[7] EHRENZWEIG, A. A.: *Private International Law*. New York, 1967.

[8] TUNC, A.: *Commentary of the Hague Conventions of 1st July 1964 on the International Sale of Goods and on the Formation of Contracts of Sale*. Ministerie van Justitie, The Hague, p. 16; resolutely opposing this solution: DE WINTER, L. I.: Nederlands Tijdschrift voor International Recht, 1964, pp. 271—279, at 273.

it will not preclude that the two laws are applied in a litigation to which a Hungarian national is a party.

One of the contingencies of this is where under the private international conflict rules the law of such a country ought to be applied which has ratified the convention on the sale of goods and the contract is governed by Article 1. of the two Uniform Laws.[9] No specific issues are involved in such a contingency.

The other set of cases – more important for the problem now discussed – is the following. Under Article 2. of the ULIS and para 1 Article 1. of the Formation of contracts of international sale the application of private international law is precluded within the scope of the operation of the two laws provided no different regulation is contained in the law. The two laws become, through ratification or accession part of the law of the land of the country concerned. Should therefore a case which by virtue of the facts involved would come within the scope of operation of the two laws come up before a court in a country which is not a party to the convention on international sale the court will adjudicate on the strength of these laws even if, according to the conflict rules of private international law, it ought to apply the law of such a country which has *not* ratified the conventions on international sale. If action has been instituted in country A which is a party to the conventions and if under the private international law conflict rules the law of country B ought to be applied but the latter country is not a party to the conventions, the Uniform Laws shall be applied as the municipal law of country A for in cases of this type in respect of the relevant contracts in country A the private international law conflict rules shall not be applied. It follows however from what has been said that the issue whether the two laws can or cannot be applied is determined by the fact whether *the country of the forum is a party to the two conventions*[10] irrespective of the parties'countries being or not being parties thereto.

There is but a single exception to this rule: if the forum's country has availed itself of making a reservation allowed under Article III of the two conventions and has restricted the operation of the two laws to the eventuality where both parties'countries are "contracting parties". It should however be pointed out that such a reservation prevails if the *state of the forum* has availed itself of it. Should country A made such a reservation but an action which concerns it has been brought in country B which has *not availed* itself of such a reservation allowed under Article III, statutes which concern actions brought

[9] ZWEIGERT-DROBNIG, op. cit. p. 163.

[10] See on the problem *for* and *against:* DÖLLE, op. cit. pp. 438—449, at 439, pp. 447—448. HONNOLD, J.: 30 Law and Contemporary Problems 2/1965. pp. 326—353, at 332, 334, KAHN, PH.: Rev. trim. dr. comm. 4/1964. pp. 689—727, at 697—698, KATONA, op. cit. pp. 177—178, NADELMANN, K.: 74 Yale L. J./1965. p. 449, at 457, RIESE, O.: 29 RabelsZ 1/1965. pp. 1—100, at 9—10, TUNC, op. cit. p. 16, DE WINTER, op. cit. et 273. seq., ZWEIGERT-DROBNIG in the comparison with the June 15, 1955 convention on conflict rules op. cit. p. 155, in other respects pp. 163—164.

by enterprises in country A shall be applicable, the reservation made by country A notwithstanding even if the opposing party's country is not a party to the conventions. Besides, under the terms of Article III unification of laws is restricted and reduces the advantages inherent in it.[11] For this reason it is hardly worth while making such a reservation.

Preclusion of private international law conflict rules

6. This solution has been rather controversial. Another practicable solution which served as a point of departure for the 1956 draft would have been to the effect that the two Uniform Laws should not be applicable unless the *forum* is required under the terms of a private international conflict rule to apply the law of such a country which is a party to the conventions on international sale.[12] Arguments have been put forward both for and against both solutions; it has been found finally that precluding private international law would yield less complicated results, would provide an enhanced security and would secure an advantage inherent in the *forum* not applying a foreign substantive law but its *proper law* which is, in principle, accessible to *both parties* in equal measure.[13]

All these notwithstanding this solution is not quite devoid of deficiencies either. The very objective namely that the parties be aware in advance which law will be applied in the proceedings is not served in a satisfactory way. It is impossible to know in advance which of the parties will bring an action and it cannot be known in all instances whether the action could not be brought in a third country. It is held by *Katona* that "action can be brought before any court which considers itself to have jurisdiction in accordance with the procedural law of the country of its own. However, an action is brought only after one of the parties has failed to perform its duties; prior to that event it is uncertain in which of the countries considering their courts to have jurisdiction the plaintiff will bring an action and thus the parties are unsure as to the statutes of which state will govern the performance of their obligations."[14] Moreover as pointed out by *de Winter* it may happen that the two parties find *fora* in two countries which have jurisdictions and therefore two differing but in their existence equally justified judgments will be returned in one and the same litigation based on two different laws a solution "manifestement contraire à la securité juridique" (obviously contrary to legal security).[15]

[11] In detail: ZWEIGERT-DROBNIG, op. cit. p. 164.
[12] This solution is approved of by DE WINTER, op. cit. pp. 275–276.
[13] KAHN, op. cit. pp. 697–698, RIESE, op. cit. pp. 9–11.
[14] KATONA, op. cit. p. 177.
[15] DE WINTER, op. cit. p. 274.

This argument is certainly not devoid of reality. Even if it may be a rare occurrence that the *one and the same* legal dispute will be brought by the two parties before courts in two countries it may still happen that one of the parties will sue in connection with the *one and the same business deal* in a country which has ratified the Uniform Laws while the other party will bring an action in a country which has not done so. This contingency may in fact result in an anomalous situation, e.g. that facts will be adjudged differently in the two proceedings on account of two different laws having been applied. Yet the same situation may arise also when the conflict rules of private international law are applied until the convention on conflict rules of June 15, 1955 will have become universally accepted. It is possible that under the private international law of one of the *fora* it will be the seller's law under that of the other another law shall be considered to be the *lex contractus* although this will occur relatively less frequently than the doubling of laws to be applied under the solution proposed in ULIS. On the other hand uniformity can be brought about under the present solution too. In case the seller's country has ratified the Uniform Laws while the country of the *forum* where action has been brought by the buyer has failed to do so but under its private international law rules the seller's law shall be the *lex contractus* and uniformity will almost (point 8 below) be fully materialized.

Under such conditions in the future when a large number but still not the overwhelming majority of countries will have adhered to the conventions it will be a relatively frequent occurrence that the applicable law cannot be anticipated and when the Uniform Laws will not be applied in legal disputes of enterprises in states parties to the conventions and vice-versa.

When the feasibility of anticipating the applicable law is considered in given situations a larger security can be afforded by the international unification of conflict rules than by that of the substantive law offered for use by the solution adopted in the Uniform Laws. It would however not be correct to see merely this disadvantage—or to exaggerate it by citing extreme examples. *This disadvantage should be opposed to the advantages now outlined briefly* and it is in this way that the balance should be drawn.

7. Another problem involved by the solution now outlined is that from the aspect of the applicability of the two Uniform Laws the June 15, 1955 Convention on the law applicable to international sales of moveables becomes irrelevant because private international law conflict rules would not be applicable. Representatives of states affected by this Convention did, in fact, protest at the Hague conference of 1964 against the rule now discussed;[16] concessions made thereupon will be dealt with in the next point while the question to what

[16] *Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague 2—25 April 1964*, Government Printing Office, The Hague, 1966. Vol. I—II, at I. 139—140, RIESE, op. cit. p. 10.

an extent are protests and opposition justified will be discussed in point 10 below. Instead of this convention however the problem of the April 15, 1958 Convention on the jurisdiction of contractual *forum* in cases of the international sale of movable property arises according to which the parties may stipulate exclusive jurisdiction. Country A has been stipulated by the parties as the seat of the court but one of the parties brings an action in a court of his country evoking that his country is a party to the conventions on sale under which the application of private international law as well as the convention relating to the *forum* are precluded. In this context the problem becomes one of classification: does the April 15, 1958 convention contain "private international law" or "international procedural law" rules? If according to the law of the *forum* the issue comes unequivocally within the orbit of the law of international procedure the way is open for the rules of the Uniform Laws to prevail. It may however happen that no difference is made in a country between private international law and the law of international procedure. It is likewise possible that the issue is rendered more complicated by the problem of jurisdiction which constitutes the preliminary question of all competences. There are states where this problem is regulated by the rules of private international law (common law, French law).[17] In countries where such a regulation prevails it may arise that jurisdiction cannot be stipulated by means of private international law — and this applies also to the convention on the *forum* — under the terms of the Uniform Laws. Thus, in countries where no difference is made between private international law and the law of international procedure or, alternatively jurisdiction is regulated by private international law the same position is encountered as in cases of conflict between the convention on conflict rules and the conventions on sale (*supra* point 3): the *forum* is precluded and allowed by equally strong sources of law.

In countries however where the April 15, 1958 convention would be susceptible of operation it would assume a practical significance. If namely a litigant wants to make himself secure as to the application of the two conventions on sale in his lawsuit he may attain this objective, as follows from the aforesaid, *either by stipulating the application of the two conventions or agrees to selecting as a f o r u m the country of which is a party to the conventions on sale.* In the latter contingency he will not be secure unless his own and the other party's states are parties to the April 15, 1958 convention: it is only in this way that the stipulation in respect of the forum will on all accounts prevail. It should however be added that if the Uniform Laws operate by virtue of a

[17] Szászy, I.: *Nemzetközi Polgári Eljárásjog (International Law of Civil Procedure)*, Budapest, 1963. pp. 32—33; Réczei discusses the problem of jurisdiction in detail in the part on private international law, but deals with it also in the part on the law of international civil procedure; in addition he points out to what an extent are clear lines of division lacking in respect of the two spheres of law (*Internationales Privatrecht*, Budapest, 1960. pp. 125—138, 422, 424—425).

stipulation by the parties, under the terms of Article 4 provisions of the former which would be conflicting with the mandatory rules of the law applicable in absence of a stipulation, shall not prevail.[18] Should the parties have agreed on the *forum* only the rules of the Uniform Laws shall be applied as municipal legal rules of the *forum* which preclude the application of the conflict rules of private international law, in other words operate irrespective of the mandatory rules of the law which would otherwise be applicable. *Therefore the purpose is better served by stipulating the forum and that is why the April 15, 1958 convention becomes of a timely significance.*

8. The following issue arises in this context. Private international law rules refer to the law of such a country which has ratified the Uniform Laws and the transaction is governed by the former. In such an instance it will be the Uniform Laws which will be the applicable municipal law.

The first question which should be raised at this juncture is whether an insoluble magic circle does not come into being: the conflict rule of private international law refers to a municipal law under which private international law conflict rules must not be taken into account. I don't think that this would be the case. In such a contingency the Uniform Laws are applicable not on the strength of the Hague conventions, not as the substantive law of the *forum* but according to the rules of private international law just like any other municipal law. But after having been applied the provision which precludes the application of the conflict rules of private international law will prevail subsequently in a way identical with other provisions of the Uniform Laws; when the Uniform Laws are applied the conflict rules of private international law can be resorted to again only insofar as explicitly allowed under the Uniform Laws.

Another question is in what way do the Uniform Laws operate in such cases. The answer is obvious: in a way identical with such of a foreign law applied by virtue of the provisions of conflict rules. This is tantamount to saying e.g. that a foreign law is applied by the *forum* and therefore – although such an occurrence is very rare in the sphere of international sale – the issue of public policy or the preclusion of the application of mandatory rules may arise.[19]

9. The conventions on sale took into account the opposition of those countries which had already adopted the June 15, 1955 convention on conflict rules. Such states are enabled under Article IV. of both conventions on the substantive law of sale to make a reservation to the effect that the two Laws shall not be applicable unless these shall be applied *as a result of the conventions on conflicts being applied.* In such a contingency the application

[18] TUNC, op. cit. p. 36. In this context private international law conflict rules become relevant.

[19] See RÉCZEI, L.: op. cit. clause 76.

of the Uniform Laws is governed not by the law of the *forum* but by whether the law applicable to the sale by virtue of the convention on conflicts will be that of a state which has adhered to the two Laws on sale. In such cases therefore the uncertain *forum* is replaced by the law defined in the convention on conflict rules and known from the outset.

All these notwithstanding this solutions also is laden with certain disadvantages which are pointed out by *Zweigert-Drobnig*.[20]

When all the above are considered it is most likely that the conclusion will be arrived at that to make use of the reservations allowed under Article IV would hardly serve a useful purpose.

Gaps in law, construction and self-regulatory character

10. By precluding the application of private international law conflict rules the framers of the conventions intended, on the one hand, to eliminate a link from the process of establishing the law to be applied: it should be directly the *lex fori* and not the conflict rules of the *forum* which should serve as a guidance for the decision. Another objective was to secure a self regulatory character: *the ULIS should suffice as a source of law in itself*. This ambitious effort is highly respectable and indispensable too for when the Laws are transformed into the municipal law of states it may happen that the legal system into which they have been included will, in the course of practical application assimilate them, will absorb the foreign body whereby the Uniform Law will cease to be uniform; such an effect of assimilation is well-known when foreign law has gained *reception*, a process somewhat similar to the one now discussed ("interpretation belge du code civil" — Belgian interpretation of the Civil Code). The danger in this respect is much larger than e.g. regarding bills of

[20] The main disadvantages are:

a) The definition of sale contained in the convention on conflict rules on the one hand and in the Uniform Laws on the other is not identical. The applicable law has thus to be decided upon twice. It may occur that the transaction comes under the operation of the convention on conflict rules, the *conflict rule*, in turn, refers to a country where the Uniform Laws have been enacted but the latter cannot be applied because the *transaction* does not come within the operation of the Uniform Laws;

b) the inclusion of the convention on conflict rules may lead to the result that in respect of one part of the contract the Uniform Laws, in respect of another part another law shall be applied. If the ULIS is the seller's law but it is not the law of the place of performance, disputes connected with inspection, contestation, placing at disposal shall come under the application of the law of the place of performance and not of the place of inspection, etc. as laid down in the ULIS;

c) if the ULIS was enacted in a country, under the provisions of the convention on conflict rules these shall be applicable to export but to import only in the event if the partner's state is also a party to it. In other words although the incidental nature in respect of the *forum* will entail no consequences but often two different laws shall be applicable to export and import respectively;

d) in the event the convention on conflict rules has been included the Uniform Laws shall be applicable by *fora* for which these laws are foreign law. And it can hardly be doubted that the *forum* knows its proper law better than a foreign law. (ZWEIGERT-DROBNIG, op. cit. pp. 157—159.)

exchange or carriage by rail (see point 19 below). At the same time there is something in the efforts to attain a self-regulatory character which reminds us of the endeavours of Justinian and Napoleon to stop the clock, to bar the continued evolution of the material of law.[21] It is a very exacting problem to transplant provisions drawn up on an international scale into different legal systems while trying to preserve their homogeneous character.

The issue is of an importance in the first place from the aspect of *filling the gaps of law* and, in general, the *construction of law*. Explicit provision is found only in respect of filling the gaps of law and only in the ULIS at that; the convention on the Formation of contracts does not contain a rule of that kind. According to Article 17 of the ULIS as regards gaps of law the basic principles on which the ULIS is based shall be observed when a problem of a legal gap arises.

This provision has been subjected to many criticisms and a great number of suggestions have been put forward to solve the problem.[22] The proposal submitted by the representative of the German Federal Republic according to which when a gap in law is found still the law as laid down in the private international law conflict rules should be applied could hardly be accepted because an additional nest of litigation would be brought about in respect of the question whether there is a gap in law, in other words whether, despite the overall prohibitive provisions private international law can be resorted to: the problem should, in fact, be solved within the framework of the ULIS. The solution selected is however not a fortunate one. There are namely no explicit basic principles laid down in the ULIS; moreover there is no legal system laid out in the background of the ULIS from which such principles could be inferred: the ULIS is a law built up and abstracted from many legal systems. It would e.g. be difficult to conceive how the problems connected with the rate of exchange between the currencies of the bargain and of the settlement (monnaie de compte and monnaie de paiment) could be deduced from the basic principles of the ULIS (e.g. what rate of exchange should be relevant at a given date); there are namely no provisions found to that effect and it is held by *Kahn* that usages have not assumed a distinct pattern in this respect.[23] Under such conditions the demand for referring back to the "general principles" of the ULIS would almost necessarily result in the *forum* making its own conception of law prevail whenever a gap in law is ascertained. If the pro-

[21] As to the self-regulatory character see the debate between Knapp and Tunc, *The Sources of the Law of International Trade*, ed. Schmitthoff, London, 1964. pp. 276—277. The stand adopted by SCHMITTHOFF in favour of the self-regulatory character see in this note op. cit. p. 34, and op. cit. in n. 6 at 564, 568; as to the sceptical view adopted —in my opinion for good reasons—see MÁDL, F.: *Foreign Trade Monopoly—Private International Law*. Budapest, 1967. pp. 111—114.

[22] A survey is given by RIESE, op. cit. pp. 30, 31.

[23] The lack of regulation is objected to by KAHN, op. cit. p. 723.

posal submitted to the Hague conference of 1964 were adopted in which it was suggested that a rule similar to that laid down in Article 1 of the Swiss Civil Code is required it would lead to the same result. Perhaps the proposal submitted by the Hungarian delegation would be susceptible of reducing the danger of divergent practices: it was proposed in it that the gap in law should be solved by means of *analogia legis;* in such instances the key to solving the problem should be sought for in a rule of the ULIS. This solution would not be a perfect one either because in cases of a gap in law no such provision could always be found with which the case not regulated by law were analogous (e.g. in the sphere of the Formation of contracts the "public offer"; see point 17/a below or the problem of prescription).

Filling gaps in law and construction can, in principle, be effected in three ways:

a) on the strength of the Uniform Laws;

b) on the strength of the law applicable by virtue of private international law conflict rules, and

c) as the conventions on sale are transformed into the municipal law of the *forum*, on the strength of the latter's law.

The solution based on conflict rules is precluded under both Laws on sale save three specified categories of cases. Moreover the *lex fori* is precluded under the ULIS in cases when there is a gap in law. None of the Laws contain provisions on the interpretation of law, only on the construction of the declaration to contract; the Formation of contracts does not provide for cases of gaps in law either.

The consequences involved by this solution are not fortunate in every respect.

a) It may happen that both the *lex fori* and the Uniform Laws as well as the law provided for by the conflict rule may come up in one and the same question (see point 16 below). This is however an exceptional contingency: to disregard conflict rule in respect of legal gaps and construction is completely justified.

b) Private international law may be asserted also in another way. Should the law not contain a reply to a question the three possibilities may appear in these forms:

aa) the problem does not come within the orbit of legal regulation in which case private international law shall prevail,

bb) there is a *gap in law* in which case Article 17 of the ULIS shall be applied or

cc) a problem of *construction* has arisen and for want of a relevant provision there is hardly any other possibility but a construction in accordance with the legal conception of the *forum* for the conflict rules of private international law cannot be applied while explicit provisions relate only to gaps

in law.[24] The borderline is everywhere uncertain. Matters *explicitly excluded* by the law (disposing capacity, invalidity– Article 8. ULIS) do not come within the scope of the Law's regulation. What is the situation when it is laid down in the protocol of the conference that the problem of the "public offer" has been deliberately left open in the Formation of contracts (point 17a below)? Does "public offer" not come within the regulation by the ULIS and is it governed by private international law rules? Or is it about a gap in law? Or is it about the very interpretation of the provision on the "adequate precision" of the offer? In certan instances the possibility of bringing action for damages is assured in the ULIS but of course it cannot be demanded that the entire field of damages be regulated by it. Does contributory fault fall outside the scope of the ULIS, is it a problem of a gap in law or one of construction? The same question might be raised in respect of the Formation of contracts with regard to the time and place of the formation of contracts. It might also be asked whether – apart from the scope of regulation contained in Article 49 — prescription does fall outside the regulation of the ULIS or should that be considered a gap in law.

It may be a reassuring fact in this complicated ramification of problems that it will be the *forum* which will *classify* such situations and it will obviously make efforts toward effecting a classification in which its own conception of law could be asserted, in other words it will see a problem of construction involved in instances where a party claims a gap in law to be extant or alleges that the problem does not come within the regulation of the ULIS. Legal disputes however will nevertheless be arising. In any case it would have been more helpful to do everything to attain a *solution as uniform as possible* in respect of the three categories of cases which are difficult to delimitate.[25] Matters *excluded* from the scope of the law's regulation (which is tantamount to saying that involving the application of private international law) should have been considered *only such* which are *explicitly excluded* from its sphere of application by the Law itself and a *uniform solution should have been found for filling gaps in law and for construction.* In case the legislator has adopted a different course of action the preclusion of applying private international law conflict rules in filling gaps of law will be of no avail: whether a gap in law does or does not exist will remain a substantial issue to be decided in the course of the litigation.

[24] GRAVESON—COHN—GRAVESON write that British courts just as courts in other countries do, will apply their own traditional rules of construction in respect of the Uniform Laws; they disagree with TUNC who holds that the operation of Article 17 extends also to the construction. (*Uniform Laws on International Sales Act 1967.* London, 1968. pp. 5, 9.)

[25] GRAVESON—COHN—GRAVESON point out that the solution adopted in the ULIS will lead to the result that the law applicable to the contract will split into parts in which private international law is not applicable and in which it must be applicable (15).

c) It has already been pointed out that gaps in the ULIS could hardly be filled by resorting to their general principles which are in any case non-existent. Were such general principles be available the legal conception of the *forum* would have a part to play also in the construction thereof. I am inclined to say that the difference between filling gaps in law according to the "general principles" of the ULIS on the one hand and the *lex fori* on the other will be merely that in the first instance the conception of the *forum* in the second one the *lex fori* will be governing which is practically not a very wide difference. For this reason the practical significance of the objection raised in point *b)* above will be reduced.

From all what has been said I would conclude that the ULIS *will fail to assume a self-regulatory character.* What is achieved by both laws is that in respect of *construction and in the last resort practically also of filling gaps in law it is not the law determined by the law of conflicts but the lex fori or at least the forum's conception of law which will prevail.* In this context such problems strongly coming within that of interpretation, in addition to the above should be recalled – although these concern rather interpretation of contracts – like assessing engagement by offer (point 15/b below) the preclusion of the ULIS in an implied manner (point 11/a below).

Referring back to the *lex fori* and the *forum*'s conception of law is, in my view, a more conducive solution in cases of filling gaps in law and construction than if the *forum* were bound to fill gaps in law or to effect construction by resorting to a foreign law (one determined by conflict rules). The opposite case would result namely not only in bringing about a nest of litigation but it is more difficult for the *forum* to *effect construction* than *to apply* a rule on the ground of foreign law. What, however, was meant to be achieved in the ULIS – the self-regulatory character – has not been solved for it is *insoluble.* The laws on sale are included, by virtue of the conventions, within municipal laws, whereupon Article 17 of the ULIS strives, at least in cases of filling gaps in law, to isolate these within the body of municipal laws. It may be assumed that the same endeavour might be pursued in respect of the construction although this is not explicitly laid down.[26] This important effort is however bound to be a failure. *The forum's activity in construction and filling gaps in law must inevitably lead to the result that the Uniform Laws after having become parts of the municipal laws will be coming under the attraction of the lex fori, the legal conception and general practice of the forum.* The Pyrrhic victory of *Ehrenzweig* mentioned before is not so Pyrrhic after all.

This process can be slowed down but it can hardly be prevented from going on. This danger is recalled by *Schmitthoff*[27] *and Malintoppi*[28] in no un-

[26] It is worth while noting that contrary to it CAEMMERER speaks on one occasion (point 17/a below) of a construction according to the law of the *forum.*

[27] SCHMITTHOFF, op. cit. in n. 6, pp. 566–567.

[28] MALINTOPPI, in: op. first cit. in n. 21, 127 et seq.

certain terms. Both of them suggest various proposals with a view to avoid divergent constructions. In recent British practice a principle of construction has struck root – particularly in connection with the bills of lading – according to which when international business transactions are concerned foreign laws shall be taken into account in the course of the construction. All these notwithstanding the homogeneity in principles constituted by the Uniform Laws will be followed by certain divergencies as to details – a conclusion in *Graveson–Cohn–Graveson* which is very likely a correct one.[29] I am also of the opinion that after the elapse of a longer period an application of the Uniform Laws coloured with a certain national tinge has to be reckoned with. This fact has to be stated without inferring from this a condemnation of the method pursued in the Uniform Laws. *Unification of law can, even by applying the most perfect method, the Uniform Laws, only come close to what is meant by it which is not tantamount to diminishing the necessity of efforts aimed at the unification of law wherever the conditions thereof are extant.*

Subsidiary character

11. The subsidiary character of the Laws is opposed to the efforts aimed at achieving a self-regulatory character both as regards contractual stipulations and usages. The first – the permissive nature – is completely justified. As to the preferance of usages it is based on real grounds: business circles would be reluctant for obviously well-founded reasons to accept a uniform law which would impair the validity of usages. Still it is remarkable that while both Laws on sale go to extreme lengths in discarding the impact of the conflict rules and substantive law rules of municipal laws, wide opportunities are provided for the operation of permissiveness and usages. As very energetic efforts were made in order to protect the laws against the impact of private international law and the assimilating tendencies inherent in municipal laws the introduction of the twofold subsidiary nature displays an indifference as to what an extent the rules thus protected will in fact prevail. As far as the concrete solutions regarding permissiveness and the role played by usages are concerned the objection may be raised that these *diminish the possibilities to foresee the law to be applied* and may result in an uncertainty in law.

a) Declaring the ULIS *permissive* (non-mandatory) (Article 3) results in uncertainty on account of the provision that – contrary to the convention on conflict rules of June 15, 1955 and the 1963 draft of the ULIS[30] – in order to protect the autonomy of wills of the parties preclusion of the application

[29] GRAVESON–COHN–GRAVESON, op. cit. pp. 5, 27.
[30] See CAEMMERER, in op. first cit. in n. p. 3, pp. 318–319.

in part or *in toto* of the ULIS in an *implied* manner is allowed. This state of affairs may bring about a nest of litigation, may be susceptible of excessively extending the opportunities of construction for the law-applying organs and the impact of the construction practice pursued by the *forum* and detrimental to the unity of law.[31]

b) The problem of *usages* is caused by para 2 Article 9 of the ULIS and the convention on the Formation of contracts Article 13.[32] It is pointed out by *Katona* that the extent of the area where a usage prevails is frequently uncertain; diverse usages may evolve in one and the same area in respect of one and the same commodity; moreover it cannot be known whether the usage adopted in the place where the contract has been made or where the performance is due shall be applied, etc. The rules mentioned above may also result in a situation where usages prevail against the Laws on sale even if the parties have failed to refer to these or when these had been unknown to them.[33] This contingency, besides giving rise to uncertainties, may be a source of unpleasant unexpected events being beneficial to the stronger party which has a more numerous staff trained in law and which is constantly present on the market as a long-established firm. This rule appears to be particularly dangerous for the developing countries. Therefore what *Tunc* says and he is basically right – namely that the Uniform Laws are valuable particularly for economically weeker enterprises because it suffices if only two legal systems, viz. their own and the Uniform Laws are taken into account can only be accepted with certain limitations.[34] As provided in the Laws on sale such parties have to be familiar with the complicated problems of the usages as well.

The solution adopted in respect of permissiveness and usages is *basically correct but operates in an avoidable manner against the unification of law; it diminishes the chances to foresee the applicable law; the stronger party benefits from it.*

The chances to foresee the applicable law; summing up

12. The chances to foresee the applicable law are thus diminished by the following considerations:

a) whether the Uniform Laws shall be applied as governed by the *lex fori*,

b) departure from the Laws can be effected by an implied "stipulation",

c) usages can be applied even without the parties being aware of these,

[31] The difficulties to be expected in this connection are pointed out also by DE WINTER, op. cit. p. 278.

[32] Op. first cit. in n. 16, Vol. I. pp. 34–35, RIESE, op. cit. pp. 21–22, KATONA, op. cit. pp. 184–185, BERMAN, H. J.: in: 30 Law and Contemporary Problems 2/1965. pp. 354–369 at 336 n. 3.

[33] KATONA, op. cit. pp. 184–185.

[34] TUNC, op. cit. p. 4.

d) in cases of gaps in law decision within the scope of the ULIS has to be reached on the ground of general principles which are non-existent.

I must however point out that in instances listed under points *a)* and *d)* every other solution would also entail disadvantages while in instances listed under *b)* and *c)* the solution is basically correct but extends to a wider sphere than would be the best. In my view there are *more arguments for precluding the application of private international conflict rules than against:* resorting to private international law provided a greater security only in case the convention on conflict rules of June 15, 1955 were adopted by a great number of states but this eventuality would also involve additional problems: in the field of construction the position would deteriorate insofar as the *forum* were frequently forced to fill gaps in law and to effect construction on the ground of a foreign law with which it is unfamiliar. *However, within the scope of permissiveness (non-mandatory character) and usages not the best possible variant was selected, within the basically correct solution.*

IV

Issues of content

General characteristics of the ULIS

13. The problem has been discussed up to now in an abstract way, irrespective of the content of the Uniform Laws. But it is obvious that great many things depend on matters of content: it may occur that solutions adopted in respect of content will offset the detrimental effects of the operation of the Uniform Laws; it may occur that such solution will impair their advantages or enhance the advantages or increase disadvantages.

It is held by *Tunc* the the ULIS "is less a work or compromise than a work of choice and creation"; efforts are directed not toward reaching a compromise between legal systems but toward finding the best solutions possible.[35] According to *Kahn* though the ULIS is a bit complicated it bars the way of the stronger party's law being asserted, it contains in a well-balanced proportion old and new solutions, it is characterized by a fair deal; it is equally susceptible of serving the purposes of the trade between developed and developing countries as well as between socialist and Western countries.[36] *Caemmerer* quoting *Rabel* – says that the ULIS is an attempt to attain up-to-date solutions by means of precise researches into comparative law which are acceptable for all legal systems.[37] *Riese* writes in a paper on the 1956 draft that the framers of the Laws did not put mosaics together but were striving

[35] TUNC, op. cit. p. 8.
[36] KAHN, op. cit. p. 727.
[37] CAEMMERER, op. cit. in n. 29, 331.

to amalgamate the frequently obsolete and rigid rules of various municipal laws in a unity of higher level;[38] in his paper on the ULIS he states with satisfaction that almost all demands of the German Federal Republic have been acceded to and that the ULIS strikes a proper balance between sellers' and buyers' interests.[39] On the other hand the ULIS is unequivocally rejected by American authors; this is done by *Honnold* in a polite way while *Berman* and *Nadelmann* use a rather strong language. The stand adopted by Great Britain is best shown by the fact that she enacted the ULIS with a reservation — made possible upon British proposal — that the ULIS cannot be applied unless explicitly so stipulated. The Scandinavian countries who are content with their regional solution and the June 15, 1955 convention on conflict rules and whose laws are close to the common law in several respects have adopted a negative stand.

It may be clear from this survey that the *ULIS pursued codification methods prevailing in countries of the continent (among others, in Hungary too) and a major part of the solutions adopted in it was attained under the impact of continental patterns among Western laws.* It is another question how substantiated are those statements according to which the ULIS secures equal opportunities for financially solid big enterprises well-established in the market in their trading with weaker partners.

The overall statement may be made of the solutions that, as far as their origin is concerned, they may be divided into four groups:

a) solutions of a *substantially general acceptance,*

b) solutions of a *novel* type (mainly the structure of the breach of contract, the concept of conformity, the preclusion of impugnment on account of error in cases where for want of conformity action can be brought for breach of contract, separation of the transfer of risk from the transfer of property etc) the considerable part of which as will be seen are rather near to the solutions adopted in the new socialist Hungarian law,

c) the taking over of an institution of *a municipal law* [e.g. the *(Nachfrist)* supplementary time limit known also in Hungary or the French *stoppage in transitu*].

d) making possible in very exceptional instances that the *forum could apply a solution in conformity with its proper law* (the *forum* decrees a specific performance only within the scope in which it is made possible in respect of sales not regulated by the ULIS by its law otherwise applicable; Article 16, Convention Article VII).

Katona made the comprehensive statement of the 1956 draft that "despite its numerous shortcomings it is a work which may be susceptible after including several amendments and polishing its wording of providing

[38] Riese, 21, Zschr. für ausländisches und internationales Privatrecht 1/1957.19.
[39] Riese, op. cit. in n. 10, p. 100.

a basis for the unification of the law of international sale on a wide scale"[40]. This statement holds, in my view, to an increased extent in our days.

In the following the principal solutions regarding the content of the two Laws will be reviewed.

The scope of transactions coming under the operation of the Uniform Laws

14. The first set of problems which will be dealt with is the scope of transactions covered by the Uniform Laws.

a) It is of course a requirement in both Laws that the sale contain some international element. But it is rather difficult to grasp constituents of an international nature. Still, the solution adopted may be said to be a fortunate one. Its substance is that *one of the three objective elements has to be extant in conjunction with a subjective one.* The subjective element which is indispensable for the application of the Laws on sale is that the registered offices or in default of such the places of residence of the two parties must be in different countries; the nationality of the parties is however irrelevant. The objective elements of which only one must be present together with the subjective one are as follows:

aa) the goods must be delivered from the territory of a country to the territory of another one at the time of making the contract or thereafter,

bb) making the offer and declaring acceptance must be effected in the territories of different countries,

cc) the place of performance must be a country other than the one where the offer was made and acceptance was declared respectively (para 1—2 Article 1.). In my view this solution can be accepted (but see the next sub-clause).

b) No difference is made in the two Laws between *commercial* sale and *civil* law sale (Article 7 and para 8 Article 5). This is only natural for there are states the law of which has not adopted this differentiation and in laws where this differentiation is known the line of division between the two kinds of sales is drawn in a different way.

This solution however is still susceptible of causing problems in respect of transactions by private individuals. This presage was expressed at the Hague conference where it was proposed by the delegation of Norway that sales serving directly the purposes of private consumption should be exempted from the operation of the two Laws.[41] Even if this proposal had been accepted it would not have served the elimination of the problems. What I have in mind are the purchases of small value encountered in connection with the steadily expanding tourist trade. Tourists buy goods ranging from souvenirs, consumer goods to articles needed for economic activity and these purchases

[40] KATONA, op. cit. p. 175.
[41] Op. first cit. in n. 16, Vol. I. p. 33.

are made mostly occasionally. In respect of such purchases the registered offices respectively the domicile of the parties are also different and usually the criterion exists too that the article bought is carried into another country.

It would hardly be useful if in respect of such purchases the Uniform Laws were to be applied. The parties are not always aware that the subjective condition mentioned before is extant; I must refer in this context to the purchases in Hungary made by the large number of Hungarians living abroad. It is not always known whether tourists intend to carry abroad the thing bought; it is open to argument e.g. whether it is tantamount to carrying the thing abroad, if a person buys a pullover on his trip and makes the return journey a week later wearing the pullover. Apart from the great uncertainty prevailing at the time when the contract is made it is questionable whether it is a practical solution to set into motion the machinery of the Uniform Laws in such instances: the rules contained therein are made basically to fit trading and the proverb namely that he who goes to Rome shall live like the Romans do apply better to the tourist trade. *An interpretation by which such purchases would be exempted from the operation of the laws on sale* (e.g. through a restrictive interpretation of "transport" and "carriage" abroad) may perhaps be conceivable. Such a practice however should be more or less uniform for which some guarantee may be found when it is assumed that states with a large tourism would in all probability be willing to adopt such a restrictive interpretation.

Additional problems may arise in this sphere if international agreements on tourism or conventions on judicial aid contain conflict rules for such instances. Under such conditions all the problems outlined in point 3 above will arise with the difference that in this context it would not serve the purpose to accord priority to the Uniform Laws.

c) The scope of transactions covered by the operation of the two Laws on sale is in any case wide. This scope includes e.g. hire-purchase contract, a sale on return, purchase of things to be acquired subsequently, purchase of livestock, barter mixed with sale but not the barter agreement pure and simple.[42] The operation of the Laws on sale does not extend to e.g. the sale of currency, securities, registered ships and aircraft, electric current, sale by public authority, forcible sale.

It is particularly remarkable and of practical significance that the contract of *locatio-conductio-operis* (for the supply of goods to be manufactured or produced) also comes within the operation of the two Laws on sale excepting if the supply of a substantial part of the raw material has been undertaken by the party who orders the goods. (Article 6. and para 7 Article 5). While this extension must be approved of, one must agree with *Kahn* who draws

[42] RIESE, op. cit. in n. 10, p. 19.

attention to the difficulties in making delimitations in this context and the vague lines of division.[43] With due respect I venture to give expression to the view that the delimitation adopted in Hungarian law which is based on the serial and non-serial production of the product respectively is more unequivocal.

Performance

It appears to be warranted to point out the following in respect of performance.

a) It is an important rule of the ULIS also from the theoretical aspect that the *delivery only of goods conform with the contract is considered performance* (para 1 Article 19; as to conformity see sub-clause *b)* of the next point). Sale in default is thus a performance while a defective or faulty performance is not one. The regulation of the breach of contract and the transmission of risk fully conform to this basic rule.

b) The consequences of the fact that the transfer of ownership in trade is effected not by a single act but in instalments: in varying respects and at different dates, are drawn in the ULIS. For this reason passing of risk is not coupled with the transfer of ownership, there are no provisions on the date of the latter; it is merely laid down that the transfer of ownership is the obligation of the seller. This is effected according to the principal rule (Article 96) *in conjunction with the performance.*[44] This regulation reflects a substantial legal-technical simplification: from the chain: delivery transfer of ownership passing of risk the middle link has been left out although this is a consequence of the preceding and a basis of the succeeding link but in respect of the greater part of commercial sales it is effected stretched out in time and broken up in parts as regards partial rights and obligations. In this way when passing of risk is based theoretically on the transfer of ownership it in practice means a *phase in the process of the transfer of ownership.* Even in cases of forward deliveries the date of performance as stipulated in the contract is observed; special rules apply to the relationship between breach of contract and the passing of risk and to maritime transport. It is made clear in a section devoted to the purpose that the agreement on bearing the costs does not necessarily affect the date of the passing of risk.

Considering that under the terms of the ULIS performance shall be effected, as a rule, in the place of business or in default of such, habitual residence of the seller, in case arrangements have been made with a carrier the place of delivery to the latter, the solution, in the last analysis, is identical with the principal rule of the Hungarian Civil Code and runs counter to the rule adopted in the field of Hungarian delivery contracts.

[43] KAHN, op. cit. p. 693.
[44] TUNC, op. cit. p. 100; KAHN, op. cit. p. 703.

c) In certain instances the *right of retention* (lien) is allowed under the ULIS.

aa) Such a right is the due of the party concerned if, after the contract had been entered into, the financial position of one of the parties has become so adverse that it is to be feared that he would not be able to discharge a considerable part of his obligations. In such an instance the party concerned can avail himself of the right of *stoppage in transitu* excepting if a third party has a right by virtue of a document to dispose of the goods[45] (Article 75). In my view such a rule is useful even if it may provide an opportunity to abuse it for parties acting in bad faith.

bb) If the performance is effected by handing over the goods to the carrier the seller may postpone dispatch or surrender of goods until receiving payment excepting if the buyer is not bound to make payment until the goods are examined (Article 72). In connection with that a proposal, in my view fully warranted, was put forward by the Bulgarian delegation — and was rejected — according to which the seller should be barred from availing himself of the right of retention if the buyer has granted bank guarantee or any other security current in trade.[46] In the absence of such a rule the rule does not strike a proper balance between the interests of the parties which deserve acknowledgement and it is again the *seller* who benefits from it.

cc) It should be mentioned at this juncture that the obligation of the parties in respect of the custody of the goods in cases of a delay in receiving and surrendering goods is regulated in the ULIS in a way very similar to the "responsible custody" as known in Hungarian law (Articles 91—95). Within this sphere the right of retention is the due of the person in charge of the custody of goods until his expenses are reimbursed.

Breach of contract

16. The part of the ULIS on breaches of contract is very probably the most original one in it.

a) Cases of breaches of contract are divided into two groups within each type of contract breaches according to whether their existence renders or does not render possible avoiding the contract. Originally the basis for this solution was provided by the common-law differentiation between condition and warranty. The 1935 so-called "Rome draft" made a distinction — just as was done in common law — according to the importance of the *contractual stipulation* infringed. Subsequent drafts and Article 10 of the ULIS leaving this solution aside adopted the distinction made according to the gravity of the *breach of contract.*

[45] KAHN, op. cit. p. 726.
[46] Op. first cit. in n. 16, Vol. I. pp. 112—113; RIESE, op. cit. in n. 10, p. 78.

While the distinction adopted in common law and the Rome draft is basically a subjective one an objective standard of assessment is adopted in the ULIS (sub-clause *d)* point *e)* below). The solution is similar, if not in all respects, but from the structural aspect to the one adopted in Hungarian law. The Hungarian proposal according to which the solution would have come nearer as regards *contents* to the Hungarian one was not adopted by the 1964 Hague conference,[47] yet the bases of the solution are still acceptable. Avoidance may be justified by a "*basic*" breach of contract in the contingency where a reasonable person would not have made the contract had he known at the time of making the contract that the given breach of contract would be forthcoming. It is held in *Tunc*'s commentary that this case will arise if the breach of contract has made the entire interest of the party extinct.[48] In cases of other types of breaches of contract — observing the pattern in German law and in a way identical with the solution adopted in Hungarian law in cases of default — the unsuccessful elapse of an appropriate supplementary time limit (Nachfrist) likewise allows the parties concerned to avoid the contract.

Avoidance is thus allowed within a wider scope than in Hungarian law according to the basic solution too; it is true on the other hand that the trend of evolution in Hungary indicates the extension of allowing avoidance of contracts. The ULIS however is favourably disposed towards avoidance also in other respects. In cases of default and if the performance was attempted not in the place of performance, where these amount to "fundamental" breaches of contract avoidance will take place *ipso facto* through the seller remaining silent i.e. in the absence of his declaration to the contrary. In my view this *solution will unnecessarily increase the number of contracts coming to naught.* Hungarian proposals on this issue have not been adopted by the Hague conference in 1964 although inconsistency in these proposals had also been pointed out that no *ipso facto* avoidance is laid down in the ULIS if the goods were handed over at a place other than that fixed (Article 32). The proposal according to which the buyer would have been bound to dispatch

[47] Op. first cit. in n. 16, Vol. II. pp. 124—125; RIESE, op. cit. in n. 10, p. 22.

[48] TUNC, op. cit. p. 26; GRAVESON—COHN—GRAVESON strongly object to the formulation in the ULIS principally on the basis that it will be dependent on the situation on the market whether a reasonable person though aware of the defect, would have or would not have entered into the contract: if the situation is detrimental for him he will make allowance for major deficiencies while when the situation takes a favourable turn for him he will not enter into contract even if the defect is of a minor significance (op. cit. pp. 55—57). In my view however the question in such cases should be examined detached from the situation on the market, comparing the deficiency to the use of the defective commodity, its use as defined in law and in contract. This formula which appears to be alien to those thinking in terms of common law is opposed also by ELLWOOD, L. A.: *Some Comparative Aspects of the Law Relating to Sale of Goods*, ICLQ Supplementary Publication No. 9, London, 1964. pp. 45—46.

the goods to the place of performance at the expenses of the seller instead of avoiding the contract was likewise rejected.[49]

It should be pointed out that when there is a case of defective performance no *ipso facto* avoidance will take place. The difference is obviously rooted in the interrelation between changes in prices on the market and can be understood to that extent. In my view, on the other hand it carries the principle of *vigilantibus iura* too far which is again detrimental for the developing countries in the first place and for enterprises not having a strong staff.

But it should also be added that the stand adopted of the Hungarian delegation at the Hague conference of 1964 was successful in other respect in regard to extending the right of avoidance. As laid down in the 1956 draft avoidance would have been precluded – with very few exceptions – in cases where no *in integrum restitutio* was possible.

It was pointed out by the Hungarian delegation that the seller would gain from this solution undeserved advantages. Ultimately the scope of exceptions from the rule laid down in Article 79 was made wider to such an extent that the section appears to be acceptable in its present wording.[50]

b) The ULIS should be credited for creating a distinct category by introducing the notion of "conformity of the goods" for defective, *aliud* and faulty performance, listing in detail the cases coming under this regulation (Article 33).[51] In the event of such deficiencies and faults occuring the seller will not comply with his obligations in respect of the performance; rights reminiscent of the warranty rights *(Gewährleistung)* known in Hungary can be enforced against him. These are destined to have the performance of the contract materialized and have no connection whatever with assessing the conduct of the person who has committed the breach of contract.

Action based on the lack of conformity precludes every other claim (e.g. based on error), (Article 34). This means that the content of the contract is ascertained by means of construction and the performance effected is measured against it; the objection that one of the parties interpreted the contract differently from the construction given to it by the court cannot be raised within the scope of conformity. Within this scope declaring the contract inoperative on the ground of error instead of a claim for breach of contract cannot be demanded.[52] This is a remarkable and very practical solution; it is to be feared however that in order to narrow down the scope of the relevance

[49] Op. first cit. in n. 16, Vol. I. p. 62; RIESE, op. cit. in n. 10, pp. 39, 43, see also KATONA, op. cit. pp. 188—189.

[50] Op. first cit. in n. 16, Vol. I. pp. 133–134, 181–183; RIESE, op. cit. in n. 10, p. 84.

[51] KAHN holds that this is one of the most fruitful, original solutions in the ULIS; (op. cit. pp. 703, 727).

[52] TUNC, op. cit. p. 56.

of error it will in practice benefit again the party with a better trained staff i.e. which is financially stronger.

I think that the introduction of the lack of conformity is a valuable achievement and must be approved of as an institution. But it must also be said that the time limits for enforcing claims are excessively strict. It was the preparatory committee of the draft which came to the conclusion that the draft "imposes a harsh and sometimes unjust system" in this respect.[53] The ascertaining has to be effected promptly. The seller has to be informed of the fault immediately upon its discovery or within two years following the delivery at the latest and action has to be brought within one year reckoned from that communication (Articles 39, 49). Failure to observe time limits entails forfeiture of rights; proposals to the effect that the latter time limit be changed into a time limit for prescription and the Hungarian proposal according to which the time limit for bringing an action would have been extended to two years were rejected by the Hague conference.[54] The solution adopted, as it was pointed out by the Hungarian delegation, reduces the chances of settling disputes out of court.

c) The possibility open for the seller to draw the consequences of the breach of contract prior to the time limit set for performance (anticipatory breach) is recognized within a relatively wide sphere in the ULIS; by laying down this rule it asserts the solution following the French pattern[55] in the entire field of the law of sale which is adopted in Hungarian law in the scope of contracts of *locatio-conductio operis* (for the supply of goods to be manufactured or produced). This rule applies not only to sales in instalments (Article 75) as is the case in most legal systems but it is of a general validity. The factual disposition in the rule – contrary to the draft regulation of 1956 — is, on Hungarian and Greek proposal of an objective character[56] but includes the possibility of an advance explicit repudiation of the performance.[57] This rule applies to the case when the goods are not in conformity with the contract (Article 48) and to avoidance in general as well. It was laid down however, on French initiative, in the protocol that these rights do not imply an authorization that the seller be allowed to check the production process on the spot (and have access to production secrets).[58]

d) One of the most essential problems of the breach of contract is the assessment of the parties' conduct. The rule on this question contained in

[53] Op. first cit. in n. 16, Vol. II. p. 195.
[54] Op. first cit. in n. 16, Vol. I. p. 92; RIESE, op. cit. in n. 10, p. 61.
[55] Under common law rules in such instances only a suspension of the performance can take place instead, see KAHN, op. cit. p. 727.
[56] Op. first cit. in n. 16, Vol. I. pp. 125—126; RIESE, op. cit. in n. 10, pp. 82—83.
[57] TUNC, op. cit. p. 88.
[58] Op. first cit. in n. 16, Vol. I. p. 90; RIESE, op. cit. in n. 10, p. 60.

the ULIS is in many respects similar to the one laid down in para 1 Section 339 of the Hungarian Civil Code. A system of exculpating evidence is introduced in respect of claims of damages and on the basis of an objective standard adopted all through the law at that (para 1 Article 74, Article 10 on the assessment of the "fundamental" character of the breach of contract, Article 13 on the assessment of bad faith). This standard of conduct is centred around the assumption what could have done a *"reasonable person in the same situation"*.[59]

It should be noted, however, that the above standard results in a serious liability reaching more or less the limits of irresistible force. It was particularly the delegation of the German Federal Republic which insisted on basing liability on fault and that the principle of fault be extended to certain cases of defective performance.[60] After all the solution is nearer, as regards its content, to that adopted in common law and the Scandinavian law than to the German type and makes, as it is done also in the Hungarian law, the liability of the seller very serious. It benefits the buyers; sellers, on the other hand, can find protection in clauses precluding liability. In this way the rule is not invariably disadvantageous for sellers in strong financial position particularly if no great competition is to be anticipated and is, mostly, detrimental for sellers in weaker position. This solution — despite its being akin to that of Hungarian law — is not favourable for Hungary in all respects, for it is not likely that Hungary will avail itself of stipulations restricting liability in respect of enterprises in developing countries but she might find herself in a position where she will eventually be unable to come to such terms with companies in developed Western countries, while, on the other hand such companies may perhaps seek, when sellers, to restrict their liability.

e) As regards the *scale of compensation* the solution contains rules less exacting than those of Hungarian law: compensation is allowed in return for loss of profit only for damages which could have been objectively foreseen when the contract has been made (Article 82, 86). This regulation simplifies, within practicable limits, the very complicated problems connected with the causal relationship.[61]

I must add, however, that the ULIS cannot, of course regulate the entire set of tort-problems; it did not regulate, among other topics, contributory negligence. Among the issues not regulated it is only fraud to which a rule is applied: in such cases — exceptionally — private international law conflict rules are applied (Article 89). This regulation means no doubt that if the *forum* finds classifying according to its proper law, that a case of fraud has emerged

[59] TUNC, op. cit. pp. 82—86. The Hungarian formula " . . . acting in such a way as might generally be expected in the given situation". (Civil Code para 1 Article 339.)
[60] RIESE, op. cit. in n. 10, pp. 54—55, 79—81.
[61] RIESE, op. cit. in n. 10, p. 87.

it is bound to change over to the law determined by the conflict rule of its proper law. As far as other topics left without regulation are concerned it may be open to argument whether these are cases of construction or gaps in law; in the former contingency the *lex fori* will be taken into consideration in the latter the general principles otherwise non-existent of the ULIS. In this context the ULIS, the general substantive law of the *forum* and the law determined by the private international law of the *forum* may have a part to play and decision depends on the very difficult problems of drawing the proper lines of division.

The problems of the Formation

17. *Caemmerer* very rightly says of the Formation that, in spirit and in style, it has been prepared as supplement to the ULIS[62] although it is laid down also in a version which has a text separate from the ULIS serving the purpose that the relating convention could come under ratification apart from the ULIS. A number of its rules are nevertheless identical with those of the ULIS although, I would say, it has come perhaps to a greater extent under common law impact than the ULIS.

In the following some debated questions in the Formation will be discussed.

a) The offer must be *sufficiently precise* and must express the intention of the person making the offer that he will consider himself bound by the contract (para 1 Article 4). It appears from the protocol of the 1964 Hague conference that the omission to regulate "public offer" (displaying in shop window, installing slot-machines, transition between advertising and offer) is a deliberate one. In such cases it is doubtful whether it is about an invitation to make an offer or an offer proper. Complete uncertainty prevails on this point. *Caemmerer* holds that if a case concerns the construction of the preciseness of the offer the *forum* will construe it on the ground of its own law of purchase and the traditions of its own law[63]; should the case be one of a gap in law *Caemmerer* suggests that the law should be regarded, after the pattern of Article 17 of the ULIS, as self-regulatory.[64] I would consider the latter suggestion as doubtful: numerous rules of the ULIS are repeated in the Formation and if it is not done in respect of Article 17 of the ULIS it would be difficult to extend it to the Formation. In any case it serves the purpose better if one and the same law is applied in cases both of gaps of law and construction.

b) In respect of the *engagement by offer* a compromise solution has been reached between the common law and French groups of law on the one hand and the German, Austrian, Swiss and the Socialist groups of law on the other.

[62] CAEMMERER, 29 RabelsZ 1/1965. pp. 101—145, at 111.
[63] CAEMMERER, op. cit. in n. 62, pp. 117—119.
[64] CAEMMERER, op. cit. in. n. 62, p. 107, pp. 119—122.

According to the former group, an offer cannot have a binding force unless an explicit undertaking has taken place and according to the second group, engagement by offer must be based on the Law but preclusion must be allowed.[65] Finally the principal rule adopted in Article 5 became that offer can be withdrawn until acceptance has been declared but due to the subsequent system of multiple-stage exceptions this rule has become modified to a point where it has become acceptable for Hungary. Engagement by offer results from a declaration made by the person making the offer to that effect — but the making of such a declaration may be inferred from the circumstances, the preliminary talks, the practice pursued between the parties and from usages; in addition, offer cannot be withdrawn in bad faith and contrary to "fair dealing". As it is seen the exceptions are in principle unlimited for a *forum* the law of which adopted the engagement by offer; wide divergencies may be expected to occur in pratice regarding this issue in consequence of the divergencies in the legal conceptions of the *fora*. It may be assumed that there will be borderline cases where engagement by offer will be found by a Hungarian and the absence of it will be found by a British court.

c) Acceptance may be effected, according to the general rules, in any manner but the *dispatch of the goods* is considered an acceptance only in the event if it can be inferred from the offer, the practice pursued between the parties and the usages (para 2 Article 6). This rule which appears in Hungary unusual is justified by the assumption that it would be unsafe for the buyer if he were bound to bear the risk of a destruction of the goods during transport although being unaware of the making of the contract; and it would be detrimental for the seller if he were informed of a deterioration in the buyer's solvency and were thus unable to make dispositions about the goods already forwarded.[66] It is my impression that the rule which recognizes the most expressive conduct referring to acceptance namely acceptance of the offer by accomplishing performance, within narrow limits is related to the attitude against engagement by offer. If namely the starting-point is adopted that the person who has made the offer is bound by it it will be practically immaterial that he bears risk although unaware of the contract having been entered into.

Such a knowledge is in any case irrelevant as regards bearing risk in respect of goods during transport. Besides a great uncertainty may prevail also in the decision of the question whether the dispatch of goods should or should not be qualified as an acceptance.

d) Under para 2 Article 7 in the event when the *acceptance is at variance with the offer on insignificant points* the contract will come into being with a content changed in this sense unless the person making the offer has promptly protested. The Hungarian delegation took a resolute stand at the Hague con-

[65] CAEMMERER, op. cit. in n. 62, p. 107, pp. 119–122.
[66] CAEMMERER, op. cit. in n. 62, p. 124.

ference against this solution but without success; the conference rejected moreover the proposal that the person accepting the offer be bound to draw attention to the divergence. Apart from the gist of the rule it will often be difficult to decide whether the divergences contained in the acceptance are essential. We have serious reservations in regard to that rule.

d) The solution of the issue connected with *belated acceptance and acceptance arrived late* (Article 9) is correct from the aspect of legal dogmatics but in certain instances it is not satisfactory from the practical point of view. If the person accepting the offer has come to be in default the contract will this notwithstanding come into being on the ground of a *declaration made by the person who has made the offer.* If on the other hand an acceptance forwarded in due time arrives late the contract will come into being if the *person making the offer does not make a declaration in the contrary sense.* No particular detrimental consequences were to follow from this regulation could the time limit always be known within which a reply ought to be sent to the offer e.g. after the elapse of how long period ought the forwarding of the acceptance be qualified as belated. The situation is however different. According to the Law the reply shall be made, in general, "within a reasonable time". Now, should the person accepting the offer believe that he has forwarded his reply "within a reasonable time" while the person making the offer believes that it has been made past the "reasonable time" and the latter observes silence, the person making the offer believes that no contract has been made while the guileless person who has made the acceptance is convinced that a contract did come into being and it may happen that such a misunderstanding will come to light only when performance is attempted. It was for this reason that the Hungarian delegation proposed at the 1964 Hague conference that the person making the offer be bound to make a declaration in every doubtful case and that his silence be qualified an "acceptance" of the declaration which has reached (or so he thinks) him belatedly. In my view this proposal would have led to satisfactory results in every respect; it was admitted at the conference that the solution adopted in the Law might involve unfavourable results as described above but the proposal was not adopted.[67]

Summing up

18. By way of a summary it may be said of the two Laws on sale that

a) these are acts of legislation of a high level, which successfully amalgamate solutions adopted in different legal systems, prudently formulated, of an up-to-date nature introducing innovations in a careful manner and do not contain such provisions which would be utterly unacceptable for Hungary;

b) more than one solution contained therein is similar at least in its structure or outlines to the ones adopted in Hungary;

[67] See on the problem: CAEMMERER, op. cit. in n. 61, p. 130.

c) some of its solutions may be objected to principally for the reason that these let, unintentionally, the party which has a better trained staff, in general the financially stronger one to gain in practice a more favourable position than the less developed ones furthermore because in several instances they contain provisions over and above the unavoidable degree, which are vague, unforeseeable, give rise to nests of litigation and may jeopardize the prospective uniform practical application of the uniform laws.

V

Integrating the uniform laws with the national laws

Double commitment

19. The Laws on sale become, after the relating conventions have been ratified, parts of the municipal law. The issue what problems are thereby involved in the field of securing uniform international judicial practice, in other words preserving the unification of law has already been dealt with. (see point 10 above). Now it will be discussed what does the internationally uniform nature mean from the aspect of national legal systems. The two aspects are namely mutually contradictory: *the more successfully is unity of law upheld the less it will be possible to preserve the unity of national legal systems.*

20. Integrating a law prepared on an international scale seeking to bring the world's legal systems into harmony with the national laws must invariabely involve certain problems. The magnitude of these problems is in direct proportion with the degree occupied in the centre of the national legal system of a legal institution. The more it is embedded in the latter and the more special solution had been adopted earlier in the given national legal system in the given question the more this problem becomes greater.

As far as the latter aspect is concerned: there is a certain uniformity encountered in the world's legal systems in regulating sale because it concerns the most typical expression in law of the commodity-money category and international trading has brought about a certain nearing of the national laws. This kind of certain uniformity — insofar as it exists — is found rather in the practical solution of the problems and less in the legal-technical process leading to practical solutions. Rules laid down in Codes display many divergencies in the sphere of sale as well.

As to the first aspect: the difficulties are even greater in this field. Ratification of international conventions on bills of exchange and cheques is made easier by the fact that these two institutions are special to such an extent, that they require a system of rules rather close in itself which has relatively few connecting points with other sectors of the legal system (e.g. the general rules of the law of obligations). This fact may render possible that

the Uniform Law be the *single* regulation in a given country on bills of exchange and cheques. The position is quite different in respect of sale. Sale is a legal institution of fundamental significance applied on a large scale in everyday life which is tied with numerous links to the legal system; moreover the general part of the law of obligations has had a very great regard for sale from the very first. In this field it is hardly possible that the Uniform Laws on sale become a law governing sales other than international, become the exclusive law of sale.

The situation thus evolving is not very desirable from the aspect of the unity of national law. Looking at the matter from this aspect an internationally unified law will become a foreign body in national legal systems and one and the same state will have two regulations in respect of a legal institution of central importance: one on international and one on domestic relationships.

21. Another problem is that it is conducive if in respect of Uniform Laws, become part of the municipal legal system, the more or less uniform international practice is maintained. Uniform Laws will thereby assume a *double commitment.* It is not only that *two kinds of regulation* prevail in respect of a single field of law but also that the uniform law becomes the subject of an *attraction in two directions.* It will become a problem e.g. to what degree can *the basic principles, general rules governing contracts laid down* in the introductory part of the Civil Code and *other parts of the legal system relevant for sale be resorted to* when the Uniform Laws are applied. Will municipal legal systems serve as mere *repositories* for laws unified on an international scale or will these strike root in the municipal legal systems? The first contingency is unfavourable for municipal legal systems the latter one would bar the way of upholding the unification of law. In all probability we are witnessing the *emergence of a legal material containing rules closed in themselves which is isolated from other sectors of the legal system the construction of which is this notwithstanding effected in conformity with the legal conception as evolved in municipal legal systems.*

22. If therefore the matter is viewed *exclusively* from the angle of municipal legal systems sale can hardly be susceptible of being a subject of a unification of law of such character. The aspect of municipal legal systems, however, is not the sole one and although it is not devoid of certain significance it would not be right to attach an exclusive importance to it. To facilitate international trading is an aspect which may warrant, under given circumstances, the undertaking of disadvantages and problems, mentioned before, connected with the coherence of municipal laws.

Les Conventions de La Haye de 1964 concernant la vente internationale des objets mobiliers corporels

Gy. Eörsi

L'étude commence par l'explication du fait qu'il n'y a aucune contradiction entre l'unification régionale et universelle du droit, entre l'unification des normes de collision et du droit de fond ainsi qu'entre l'unification du droit au moyen d'usances et lois. Dans la suite elle expose les avantages et les inconvénients résultant de l'exclusion des normes de collision; soumet à un examen critique la solution adoptée par les Conventions de La Haye au sujet de la lacune de droit et de l'interprétation. L'auteur désapprouve la possibilité d'une exclusion toutes les lois ainsi que l'application des usances même au cas où les parties les ont ignorées. L'étude donne ensuite une appréciation générale du contenu des Conventions de La Haye, pour passer au traitement des problèmes des contrats tombant sous le coup des Conventions et de ceux de l'exècution, de la rupture et de la conclusion des contrats. L'étude met enfin en relief de la contradiction consistant dans le fait, que plus la sauvegarde de l'unité internationale de la législation est réussie, plus difficile est de conserver le caractère homogène du système de droit national.

О Гаагских конвенциях 1964 года по международной купле-продаже

Д. ЭРШИ

Автор прежде всего раскрывает своё мнение о том, что нет противоречий между региональной и универсальной унификацией права, между коллизионными нормами и унификацией материального права, а также и унификацией права путём обычаев и путём законов. Вслед за этим он анализирует преимущества и трудности, вытекающие из исключения коллизионных норм, критикует решение гаагских законов по вопросу пробелов в праве и толкования, и выражает своё несогласие с тем, что эти законы могут быть исключены даже и молчаливо, и что юзансы (usance) могут осуществляться вопреки законов даже и в том случае, если стороны о них и не знали. После этого статья дает общую оценку содержания гаагских законов, затем занимается кругом сделок, подпадающих под действие этих законов, с некоторыми проблемами исполнения, неисполнения и заключения договоров. Наконец, автор говорит о противоречии, которое состоит в том, что чем успешнее сохранение международного единства права, тем менее сохраняется единство национальной системы права.

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Les problèmes de l'administration provinciale en Hongrie au XVIII[e] siècle

par

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En conformité avec l'ordre public de la féodalité, les différentes unités de l'organisme administratif étaient en Hongrie, et en Transylvanie aussi, très variées. En Hongrie les unités de base étaient les comitats et les villes royales libres qui étaient directement attachées aux organes centraux du gouvernement: au conseil de lieu-tenance, organe centrale de l'administration publique et à la chambre royale, le plus haut organe des finances. Dans les comitats, les districts étaient les autorités administratives d'un échelon inférieur, à l'échelon le plus bas se trouvaient les communes, soumises à la juridiction du seigneur. Des semblables organes subordonnés étaient aussi les bourgs subordonnés également à ces derniers.

En dehors de ces unités générales de l'administration, le particularisme de l'Etat féodal s'est manifesté sous plusieurs aspects dans l'administration provinciale. Nombre de territoires du pays étaient en effet exempts de la juridiction des comitats. Tels territoires étaient la circonscription des Iazyges et des Coumans ainsi que celles des Heïduques, toutes les deux ayant été des organismes autonomes en dehors des comitats. Des formations particulières de l'administration locale étaient encore certaines *sedes* et circonscriptions ainsi que les *sedes prediales* des soldats nobles des prélats.

Le tableau de l'administration de la Hongrie proprement dite était complété par l'organisme administratif des pays annexes de la Croatie, Slavonie et Dalmatie, jouissant d'une autonomie très étendue. Une autonomie également trés importante revenait aux zones-frontières sous l'administration militaire.

S'il est vrai que pendant le XVIII[e] siècle la division territoriale de l'administration de la Hongrie révélait une variété très grande, plus grande était encore cette variété en Transylvanie. L'union des trois nations (hongroise, székely et saxonne) et des quatre confessions (catholique, calviniste, luthérienne et unitaire), formée pendant l'ère de la principauté, s'est conservée aussi pendant le XVIII[e] siècle, malgré qu'à cette époque les Roumains étaient déjà en majorité dans une partie considérable du pays. Néanmoins les Roumains n'étaient pas reconnues comme une nation menant une existence propre; leur représentant n'ont pu prendre part aux séances de la Diète qu'au cas où ils étaient des prélats catholiques, possédaient un titre de noblesse hongroise ou étaient des députés de villes. Les Roumains des comitats de Fogaras et de Hunyad jouissaient d'une certaine autonomie; il en était de même concernant la population des zones-frontière roumaines établies par Marie-Thérèse. En Transylvanie l'organisme administratif était en réalité conforme à l'union des trois nations: à côté des députés des comitats hongrois, des *sedes* des *Székely* et des *Saxons*, aussi les députés du territoire de la Hongrie, dit *Partium* (provisoirement attaché à la Transylvanie pendant la domination des Turcs) prenaient part à la Diète. Les mêmes autonomies s'acquittaient des tâches de l'administration locale.

Dans la deuxième moitié du XVIII[e] siècle, aussi en Hongrie commence l'édification d'un appareil burocratique des fonctionnaires de l'administration. Les réformes de l'empereur Joseph II ne se consolidèrent pas, mais la Diète de 1790/91 a délégué des nouvelles commissions pour préparer une réforme de l'administration. C'est à l'aide des travaux de ces commissions et des projets préparés par les «Jacobins hongrois» notamment par József Hajnóczy, agissant en dehors de ces commissions, que l'auteur fait connaître les problèmes de l'administration provinciale hongroise de l'époque.

I

Introduction

Le XVIII[e] siècle avait apporté des changements essentiels à la vie publique de la Hongrie. La libération de Buda, puis du territoire entier du pays, de la domination ottomane vers la fin du siècle précédent avait créé les conditions nécessaires pour le regain de l'indépendance nationale et du rétablissement de l'unité de l'Etat. De ce fait la guerre d'indépendance déclenchée en 1703 par Ferenc Rákóczi, descendant de princes de Transylvanie, tenait déjà compte, même si au commencement Rákóczi n'avait revendiqué pour lui-même que le principat de Transylvanie. Après la paix de Szatmár (1711) conclue à la suite de l'échec de la guerre d'indépendance, l'empereur Charles VI (comme roi hongrois Charles III) – le dernier souverain Habsbourg en ligne masculine – pouvait réunir sous son sceptre les deux Etats qui existaient sur le territoire de la Hongrie d'avant la bataille de Mohács (1526), à savoir la Hongrie proprement dite et la Transylvanie, ensemble avec les Etats et les pays annexes y appartenant (la Croatie, la Slavonie et la Dalmatie).

Au XVIII[e] siècle aussi bien la Hongrie que la Transylvanie étaient également des monarchies féodales seigneuriales. A la tête de la première se trouvait le roi *(rex Hungariae)* qui portait aussi le titre du roi de la Croatie, de la Slavonie et de la Dalmatie *(rex Dalmatiae, Croatiae, Slavoniae)*.[1] A la tête de la Transylvanie se trouvait le prince *(princeps Transylvaniae)* portant depuis 1764 le titre de grand duc: *(magnus princeps)*. Les dignités du roi et du prince de Transylvanie étaient détenues par le même souverain de la maison des Habsbourg.

Les conditions socio-économiques de la Hongrie et de la Transylvanie avaient les mêmes racines; nombre de familles appartenant aux classes dirigeantes jouaient un rôle éminent dans tous les deux de ces pays. La structure de l'organisation intérieure de ces derniers était semblable, voire presque identique; les anciennes sources du droit (remontant du XI[e] au XVI[e] siècle) étaient les mêmes et la législation des Diètes a accédé à l'indépendance seulement pendant le XVII[e] siècle. A côté des lois générales, les sources particulières du droit *(iura particularia)* avaient également une importance considérable.[2]

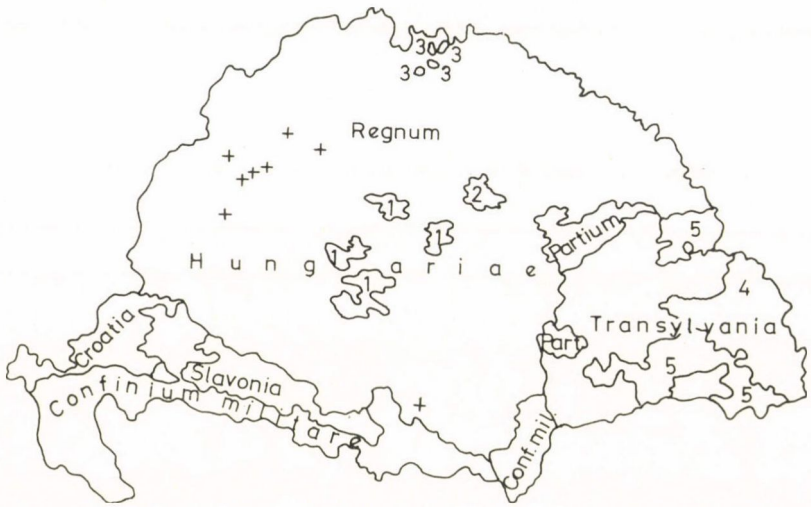
Au siège du souverain chacune de ces monarchies féodales seigneuriales avait sa propre chancellerie, par l'entremise de laquelle le souverain faisait

[1] A l'époque cela signifiait guère autre chose qu'un simple titre. Au XVIII[e] siècle les rois de la Hongrie ont été couronnés à Presbourg, capitale d'alors du royaume, à l'exception de Joseph II qui n'a pas été couronné. A la Diète du couronnement les magnats et les envoyés des pays annexes ont également assisté. Dans ces pays un couronnement à part n'a pas eu lieu.

[2] Dans les pays de la Croatie, Slavonie et Dalmatie, nonobstant nombre de ressemblances qui existaient dans les conditions sociales et économiques, on peut trouver aussi des divergences essentielles dans la structure de l'organisation intérieure de ces pays, comme aussi concernant les sources du droit, qui ont comblé les lacunes du *ius generale* du pays.

parvenir ses décrets (lettres patentes) adressés aux organes administratifs centraux respectifs des deux pays[3] et, à travers de ceux-ci, à l'administration provinciale.

Dans la Hongrie du XVIII[e] siècle, cette administration n'a pas encore réalisé la doctrine de Montesquieu sur la nécessité de la séparation des pouvoirs; l'administration était étroitement entrelacée avec la juridiction. Donc, en examinant les organes de l'administration provinciale, c'est-à-dire les comitats, les villes et les villages, nous devons les considérer à la fois comme des organes de l'administration et de la juridiction.



Les organes de l'administration provinciale en Hongrie et en Transylvanie au XVIII[e] siècle
1. Districtus Jazygum et Cumanorum
2. Districtus oppidorum hajdonicalium
3. Provincia XVI. coronalium oppidorum Scepusiensium
\+ Sedes praediales
4. Sedes Siculorum
5. Sedes Saxonum

Les organes de compétence générale, c'est-à-dire les *municipia* (comitats, villes royales libres) ne figurent pas sur la carte.

II.

Les comitats

En Hongrie les comitats *(comitatus)* étaient les unités structurales fondamentales de l'administration provinciale. Ce sont les comitats au moyen desquels les fondements de l'autonomie nobiliaire ont été jetés dès le XIII[e] siècle;

[3] Les organs centraux en question étaient en Hongrie le Conseil de lieutenance *(consilium locumtenentiale regium)* érigé en 1723 et en Transylvanie l'autorité gouvernementale supérieure *(főkormányszék)*, réglée dans le détail par le *Diploma Leopoldinum* et dans différentes lois de la Transylvanie. A la tête de l'administration de la Croatie se trouvait le ban *(banus)*, nommé par le roi de Hongrie.

les formes et l'organisation nées au cours de la désintégration du pré-moyen âge, se sont transmises aux siècles postérieurs et subsistaient jusqu'à la révolution bourgeoise et la lutte pour l'indépendance du pays de 1848. Les 49 comitats nobiliaires de la Hongrie[4] étaient des unités organiques de l'autonomie de la noblesse. Elles fonctionnaient comme des organismes de la défense des intérêts de la noblesse toute entière *(una eademque nobilitas)*. Malgré qu'en Hongrie du XVIII[e] siècle l'aristocratie et le haut clergé *(magnates et prelati)* avaient une voix décisive dans les affaires du royaume, la direction des comitats était entre les mains de la noblesse aisée, possédant des propriétés moyennes *(bene possessionata nobilitas)*. Seulement les représentants du pouvoir central préposés aux comitats et nommés par le roi (*supremi comites*, en hongrois: főispán) étaient choisis parmi les membres de l'aristocratie et du haut clergé,[5] tandis que les autres fonctions étaient exercées dans les comitats par des personnes appartenant à la noblesse moyenne et possédant des terres de quelques villages. Une différentiation ultérieure peut être observée concernant les fonctions remplies par la même couche de la noblesse. Quasi dans tous les comitats, quelques familles de la noblesse moyenne possédant des terres plus étendues (la «*bene possessionata nobilitas*» mentionnée) gardaient entre leurs mains, pendant les siècles, la première dignité élue de l'autonomie nobiliaire, celle du *vicecomes;* (en hongrois: *alispán*); la fonction du *judex nobilium vel servientium* (en hongrois: szolgabíró) préposé aux arrondissements du comitat (comprenant 10 à 20, par exception même 40 villages) était réservée à quelques familles de la noblesse moyenne domiciliées dans l'arrondissement même et contrôlant, en tout ou en partie, quelques villages y situés; tandis que l'adjoint assermenté *(jurassor)* du *judex nobilium* était élu parmi les membres des familles d'une situation plus modeste, possédant quelques tenures de serfs. Les gentilhommes campagnards pauvres, ne possédant rien en dehors de leur lettre de noblesse, ou tout au plus une tenure de serf *(armalistae)*, ne jouaient que le rôle des votants aux assemblées où la réélection périodique des fonctionnaires et des délégués du comitat à la Diète avait eu lieu. Lors de ces élections les partis intéressés ont pourvu à la nourriture et aux indemnités de déplacement de ces nobles pauvres, qui en revanche n'ont pas refusé leurs voix et les vivats à leurs

[4] A ceux-ci on doit ajouter encore 3 comitats de la Croatie (Zágráb, Varasd et Kőrös). Les comitats Szerém, Pozsega et Verőcze étaient avant la bataille de Mohács partie intégrante de la Hongrie. Pour les données y relative consultez THIRRING, G.: *Magyarország népessége II. József korában. (La population de la Hongrie à l'époque de Joseph II.)* Budapest, 1938.

[5] Au XVIII[e] siècle 26 comitats avaient des *comes* perpétuels. Parmi ceux-ci la dignité du *comes* perpétuel du comitat de Pest était liée à une dignité séculaire (à celle du palatin), dans 9 comitats à une dignité ecclésiastique, notamment le *comes* perpétuel du comitat Esztergom était l'archevêque de Esztergom, du comitat Bihar l'évêque de Várad, du comitat Baranya l'évêque de Pécs, du comitat Heves et Szolnok Extérieur l'évêque d'Eger, du comitat Nyitra l'évêque de Nyitra etc. La dignité du *comes* de 16 comitats appartenaient à des familles de l'aristocratie (par exemple celle du comitat de Zips à la famille Csáky, du comitat de Presbourg à la famille Esterházy, du comitat Vas à la famille Batthyány etc.).

mandants. Les personnes appartenant à cette couche pauvre de la noblesse n'ont cependant pas obtenu des offices, sauf si elles se sont distinguées dans une carrière ecclésiastique, juridique ou militaire, ou si elles y sont parvenues grâce à un mariage avantageux ou à des liens de famille.

Malgré tout ceci, les quatre thèses concernant les droits revenant sans distinction à tous les membres de la noblesse hongroise, telles qu'elles figuraient dans le fameux neuvième titre de la première partie (*«primae nonus»*) du *Tripartitum* de Werbőczi, codificateur du droit coutumier hongrois du XV^e^ siècle, étaient une réalité vivante. Selon ces thèses, les nobles avaient le droit de se défendre en liberté même au cas où de graves infractions leur étaient imputées (sauf les cas de flagrant délit); ils étaient soumis directement à l'autorité du roi; ils étaient exempts du paiement de tout impôt et de taxe de douane et ils n'étaient astreints au service militaire qu'aux fins de la défense du pays. Le quatrième de ces droits était celui de la résistance et des remontrances au cas où le roi porterait atteinte aux libertés nobiliaires.[6] A ce dernier droit cependant les Etats ont renoncé après la reprise de Buda, à la Diète de 1687/88 (loi no. 4 de 1688).

La composition de la noblesse des comitats a subi pendant le XVIII^e^ siècle beaucoup de changements. Après la répression de la lutte de Rákóczi pour la liberté du pays, la noblesse juridiquement homogène a été sensiblement differenciée en conséquence, d'une part, de la confiscation des biens des partisans de Rákóczi et, d'autre part, des donations royales octroyées en masse aux personnes restées fidèles à l'Autriche ainsi qu'à des «rebelles» repentis, puis à ceux qui lors de l'adoption de la Pragmatique Sanction (1723), destinée à assurer la succession au trône de la branche féminine de la dynastie des Habsbourg, se sont employés en vue de son adoption. A la différenciation ont contribué également les naturalisations solennelles conférant des titres de haute noblesse *(indigenatus)* aux fonctionnaires autrichiens dirigeant et exécutant au XVIII^e^ siècle les colonisations en Hongrie ainsi que l'octroi de simples titres de noblesse aux fonctionnaires moins importants. De plus, les offices de l'administration centrale, formés ou réorganisés pendant ce même siècle (chancellerie, conseil de lieutenance, chambre fiscale), et enfin la réforme administrative successivement réalisée sous le règne de Marie-Thérèse (1741 – 1780) ont également contribué à la transformation de la noblesse des comitats. Même si en Hongrie la noblesse de robe de la monarchie française ne s'est pas développée, toujours plus de personnes appartenant à la couche supérieure de la noblesse moyenne ont trouvé des emplois — à côté des aristocrates — dans les offices centraux. Or, une partie de ces dernières, après une activité méritoire à la chancellerie, au conseil de lieutenance ou à des cours de justice supérieures, a

[6] *Tripartitum Opus Iuris Consuetudinarii Inclyti Regni Hungariae*, Partie 1ère, Titre 9.

été recompensée par l'octroi de titres de haute noblesse. Sous le règne de l'empereur Joseph II le changement s'est accéléré; l'empereur a en effet ouvert les portes des offices centraux aux protestants qui jusque-là en ont été exclus, et a admis aux emplois plus élevés de l'administration des comitats aussi des roturiers disposant d'une qualification adéquate.

A la fin du XVIII[e] siècle les fonctions des comitats restent de nouveau fermées devant les roturiers; l'exclusivisme a été rendu en effet plus rigoureux en conséquence de l'orientation à gauche prise par la Révolution française. Malgré tout, il était peut-être possible de retarder la désintégration de la féodalité, mais il était impossible de l'empêcher.

Tous ces changements peuvent être observés en Transylvanie aussi. Dans ce pays les conditions financières plus modestes de la noblesse, et même de la haute noblesse, ont poussé les membres de la classe dirigeante à échanger les fonctions dans les comitats, peu nombreuses et considérées plutôt comme des offices gratuits *(nobile officium)*, contre des emplois d'Etat, régulièrement rémunérés. En Transylvanie, dans les communautés *(sedes)* des *Székely* et des *Saxons*, déployant leur activité en dehors des cadres des comitats, on peut constater des changements sociaux semblables; toutefois chez les Saxons le rôle prépondérant revenait aux bourgeois des villes, même si quelques-uns de ceux-ci ont acquis la noblesse hongroise. En conséquence du vaste mouvement d'immigration dans la Transylvanie pendant le XVIII[e] siècle, les Roumains formant la nationalité la plus nombreuse de l'époque, ne disposaient d'aucune territoire autonome situé en dehors des comitats comme les «*sedes*» des *Székely* et des *Saxons*. Or, au cours du XVIII[e], Marie-Thérèse a établi à Naszód pour les Roumains également une zone des gardes-frontière de caractère militaire, séparée des comitats et des *sedes* mentionnées. Dans cette zone les Roumains se sont acquittés des tâches de l'administration locale, sous la direction de leurs propres chefs.[7]

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Le comitat du XVIII[e] siècle était considéré en Hongrie comme le rempart des intérêts de la noblesse. A l'intérieur de l'Etat, chaque comitat était un monde en soi, selon la terminologie de l'époque un *municipium* (en hongrois *törvényhatóság*) ayant le pouvoir de la création et de l'application du droit, y compris l'exercice de la juridiction. Sur son territoire le comitat avait le droit de vie et de mort. Cette constatation n'est pas du tout une vérité banale. Le pouvoir absolu du comitat n'était limité que par les privilèges nobiliaires.

[7] En outre, sur les territoires habités par des Roumains, beaucoup de familles d'origine roumaine ont accédé à la noblesse, voire à l'aristocratie hongroise, comme par exemple les barons Jósika, les comtes Majláth, les barons Nopcsa et nombre d'autres familles encore, qui ont joué, aussi au XVIII[e] siècle, un rôle éminent à plusieurs postes de l'administration de la Transylvanie.

Mais dès que les intérêts du comitat étaient en jeu, le comitat quasi omnipotent, en passant outre aux libertés fondamentales de la noblesse, imposa par force son pouvoir répressif même contre le noble qui osait porter atteinte aux intérêts du comitat.

Mátyás Ráby, un noble qui au XVIII[e] siècle avait enduré des souffrances pendant deux ans et demi dans la prison du comitat de Pest, a écrit dans ses mémoires publiés à Strasbourg, en 1797, que celui qui est à la recherche de la justice à l'encontre des puissants du comitat «est enlevé, contrairement à la loi et au jugement, au sein de sa famille, pour que, isolé du monde, il soupire ses peines en fers et en menottes aux murs d'une prison étroite».[8]

La juridiction du comitat des nobles est constatée déjà par la charte de Kehida émise en 1232 par les nobles du comitat de Zala, en témoignant du privilège octroyé par le roi au comitat des nobles pour qu'il puisse exercer la juridiction «et rendre justice aux opprimés et aux victimes des torts immenses, contre tous ceux qui étaient les auteurs des injustices qu'ils ont souffertes».[9] Or, au cours du développement des comitats, ce pouvoir, au lieu d'une défense contre les puissants, s'est transformé en un moyen pour tenir en bride les opprimés, ce qui n'a été atténué que par le fait, qu'à l'encontre des tendances d'oppression impériales, le comitat était tout de même une des garanties de l'indépendance du pays. Au milieu de ces effets compliqués, agissant souvent l'un contre l'autre, l'absolutisme éclairé s'est efforcé de faire une brêche à l'omnipotence des comitats du XVIII[e] siècle et ceci dans un sens positif. En effet, tandis que les serfs ne pouvaient antérieurement pas porter leurs plaintes concernant leurs redevances devant une instance supérieure, en 1776 Marie-Thérèse a étendu la compétence du conseil de lieutenance aussi sur les affaires de cette nature.

L'organisation intérieure du comitat nobiliaire a révélé, même au XVIII[e] siècle, la forme acquise au cours du XIII[e]. En tête du comitat se trouvait le représentant du pouvoir central *(comes*, en hongrois: *főispán)* qui exerçait la surveillance royale sur le comitat.[10] Le plus important organe collégial était l'assemblée générale du comitat *(congregatio generalis)*, à laquelle avaient le droit d'assister tous les nobles ayant leur domicile ou possédant de terres sur le territoire du comitat. C'était l'assemblée qui élisait les fonctionnaires et les envoyés du comitat à la Diète, en leur donnant des instructions, qui créait

[8] RABY, M.: *Justizmord und Regierungsgreuel in Ungarn und Österreich*. Strassburg, 1797. II[e] Chapitre.

[9] «... faciendi iustitiam plenam oppressis et patientibus iniurias infinitas, de omnibus his, per quos indebite patiuntur.» *Histoire du Comitat Zala*, ed. NAGY, GY. Oklevéltár II. Budapest, 1890. p. 643.

[10] Le *comes* était nommé par le roi et pouvait être révoqué par celui-ci à n'importe quel moment, sauf les comitats où cette dignité revenait à un *comes* perpétuel. A partir de la fin du XVIII[e] siècle est devenu usage constant que pendant la minorité du *comes* perpétuel ou pendant qu'il était durablement empêché d'exercer ses fonctions, la Cour a délégué dans le comitat un «administrateur» qui a fait valoir même par la force les intérêts de la Cour à l'encontre de la noblesse.

des règles de droit *(statutum)* et qui prenait des décisions au sujet des questions les plus importantes intéressant les finances du comitat (impôts). Chaque comitat avait son propre sceau; le sceau apposé aux documents délivrés par le comitat leur conférait l'authenticité.

Un autre important organe collégial était le tribunal du comitat *(sedes iudiciaria*, en bas latin: *sedria)* qui s'est acquitté des tâches de l'administration de la justice.

Au XVIII[e] siècle le premier fonctionnaire de l'autonomie du comitat était le *vice-comes* (en hongrois: *alispán*). C'était lui qui à la place du *comes* présidait les séances des organes collégiaux, y compris la *sedria*. Il était le chef de l'administration du comitat. Il avait le droit de disposer des fonctionnaires; il veillait à l'exécution des ordres du conseil de lieutenance et de l'assemblée du comitat. Au XVIII[e] siècle les tâches de l'administration se sont déjà multipliées. En conséquence ont été généralement adoptées partout les fonctions du *vicecomes* adjoint *(substitutus vicecomes)*, du préposé aux affaires juridiques *(fiscalis)* et du préposé au recouvrement des impôts *(perceptor)*, à côté de l'ancien notaire *(notarius)*. Des organes plus récents sont encore les vice-notaires, les archivistes et les trésoriers. A partir du règne de Marie-Thérèse un organisme sanitaire du comitat a été également créé par les emplois du médecin en chef *(phisicus)* et du chirurgien *(chirurgus)* du comitat; même la sage-femme *(obstetrix)* est devenue une employée de l'administration du comitat.

Chaque comitat était divisé en districts *(processus)* à la tête desquels se trouvait le *iudex nobilium* (en hongrois: *főszolgabíró*) qui — secondé par ses adjoints *(vicejudlium)* — expédiait les affaires administratives du district (*popularis, dicalis conscriptio*, fourniture d'attelage, mise sur pied, le cas échéant des unités militaires des nobles *(insurrectio)*, entretien de routes au moyen de corvées). Le *iudex nobilium* et son aide assermenté *(jurassor)* étaient les témoins officiels des actes juridiques *(testimonium legale)*.

Au XVIII[e] siècle s'est formée la juridiction des *vicecomes* et du *iudex nobilium* dans des affaires civiles de moindre importance *(forum pedaneum)*. Contre les sentences de ces derniers, appel pouvait être interjeté devant le tribunal du comitat.[11] Le *iudex nobilium* a connu aussi des affaires de contravention.[12]

C'est dès le règne de l'empereur Joseph II (1780—1790) que l'absolutisme éclairé a pris son plus grand essor. L'empereur a voulu non seulement trans-

[11] Torday, L.: *A megyei polgári peres eljárás a 16—19. században. (La procédure civile des comitats du XVI[e] au XIX[e] siècle.)* Budapest, 1933. — Meznerics, I.: *A megyei büntető igazságszolgáltatás a 16—19. században. (La justice pénale dans les comitats du XVI[e] au XIX[e] siècle.)* Budapest, 1933.

[12] Quant aux attributions du *iudex nobilium* voire: Zsoldos, I.: *A szolgabírói hivatal. Közrendtartási rész. (L'office du iudex nobilium.)* Partie relative à l'administration. Pápa, 1842. Partie relative à la juridiction. Pápa, 1844.

former l'administration du comitat, mais s'est proposé de réorganiser l'entière organisation provinciale. En conséquence, Joseph II supprima en 1785 l'autonomie des comitats. Il divisa le pays en 10 circonscriptions, en mettant à la tête de chacune de celles-ci un commissaire royal revêtu de pouvoirs presque absolus.[13]

Les problèmes de la modernisation de l'administration des comitats ont fait leur apparition dans la littérature politique également. Les réformistes ayant des attaches avec la Cour, comme le chancelier Miklós Pálffy, ont proposé que la surveillance exercée par l'Etat sur l'administration des comitats soit rendue plus efficace.[14] Un projet de Constitution paru pendant la Diète de 1764/65 a demandé la réduction des honoraires des fonctionnaires du comitat — en particulier celle des honoraires des *comites* — et a voulu que les dépenses du comitat soient couvertes à la charge des revenus des propriétaires terriens du comitat.[15]

Un projet mieux motivé était celui du roturier József Hajnóczy, ancien *vice-comes* sous le règne de Joseph II. Hajnóczy est devenu plus tard un des chefs du mouvement des «jacobins» hongrois et en 1795, à cause de cette activité, condamné à mort et exécuté. Dans un de ses projets de constitution, présenté à la Diète de 1790/91, il a proposé que les fonctionnaires du comitat soient élus parmi les propriétaires terriens des comitats et que des roturiers puissent également acquérir des terres. De plus, «à fin que l'honnêteté et la capacité des moins aisés puisse également se faire valoir», il a suggéré que les notaires et les préposés aux affaires juridiques puissent être choisis parmi ceux aussi qui ne possèdaient pas de terres. Il a insisté en outre sur la nécessité que les fonctionnaires du comitat soient réélus tous les trois ans, à défaut de quoi on pouvait former l'exception d'incompétence contre tous ceux qui, en dépassant le terme de leur office, voudraient exercer une activité de juridiction. C'est seulement le notaire *(notarius)* – à nommer par le *comes* — qui serait un fonctionnaire à vie, étant donné que ce traitement était motivé par sa plus grande compétence professionnelle.[16]

Dans son projet, Hajnóczy a voulu entreprendre la réorganisation territoriale des comitats aussi. Il a proposé, que les comitats plus grands et difficiles à administrer soient divisés et que les petits comitats non viables soient réunis. Une telle réorganisation cependant n'a été réalisé qu'en partie, au commence-

[13] Marczali, H.: *Magyarország története II. József korában. (L'histoire de la Hongrie à l'époque de Joseph II.)* Budapest, 1885. Vol. II. pp. 437 et ssq.

[14] Marczali, H.: *Gróf Pálffy Miklós főkancellár emlékiratai Magyarország kormányzásáról. (Les mémoires du grand chancelier Miklós Pálffy sur le gouvernement de la Hongrie.)* Budapest, 1884. pp. 14 et ssq.

[15] Csizmadia, A.: *Egy kétszázéves alkotmánytervezetről. (D'un projet de constitution d'il y a deux cent ans.)* Állam és Igazgatás, 1965. pp. 842—843.

[16] *Ratio proponendarum in comitiis Hungariae legum.* Manuscrit dans la Bibliothèque Nationale Széchényi. Budapest, Fol. Lat. 647. pp. 260—276. fol. Publié en langue hongroise dans l'ouvrage: Csizmadia, A.: *Hajnóczy József közjogi-politikai munkái. (Ouvrages de droit public et politiques de József Hajnóczy.)* Budapest, Akadémiai Kiadó, 1968. pp. 47—96.

ment du siècle suivant (1803) et, dans une dimension plus grande, en 1876, après le compromis austro-hongrois.[17]

Les projets de Hajnóczy se sont étendus également sur les finances des comitats. Jusque-là les serfs, seuls contribuables des impôts d'Etat, ont supporté aussi les frais des comitats dans la forme d'une contribution dite domestique *(domestica)*. Selon la proposition de Hajnóczy tous les propriétaires auraient dû se charger des frais de l'administration de leur comitat. Du reste, la rénumération des fonctionnaires du comitat devrait être fixée par la Diète.[18]

Le projet de Hajnóczy n'a éveillé cependant aucun écho considérable. Malgré que la Diète de 1790/91 a délégué plusieurs commissions pour élaborer et soumettre à la prochaine Diète les réformes les plus urgentes, parmi les projets élaborés ne figure aucune réforme générale des comitats. Les membres de la classe dirigeante ont considéré l'organisation et les attributions des comitats comme excellentes; tout changement y apporté aurait soulevé la question de leur mise à contribution, à quoi la noblesse hongroise répugnait avant tout. C'était seulement en connexité avec la réforme judiciaire qu'on voulait régler le système des instances du comitat, ensemble avec les émoluments des personnes qui prenaient part à l'administration de la justice.

Allant de pair avec la direction de gauche prise par la Révolution française, le radicalisme des intellectuels hongrois a également gagné du terrain. Nous connaissons un autre projet de constitution né à cette époque, qui aurait entièrement bouleversé le système des comitats. L'auteur de ce projet était Ignác Martinovics, abbé de Szászvár, ancien professeur à l'Université de Lwow et plus tard l'organisateur principal du mouvement des jacobins hongrois. Selon son projet, la Hongrie, devenue indépendante, aurait dû être divisée, ensemble avec la Transylvanie et les pays annexes, en provinces et les provinces en circonscriptions, en supprimant ainsi le système entier des comitats. La division aurait dû avoir lieu en tenant compte de l'aménagement territorial des nationalités.[19] En conséquence de l'échec subi par le mouvement des jacobins, ces projets ne se sont jamais réalisés. La Cour et la noblesse hongroise, prises de panique par le gauchisme de la Révolution française, sont restées fidèles à la structure constitutionnelle du pays, telle qu'elle l'était et qui, de leur point de vue, a fait bien ses preuves. Elles refusaient donc d'admettre des changements concernant l'administration locale.

[17] Benisch (Némethy) A.: *Vármegyei határkiigazítások. (Rectifications des frontières des comitats.)* Budapest, 1938; du même auteur: *Reformtörekvések államigazgatási területbeosztásunk rendezésére. (Tentatives de réforme de la division territoriale de notre administration.)* Állam és Igazgatás, 1955. No. 1—5.

[18] Hajnóczy, J.: *Ratio proponendarum.* op. cit. Chapitre VII.

[19] *Entwurf einer neuen für Ungarn bestimmten Konstitution.* Mois d'août 1793. Publié dans: Benda, K.: *A magyar jakobinusok iratai. I. (Les écrits des Jacobins hongrois. I.)* Budapest, Akadémiai Kiadó, 1957. pp. 897—908.; en hongrois: Beér, J.—Csizmadia, A.: *Történelmünk a jogalkotás tükrében. Sarkalatos honi törvényeinkből 1001—1949. (Notre histoire à la lumière de la législation. Selection de nos lois fondamentales de 1001 à 1949.)* Budapest, 1966. pp. 633—644.

III.

Circonscriptions libres, sièges (sedes) des soldats nobles de prélats, zônes frontières

Sur certaines territoires du pays l'autorité des comitats ne s'étendait pas. De tels territoires étaient les circonscriptions des *Jazyges* et des *Coumans* ainsi que celles des *Heïduques*, les territoires *(sedes)* des soldats nobles *(prediales)* de certains prélats, et les zônes frontières sous administration militaire. Tous ces territoires étaient des unités administratives spéciales. Parmi celles-ci, la plus importante était la circonscription, située sur la Grande Plaine hongroise, des deux peuples frères, des *Jazyges* et des *Coumanes*, immigrés en Hongrie pendant les XII[e] et XIII[e] siècles. Avant la bataille de Mohács cette circonscription jouissait d'une autonomie considérable.

Après la libération du pays de la domination des Turcs, la *Neoacquistica Commissio*, chargée par la Cour autrichienne de la régularisation de la situation des propriétés terriennes, a refusé de reconnaître les libertés des *Jazyges* et des *Coumans*, ensemble avec leur droit à avoir leur propre territoire, qui a été donné par la Commission en gage à l'Ordre de la Chevalerie Teutonique. Les *Jazyges* et *Coumans* cependant ne s'acquiescèrent pas à leur dégradation à la condition de serfs, ils ont fait la collecte du montant du gage et rachetèrent leur liberté. En 1745 Marie-Thérèse les a réinstallés dans leurs anciennes libertés et vers la fin du siècle (1791) leurs délégués — ensemble avec ceux de la circonscription des *Heïduques* — ont obtenu le droit de vote à la Diète.

Après avoir réacquis sa liberté, la circonscription des *Jazyges* et des *Coumans* a été placée de nouveau sous l'autorité «du grand capitaine» de la circonscription. Dès ce moment les Jazyges et les Coumans ont repris l'exercice de leurs droits découlant de leur autonomie, à la fois dans le domaine de la juridiction et de l'administration.[20]

La circonscription des *Heïduques* s'est composée des villes et villages, dans lesquels István Bocskai, prince de Transylvanie (1604—1607) a établi les *Heïduques*, anciens soldats de ses troupes. Au XVIII[e] siècle fonctionnait déjà la collectivité *(universitas)* des 7 villes *Heïduques*, avec un «grand capitaine» nommé par le roi à leur tête. Le capitaine présidait à l'assemblée de l'*universitas;* tous les *Heïduques* avaient le droit d'y assister et prendre part à l'adoption des résolutions.[21]

[20] TATAI MOLNÁR, M.: *A jászok és kunok története. (L'histoire des Jazyges et des Coumans.)* Szeged, 1937.; ILLÉSY, J.: *A jász-kun területek visszaváltása 1745-ben. (Le rachat des circonscriptions des Jazyges et des Coumans en 1745.)* Századok, 1900. — KELE, J.: *A Jászkunság megváltása. (Le rachat des Jazyges et des Coumans.)* Budapest, 1903.

[21] CSÁSZÁR, E.: *A hajdúság kialakulása és fejlődése. (La formation et le développement des communautés des Heïduques.)* Debrecen, 1932. — HUNYADI, B.: *A hajdúvárosok régi közigazgatási és igazságszolgáltatási szervezete. (L'ancien organisme administratif et juridictionnel des villes des Heïduques.)* Hajdúszoboszló, 1934.

Les villes de la Zips habitées par des colons saxons y installés dès le près-moyen âge, étaient également exemptes de l'autorité des comitats. En 1412 une partie de ces villes a été donnée en gage à la Pologne par le roi Sigismond de la maison des Luxembourg. En Hongrie ne sont restées ainsi que 11 villes de la Zips. A la tête de leur organisation (la communauté des villes saxonnes de la Zips) se trouvait le comte de la Zips *(comes Scepusiensis)* qui a décidé des affaires de majeure importance de concert avec les juges des villes. Parmi ces villes, seulement les villes royales libres ont pu conserver leurs privilèges jusqu'au XVIII[e] siècle et la communauté des autres villes a été assujettie aux comtes de la Zips.[22]

Même pendant le XVIII[e] siècle continuaient d'être exemptes du pouvoir autonome des comitats les «sièges» *(sedes)* des soldats nobles de certains prélats *(nobiles prediales)*,[23] comprenant les villages possédés par ces derniers. La «siège» – en guise d'un petit comitat – s'acquittait des tâches découlant de l'autonomie, dont les *nobiles prediales* jouissaient. A la tête de chacune de ces communautés était le prélat respectif, en la qualité d'un *comes*.[24] Du reste, leur organisation était semblable à celle des comitats. L'assemblée *(congregatio generalis)* de la communauté avait aussi le droit de promulguer des statuts.[25]

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En Transylvanie les comitats ainsi que les autonomies territoriales *(sedes)* des *Székely* et des *Saxons* avaient une organisation qui au fond était la même que celle des comitats en Hongrie. Le territoire nommé *Partium*, c'est-à-dire la partie du territoire de la Hongrie qui a été réunie à la Transylvanie pendant la domination turque, était également divisé en comitats. Ce territoire restait attaché à la Transylvanie jusqu'à l'union avec la Hongrie intervenue en 1848.

Les comitats en Transylvanie — constituant «*la terre hongroise*» du Pays — étaient administrés par des *comes* nommés par le prince; les fonctionnaires

[22] Sur les villes du Zips voir l'ouvrage fondamental de Carolus WAGNER: *Analecta Scepusii sacri et profani.* Vol. I—II. Wien, 1773. ainsi que DOMANOVSZKY, S.: *A szepesi városok árumegállító joga. (Le droit de relâche des villes du Zips.)* Budapest, 1922. et la littérature y invoquée.

[23] L'archevêque d'Esztergom, l'évêque et le chapitre de Győr, le grand abbé de Pannonhalma, le prévôt du chapitre de Zágráb en sa qualité de bénéficiaire de l'abbaye de Topuszkó.

[24] Les fonctionnaires principaux préposés aux quatre *sedes* des nobles ecclésiastiques de l'archevêque d'Esztergom portaient le titre de «palatin».

[25] Pour les *sedes* de la noblesse ecclésiastique voir: SZÉKELY, O.: *Az egyházi nemesség. (La noblesse ecclésiastique.)* Annales du Gróf Klebelsberg Kunó Magyar Történetkutató Intézet. Vol. V. (1935). HOLUB, J.: *Az egyházi nemesek jogállása a középkorban. Különnyomat a «Regnum» egyháztörténeti évkönyv 1941—46. évfolyamából. (La situation de la noblesse ecclésiastique au moyen âge. Separatum des années 1941—46. des annales «Regnum» d'histoire ecclésiastique.)* Budapest, 1947. BÓNIS, GY.: *Hűbériség és rendiség a középkori magyar jogban. (Féodalité et régime des Ordres dans le droit hongrois du moyen âge.)* Kolozsvár, 1947, pp. 181—216. CSIZMADIA, A.: *Die Rechtsstellung der Predialen und Predialenstühle in Ungarn.* Festschrift Hans Lentze. Innsbruck, 1969. pp. 95—118.

étaient élus à l'assemblée générale parmi les candidats présentés par le *comes* (loi no 12 de 1791 de la Transylvanie). L'organisation et les attributions des comitats transylvains étaient au fond identiques à celles des comitats hongrois. Ils ont élu des délégués à la Diète de Transylvanie, en leur donnant des instructions; ils ont arrêté leur budget, ils dirigeaient l'administration. Chaque comitat avait son sceau, qui témoignait de l'authenticité des documents qu'il a émis. Les comitats du *Partium* avaient une organisation similaire.

Sur la «*terre des Székely*» les cinq autonomies territoriales *(sedes)* de ces derniers s'acquittaient des tâches de l'administration. Chacune des *sedes* a envoyé deux délégués à la Diète de Transylvanie; en dehors des droits corporatifs dont disposaient les comitats, elles avaient encore le privilège d'élire elles-mêmes leur juge suprême (*iudex regius*, en hongrois: királybíró) et tous leurs fonctionnaires, sans présentation par autrui;[26] l'élection du juge suprême avait néanmoins besoin d'être approuvée par le prince.[27]

La «*terre des Saxons*» s'est divisée en neuf *sedes* et deux «régions». Les juges suprêmes qui administraient les *sedes*, ainsi que les conseillers de celles-ci ont été également élus par le «peuple» saxon sous réserve de l'approbation de l'élection par le prince. Le juge suprême de Nagyszeben (Sibiŭ, Hermannstadt) le *iudex regius Cibiensis* était le président de *l'Universitas Saxonum* qui était un organe collégial collectif de la nation saxonne; il a été élu par l'ensemble des villes saxonnes et confirmé dans sa dignité par le prince.[29]

Dans la *Croatie-Slavonie* les comitats avaient pendant la féodalité moyennâgeuse une autonomie territoriale très étendue de la noblesse et ils étaient les remparts de la noblesse; à l'époque de la monarchie de la féodalité finissante ils se sont transformés en des unités territoriales de l'administration centralisée de la Croatie *(Banska Horvatska)*. Leur suprême organe collégial était également l'assemblée du comitat *(zupanijske skupstine)* présidée par des *comes* nommés par le roi et souvent héréditaires.[30]

Au XVIII[e] siècle une importance particulière revenaient dans ces pays aux *zônes militaires de la frontére* établies pour défendre le pays contre les Turcs. Telles zônes étaient la zône de *Karlovac* formée sur le territoire de la Croatie et dans la région méridionale de la Slavonie ainsi que la zône frontière du Banat

[26] *Compilatae Constitutiones Regni Transilvaniae et Partium Hungariae eidem annexarum.* 2[e] Partie, 1[er] Titre, Art. 17.

[27] Loi no. 12 de 1791 de la Transylvanie.

[28] *Diploma Leopoldinum* p. 8; DÓSA, E.: *Erdélyhoni jogtudomány. (Le droit de la Transylvanie.)* Kolozsvár, 1861. Vol. I. p. 99.

[29] *Compilatae Constitutiones*, 2[e] Partie, 1[er] Titre, Art. 18; *Diploma Leopoldinum*, Art. 9; loi no. 11. de 1791 de Transylvanie. Quant aux Saxons de Transylvanie, en dehors de l'ouvrage synthétique de TEUTSCH, G. D.: *Geschichte der Siebenbürger Sachsen 1899*, nous renvoyons aux ouvrages de MÜLLER, G.: *Die sächsische Nationuniversität in Siebenbürgen.* Hermannstadt, 1928. du même auteur: *Stühle und Distrikte als Unterteilungen der Siebenbürgisch-Deutschen Nationaluniversität.* 1141 1876. Hermannstadt, 1941.

[30] ČULINOVIĆ, F.: *Istorija Država i Prava Jugoslovenskih Naroda. (Histoire de l'Etat et du droit de la nation yougoslave.)* Beograd, 1962. p. 138.

(Vojna Krajina) aux environs des fleuves *Kulpa* et *Unna*. Ces zônes se trouvaient sous l'administration directe d'un lieutenant du roi et en réalité sous celle du conseil de guerre de Vienne; elles étaient exemptes de la compétence du ban et des comitats. Les zônes frontières militaires étaient en premier lieu des organismes au service de buts stratégiques, mais elles s'acquittaient aussi des tâches de leur administration intérieure.[31]

Après la libération du pays de la domination turque, certaines parties de ces territoires ont été réannexées aux comitats, pendant que sur les territoires reconquis des nouvelles zônes frontières militaires ont été organisées. C'est ainsi qu'on a créé au XVIII[e] siècle le *Banat de Temes* et en Transylvanie pendant le règne de Marie-Thérèse, les zônes frontières militaires des Roumains[32] et des Székely sur des territoires frontaliers habités par ceux-ci.[33]

IV.

Les villes royales libres

D'autres organes de base de l'administration provinciale du XVIII[e] siècle étaient — à côté des comitats (*sedes*, circonscriptions) les villes royales libres *(liberae regiae civitates)*. Ces villes étaient directement assujetties à la seigneurie du roi et ainsi à son pouvoir judiciaire et administratif également. Déjà au XV[e] siècle elles ont acquis le statut juridique d'un Etat du royaume, ce qui voulait dire, que par voie de leurs envoyés elles ont eu le droit de prendre part comme un «quatrième Etat» à la Diète, avec voix consultative et délibérative, et d'avoir ainsi leur part dans la législation. Détachées des cours seigneuriales elles ont obtenu une instance d'appel à part, notamment la *sedes tavernicalis*, c'est-à-dire le tribunal du *tavernicus* (directeur des finances royales), où elles ont même participé à la juridiction par voie de leurs assesseurs. Elles avaient le droit d'entourer la ville de murs; dans l'enclos ainsi formé elles excerçaient les mêmes attributions que les comitats, de l'autorité desquelles elles étaient exemptes.

[31] Čulinović,: op. cit. pp. 143—144.

[32] Quant à l'établissement des régiments de gardes-frontière roumains voir: Baritiu, Gh.: *Material pentru istoria regimentului I. grănicer din Transilvania. (Matériel relatif à l'histoire du 1[er] régiment des gardes-frontières en Transylvanie.)* Transilvania, 1884—1885. Quant au 2[e] régiment des gardes-frontières de Naszód (Năsăud): Sotropa, V.: *Înființarea graniței militare năsăudene*, 1762. *(Établissement de la frontière militaire de Năsăud, 1762.)* Árhiva Someșană 1938—1939. du même auteur: *Regimentul grăniceresc năsăudean. (Le régiment des gardes-frontières de* (Năsăud) ibidem, année 1925, comme aussi Bunea, A.: *Istoria regimentelor Grănicerești. (Histoire des régiments de gardes-frontières.)* Balázsfalva, 1943.

[33] Szádeczky, L.: *A székely határőrség szervezete és a mádéfalvi veszedelem. (L'organisation des gardes-frontière Székely et le désastre de Mádéfalva.)* Századok, 1900. du même auteur: *A székely határőrség szervezése 1762—1764-ben. (L'organisation des troupes Székely affectées à la garde des frontières en 1762—1764.)* Budapest, 1908.

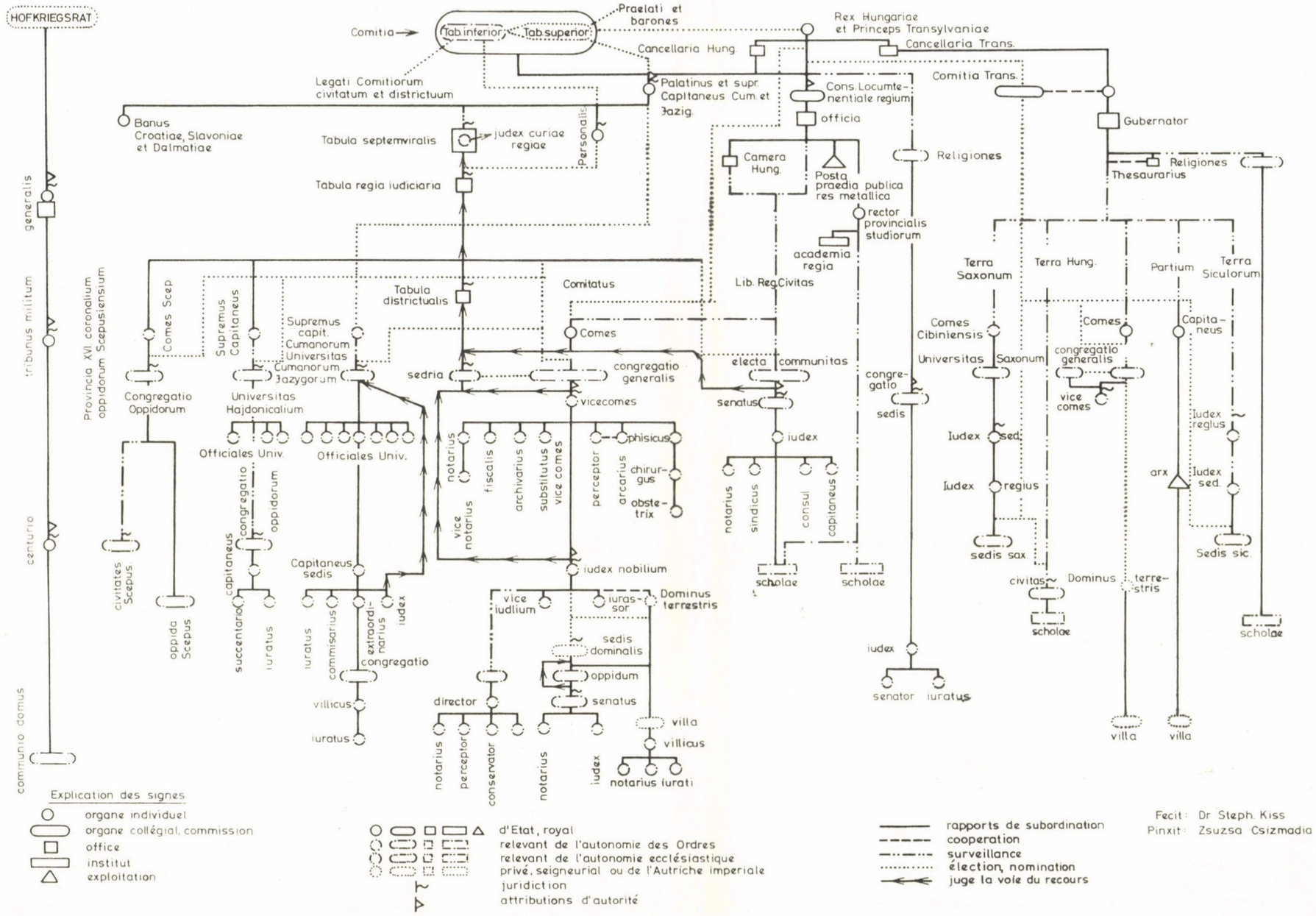

Schéma de l'administration provinciale au XVIII[e] siècle dans le Royaume de Hongrie et en Transylvanie

La noblesse a regardé les villes, accédées au statut juridique d'un Etat du royaume, avec une jalousie croissante et elle a fait adopter plusieurs lois pour mettre des entraves à l'augmentation du nombre des villes royales libres (loi no. 6 de 1608 (ante coronationem;) loi no. 17 de 1688). Malgré cela, après la cessation de la domination des Turcs, la noblesse était forcé de consentir à ce que la qualité de ville royale libre soit accordé par la Diète d'abord à certaines villes d'un passé glorieux, puis à des nouvelles villes en ascension, d'une majeure importance (lois 27, 107, 108, 109 de 1715, lois 27 de 1751 et 30 de 1791).

Pendant le XVIII[e] siècle les bourgeois aisés ont pris possession des institutions de l'organisation intérieure des villes. L'activité d'organisation et de direction de l'organisme et de l'économie des villes était exercée par le grand conseil *(electa communitas)* composé de 60 à 100 membres. La fonction exécutive était rempli par le conseil mineur *(senatus* ou *magistratus)* de 12 membres. Le conseil mineur était dominé par le patriciat de la ville, tandis que le grand conseil représentait plutôt les intérêts des citoyens membres des guildes. Le président de ce conseil, le porte-parole, qui dans son titre latin *(tribunus plebis)* gardait des reminescences romaines, servait d'intermédiaire chez le conseil mineur des revendications des cercles plus larges des citoyens; à la fin du XVIII[e] siècle cette présidence est devenue une charge sans importance et dans plusieurs villes son titulaire a été exclu même du conseil mineur.

Le démocratisme qu'on pouvait encore observer dans les villes du moyen âge, à l'aube du XVIII[e] siècle était déjà réduit à rien. Les membres des deux conseils ont été élus pour la vie et les sièges devenu vacants étaient remplis par les conseils mêmes, par voie de cooptation. En conséquence aucun rajeunissement n'a eu lieu et dans les villes le pouvoir est devenu pour ainsi dire le privilège de quelques familles. Ce sont ces familles qui s'altéraient lors des élections qui avaient lieu annuellement (ou tous les deux ans) concernant les charges les plus importantes (offices dits «piliers» — *columnares*). Les titulaires de ces charges, notamment le juge, le maire et le capitaine de la police étaient élus toujours parmi les membres du conseil mineur. A côté du notaire de la ville *(notarius)* qui déjà au moyen âge remplissait un rôle important, au cours du XVIII[e] siècle l'office du préposé aux affaires juridiques *(syndicus)* est devenu régulier dans les villes.

Malgré que le nombre des villes libres royales jouissant du statut juridique d'un Etat du royaume a continué de s'augmenter même pendant le XVIII[e] siècle, la valeur des voix dont les villes disposaient à la Diète s'est réduite très considérablement, parce que pendant longtemps les votes n'étaient pas comptées mais pondérées seulement *(vota non numerantur sed ponderantur)* et lorsque il est tout de même arrivé que les voix ont été dépouillées, la noblesse, dont l'opinion l'emportait à la chambre basse de la Diète, a fait si bien que les votes de toutes villes dans leur ensemble ont été considérées comme une seule

vote. En conséquence du caractère anti-démocratique de l'organisation intérieure des villes, au conseil mineur le terrain est devenu propice à une corruption en masse, notamment à l'utilisation arbitraire des recettes de la ville, ce qui à son tour a donné la possibilité aux organes centraux de l'Etat de s'ingérer dans les affaires des villes. Pour contrôler l'administration et la gestion financière, les organes centraux (conseil de lieutenance, chambre de finances royales) ont envoyé dans les villes suivant les cas, ou bien à l'occasion des élections, des délégations *(deputatio)*, dont les frais ont dû être supportés par les villes. Les frais de séjour de ces délégations ont signifié pour les villes des charges financières très considérables, sans améliorer en quoi que ce soit l'administration des villes, puisque dès que la délégation a quitté la ville, on a continué les anciens abus.

Dans le cadre de ses réformes administratives, Joseph II voulait mettre de l'ordre aussi dans le maquis de l'administration des villes. Il a considéré la bonne organisation comme la *conditio sine qua non* de l'efficacité de l'administration. Par conséquent, étant convaincu que les soldats s'entendent mieux en organisation que les artisans et les commerçants des villes, il a voulu introduire dans les villes partout une direction exercée par des militaires. Après son avènement au trône, il est arrivé de plus en plus fréquemment qu'il a proposé d'élire aux dignités de maire ou de conseiller des anciens officiers, sans vouloir du reste abolir les élections.[34] «La liberté des élections peut rester intacte, mais on peut néanmoins préférer un homme de mérite, ancien blessé et honorablement vielli, à un cordonnier ou à un artisan quelconque» — écrit la chancellerie.[35]

Le pas suivant était l'exigence d'une qualification pour être admis à des fonctions municipales. Il n'existait aucune ville de quelque importance où l'empereur et ses chancelleries n'auraient exigé l'emploi d'une personne ayant quelques connaissances du droit. Ainsi il a été imposé à la ville de Trnava, que son porte-parole *(Fürmender)* soit un clerc, connaissant le latin. Plus tard il sera une règle de droit *(normale)* que doivent passer un examen tous ceux qui dans une ville aspirent à un poste de juge ou de conseiller.[36]

Parmi les desseins de l'empereur une place importante revenait à l'unification de l'administration. A cause de cela il a ordonné que «du point de vue politique les villes royales libres soient subordonnées au comitat sur le territoire duquel elles sont situées». La ville, sauf l'administration de la justice et ses finances, ne sera donc qu'une partie du comitat et communiquera avec les autorités gouvernementales centrales par l'entremise de ce dernier. Uniquement les villes minières resteront soumises à l'autorité de la chambre des

[34] Archives Nationales de Hongrie, Budapest, Département de la Chancellerie, *Acta generalia* 5302/1781, 3481/1782, 6534/1781.

[35] Archives Nationales de Hongrie, Budapest, Département de la Chancellerie, ibidem, no. 2457/1784.

[36] Marczali, H.: *Magyarország II. József korában. (L'histoire de la Hongrie à l'époque de Joseph II.)* op. cit. Vol. III. p. 278.

mines, en raison de leur situation particulière. Dans le domaine de la surveillance Joseph II a réglé aussi les attributions du *comes*. A l'époque, les compétences de ce dernier ne s'étendaient pas sur les villes, parce que le roi exerçait ses droits de surveillance suprême, comme aussi les droits seigneuriaux qu'il avait sur les villes royales, par des commissaires royaux délégués à l'occasion des élections ainsi que par d'autres délégués (délégations) *ad hoc*. Du moment cependant que la réforme administrative a subordonné les villes à l'autorité des comitats, les *comites* préposés à ces derniers sont devenus indirectement des surveillants des villes aussi.

Au cours des réformes introduites par le roi, la séparation de la juridiction et de l'administration s'est faite valoir dans les villes également. La nouvelle organisation judiciaire a exigé que soit augmenté le nombre des conseillers ayant une qualification professionnelle. Comme la *tabula septemviralis*, instance suprême de l'organisation judiciaire hongroise, a constaté «pour remplir un poste administratif le bon sens suffit, mais pour un poste juridique la science est aussi nécessaire».[37] La chancellerie a exigé à son tour, que dans le futur au moins un tiers des conseillers des villes aient des connaissances juridiques, tandis que dans le domaine des affaires administratives et financières des villes il fallait tenir compte du caractère seulement.[38] Le règlement définitif a concédé aux villes une autonomie plus large que celle envisagée initialement par l'empereur. Dans les affaires financières et même dans la juridiction civile, les villes ont gardé leur autonomie antérieure; seuls les procès criminales ont passé des tribunaux des villes dans la compétence des tribunaux des comitats. Or, en introduisant le nouveau système de l'administration de la justice, l'empereur voulait grouper même la justice criminelle autour des villes royales libres. «Les sièges des procès criminels doivent être dans les villes royales libres et dans les autres villes; ces villes devront juger des affaires criminelles, aussi dans les régions leur attachées à cet effet, comme s'est fait dans la Bohême» a écrit l'empereur en 1786; son projet a cependant échoué à cause de l'opposition de *tabula septemviralis* hongroise.[39] Et si à partir de cette date le commissaire du roi devait nommer le juge principal de la ville comme il nommait aussi le *vice-comes* du comitat, l'élection des autres membres du magistrat de la ville continuait avoir lieu à l'assemblée générale de la population de la ville (séance conjointe du conseil et de la *electa communitas*); le commissaire royal exerçait seulement le droit de présenter des candidats.[40]

Pour tenir compte de la plus haute qualification qu'il a exigé, l'empereur a voulu augmenter en conformité les rémunérations des fonctionnaires des

[37] Archives Nationales de Hongrie, Département de la Chancellerie, ibidem, no. 8821/1787.

[38] Archives Nationales de Hongrie, ibidem, no. 10. 761/1786.

[39] Marczali, H.: op. cit. Vol. III. pp. 281—282.

[40] Horváth, M.: *Magyarország története. (Histoire de la Hongrie.)* Pest, 1863, Vol. V. p. 377.

villes. Celles-ci ont été classées en quatre catégories, et les émoluments ont été fixés en des montants allant de 100 à 600 florins.[41]

Nonobstant le fait qu'à son lit de mort Joseph II a annulé, parmi la plupart des ses réformes, aussi celles qui avaient trait aux villes et à l'administration de la justice, la forme surannée de l'organisme des villes a donné beaucoup à penser à la Diète de 1790–1791, réunie après la mort de l'empereur. Par son projet anonyme d'une constitution, dont nous avons déjà fait mention, József Hajnóczy, ex *vice-comes* du comitat Szerém a voulu obtenir que l'organisation intérieure des villes soit rendue plus démocratique. Il a voulu rendre plus rigoureuse les conditions de l'admission parmi les citoyens de la ville et n'a voulu concéder la qualité de citoyen *(ius concivilitatis)*, qu'à des personnes possédant des immeubles dans la ville; néanmoins il a proposé que 10 à 20 maisons élisent un citoyen qui devrait faire partie du grand conseil *(electa communitas)* et qui s'acquitterait des tâches de la police municipale concernant les maisons lui confiées. Lors de la réelection générale des fonctionnaires, les 10 à 20 maisons électrices auraient la faculté pour remplacer leur mandataire par une autre personne. Les membres du grand conseil seraient appelés à élire le conseil mineur «ouvertement, à haute voix, pour que parmi les bourgeois des sentiments nobles se forment également». C'est parmi les personnes élues que devrait être choisi, après les élections, aussi le porte-parole *(Fürmender)*; Hajnóczy a demandé que le «*Fürmender*» et les personnes élues soient autorisés à prendre part aux séances du conseil municipal. De ce fait le caractère secret des séances de ce conseil aurait été compromis. Enfin, du moment qu'il a considéré comme incompatible avec la dignité du conseil mineur que ses membres posent eux-mêmes leur propre candidature, il a suggéré que lors du renouvellement des charges qui devait avoir lieu tous les trois ans, les délégués du conseil de lieutenance ou de la Chambre des finances royales exercent le droit de présenter les candidats, qui dans les comitats compétait au *comes*.[42]

Dans les instructions données à leurs délégués envoyés à la Diète de 1790–1791, plusieurs comitats ont soulevé la question de la réorganisation des villes royales libres, et ceci en considération du fait que les propositions royales ont envisagé de mettre à l'ordre du jour de la Diète l'octroi du rang d'une ville royale libre à cinq villes ultérieures. Parmi les 107 points des instructions du comitat le plus influent, du comitat de Pest, il y avait un qui insistait sur la nécessité que «dans les villes royales libres l'administration cesse d'être arbi-

[41] Quant au classement dans diverses catégories et le règlement des émoluments voir: Opinio Excelsae Regnicolaris Deputationis motivis suffulta, pro pertractandis in consequentiam Articuli 67: 1790–1791 elaboratis Systematicis Operatis Articulo 8. 1825–1827 exmissae, circa objecta ad Deputationem Publico-politicam relata. — Auctoritate Comitiorum impressa. Posonii, 1830. Proposition . . ., Annexe no. 1. Résolution de Joseph II. émise en date du 7 août 1787.

[42] HAJNÓCZY, J.: *Ratio proponendarum in comitiis Hungariae legum.* op. cit. Chapitre VIII.

traire et qu'elle devienne libre et publique».[43] Néanmoins l'accession parmi les ordres du royaume des 5 villes proposées — sauf la ville de Pécs — a été accordée par la Diète et insérée parmi les lois du pays. (Loi no. 30 de 1791)

Pour le moment, aucune réforme n'a été introduite concernant l'administration des villes. Néanmoins la réforme des villes, comme aussi l'élaboration de beaucoup d'autres questions qui ne souffraient aucun atermoiement, ont été confiées en vertu de la loi no. 67 adoptée par la Diète, à des commissions spéciales, qui ont été invitées à se mettre au travail sans délai et d'achever leurs travaux dans la forme de projets de loi à soumettre à la Diète de 1792. Parmi ces commissions, la commission administrative *(deputatio publico-politica)* devait s'occuper de la réorganisation des villes; elle a été cependant obligée de laisser intacts les droits constitutionnels de la Diète et des comitats, de la sorte que «les travaux de la commission devaient avoir pour objet seulement le traitement mieux organisé des affaires intéressant la Diète et d'autres affaires publiques ainsi que l'expédition de ces affaires en harmonie avec l'esprit des lois».[44]

Dans la «*deputatio publico-politica*» le rapporteur de l'affaire des villes était József Majláth, conseiller au conseil de lieutenance, qui en raison de sa fonction connaissait très bien l'administration des villes, ce qui se voit du reste aussi du projet qu'il a rédigé. Le travail qu'il a fait revèle de la prudence, ce qui cependant ne l'empêche pas de vouloir éliminer les déficiences et de démolir nombre d'obstacles s'opposant au progrès de la bourgeoisie des villes, même contre la volonté de ces derniers. Ainsi par exemple, à l'avenir l'élection des députés à la Diète ne relevrait plus de la compétence exclusive du conseil municipal, mais serait entreprise conjointement par le conseil et l' *electa communitas*. Les instructions seraient rédigées par le conseil, la *communitas* aurait cependant le droit de faire des propositions y relatives. Le projet Majláth suggère d'élargir aussi l'électorat passif en la matière; aux termes de ses propositions les villes auraient la faculté de déléguer comme leur envoyé toute personne, noble ou non noble, qui d'office n'est pas membre de la Diète, à la seule condition que la personne déléguée ait de la culture et des expériences nécessaires.

Majláth a consacré un chapitre à part à l'administration des villes. Jusqu'alors les Diètes ne se sont pas ingérées dans cette administration. Selon la

[43] MARCZALI, H.: *Az 1790—1791-i országgyűlés. (La Diète de 1790—1791.)* Budapest, 1907. Vol. I. p. 180.

[44] Naponként-való jegyzései az 1790-ik esztendőben Felséges II-ik Leopold tsászár és Magyar Országi Király által, szabad királyi várossába Budára Szent Jakab havának 6-ik napjára rendelt, s Szent András havának 3-ik napjára Posony királyi várossába által-tétetett, s ugyan ott következő 1791-ik esztendőben, Bőjt-Más havának 13-ik napján befejezett Magyar Ország Gyülésének. (Annotations journalières des débats de la Diète convoquée en 1790 par sa Majesté Léopold II, empereur et Roi de la Hongrie dans sa ville libre de Buda pour la date du 6e jour du mois de Saint-Jacques, transférée en date du 3e jour du mois de Saint André dans la ville royale Posony et terminé au même lieu le 13e jour du mois de carême de l'an 1791.) Buda, MDCCXCI. *(Diarium)* p. 373.

coutume établie avant 1783, la surveillance sur les villes était exercée concernant les affaires de l'administration par le conseil de lieutenance, et, concernant les finances, par la chambre des finances royales. En 1783 toutes les affaires des villes ont été soumises à la direction du conseil de lieutenance.[45] Majláth ne propose non plus que les villes soient subordonnées à deux autorités différentes; il se contenterait de la surveillance du seul conseil de lieutenance, ce qui cependant jusqu'à 1848 ne s'est pas réalisé.

Dans le projet de Majláth il était question aussi de la relation des villes aux comitats.

Majláth constate que, quant à leurs attributions, les villes royales se trouvent à un échelon plus bas que les comitats. Il admettrait cependant que les villes situées dans un comitat puissent – comme les nobles et les propriétaires terriens – assister aux séances de l'assemblée du comitat et influer par leurs voix à la formation des résolutions de ce dernier.

Pour l'exercice d'une surveillance directe sur les villes, Majláth a proposé qu'à la place des délégations et des commissaires royaux, qui n'ont fait que traîner les affaires sans prendre des mesures utiles, on nomme des inspecteurs généraux (qu'il voudrait nommer «*tavernicus*») et dont les attributions seraient les mêmes que celles du comes d'un comitat.

En dehors du memorandum de Majláth, aussi des villes et des comitats ont saisi le palatin de leurs propositions. Parmi ces dernières la plus détaillée était celle des Ordres de la Croatie et de la Slavonie-Dalmatie, qui ont demandé que les villes soient subordonnées seulement au Conseil de lieutenance. La proposition a voulu mettre sur un pied d'égalité le conseil municipal et le grand conseil, en suggérant que le nombre de ce dernier soit élevé à 100–200 personnes.

Les propositions des comitats ont voulu sauvegarder les biens et les droits possédés par les nobles dans les villes. Le comitat Turócz a demandé expressément qu'à la Diète les villes n'aient qu'une seule voix, puisque elles ne représentaient qu'une seule personne noble. Le comitat Győr a demandé que concernant les affaires administratives les villes royales libres soient soumises à l'autorité des comitats. Tous étaient d'accord, qu'en matière de surveillance les villes ne dépendent que du conseil de lieutenance et que la Chambre des finances royales n'exerce sur elles aucun droit de surveillance (proposition des comitats Sopron, Szerém et Abaúj); en général on a exigé aussi une réforme de la structure intérieure des villes, qui permettrait que des masses plus larges des citoyens puissent prendre part aux élections.

Les villes ont également fait des propositions. Elles se sont opposées aux prétentions des comitats voulant qu'elles leur soient subordonnées; elles ne voulaient des inspecteurs permanents non plus. La ville de Lőcse a demandé

[45] Résolution royale no. 11 202 émise en date du 24 octobre 1783.

que seulement des propriétaires d'immeubles puissent être des sénateurs. En dehors du juge aussi le maire devrait recevoir des émoluments convenables. La *electa communitas* devrait comprendre parmi ses membres seulement de personnes éminentes. Les charges de la ville soient fixées d'avance; dans les villes des institutions publiques soient érigées et pour le militaire des casernes soient bâties.

En tenant compte de tout ce qui précède, dans la première moitié de 1793 la commission a achevé la rédaction de son projet. Elle a apporté plusieurs modifications au projet de Majláth. Elle en a rendu le texte plus précis, mais en même temps elle l'a dépouillé de quelques traits progressistes qu'on peut découvrir sous la rédaction prudente du projet.

Pour l'avenir le droit de vote des villes est prévu par le projet de loi sur le règlement de la Diète. Selon ce projet[46] les villes royales ayant obtenu ce statut avant 1790, garderaient le droit d'assister aux séances avec voix délibérative. Les villes nouvellement accédées à ce statut et les villes qui y accéderont dans l'avenir exerceraient ensemble leur droit d'envoyer des délégués à la Diète.

Quant à ce droit, la commission a voulu accorder aux citoyens des villes une plus grande influence. L'influence des citoyens membres des corporations devrait se faire valoir aux élections et, par l'intermédiaire de l'*electa communitas*, aussi lors de l'élaboration des instructions.

La commission a voulu charger de la surveillance des villes le *comes* compétent ou le conseil de lieutenance; la Chambre ne garderait son influence que sur la gestion des finances.

La commission aurait voulu que les sénateurs s'acquittant des tâches de juridiction soient versés dans le droit; les autres devraient avoir des connaissances relatives aux affaires économiques.

Le conseil municipal devrait être présidé par le juge de la ville. C'est sous sa présidence que seraient débattues toutes les affaires juridictionnelles et administratives. Concernant les affaires intéressant la gestion des finances et de l'économie de la ville, une commission économique devrait également prendre part aux débats.[47]

La commission a voulu régler aussi la question de l'admission parmi les citoyens d'une ville et déterminer les conditions requises pour l'admissibilité. Pour pouvoir devenir citoyen d'une ville, il fallait que le requérant soit possédant, artisan indépendant, commerçant ou qu'il exerce une profession libérale. L'admission ressortirait de la compétence du conseil, qui pouvait exiger en

[46] Opus excelsae deputationis regnicolaris in publico politicis quoad objecta art. 67 anni 1791. regnicolariter sibi delata elaboratum. fol. Posonii, 1826.

[47] Les commissions économiques ont été établies dans les villes pour qu'elles préparent les affaires à la délibération du Conseil et donnent leur avis en la matière. Les procès-verbaux de ces commissions ont dû être présentés au conseil et à l'*electa communitas*.

outre que le requérant ait été recommandé par des citoyens ou que sa probité soit témoigné par des personnes dignes de foi.

Les nouvelles élections des fonctionnaires avaient lieu conformément aux dispositions des privilèges chaque année ou tous les deux ou trois ans. La commission était d'avis que les élections trop fréquentes empêchaient tous travail efficace, à cause de quoi il serait mieux de ne faire des élections que tous les trois ans.

Les privilèges déjà en vigueur devraient être présentés au gouvernement à fin d'y être recueillis. Les privilèges des villes affranchies du pouvoir seigneurial devraient être présentés à la Diète pour y être débattus et que, le cas échéant, la lettre de privilège puisse être insérée parmi les lois du pays.

Le projet de la commission a voulu disposer aussi de la police municipale et de sa collaboration avec les autorités de police des territoires avoisinants. Le projet a envisagé en outre le règlement de la gestion économique des villes, du régime de l'importation des marchandiess et d'autres articles.[48]

Malgré que la commission a mené à bonne fin ses travaux (qui ont été même imprimés pendant une des Diètes de l'ère des réformes) dans l'atmosphère féodale de l'époque, ils n'ont pas pris la forme d'un projet de loi. Les propositions relatives aux villes ont partagé le sort des autres travaux de réforme: le gauchisme de la révolution française a rendu la Cour et la majorité prépondérante de la noblesse réfractaires aux réformes.

V.

Les villages

Le pilier sur lequel reposait l'administration locale hongroise du XVIII[e] siècle était l'administration villageoise. Les organes dotés de compétences générales étaient les *municipia* (c'est-à-dire les comitats et les villes royales libres); tout le reste n'était qu'un service détaché du comitat, comme l'était le district d'un comitat avec le *judex nobilium* à sa tête. Toutes les unités d'ordre inférieur, comme les villages, étaient soumises à l'autorité seigneuriale et restaient en dehors de l'ordre hiérarchique de l'administration générale, même si certains rudiments en pouvaient être observés déjà dans les siècles antérieurs.

Le réseau des comitats et des villes royales libres ainsi que des unités administratives autonomes que nous avons fait connaître en ce qui précède, s'est étendu sur le territoire tout entier du pays. On ne peut pas affirmer la même chose concernant les villages, lesquels — conformément au système féodal de l'époque — étaient moins des institutions de droit public que des institutions de droit civil, sous le pouvoir immédiat du seigneur terrien. Les

[48] Opus, dep. in publico politicis. op. cit.

possessions du seigneur étaient en partie des biens allodiaux et en partie des terres censives. Seules ces dernières appartenaient aux villages, parce que les terres allodiales *(allodia, predia)* restaient en dehors du territoire de ces derniers. Les villages dits des nobles, c'est-à-dire les biens de la petite et de la moyenne noblesse ainsi que certains biens de copossesseurs, avaient une organisation similaire et comptaient également parmi les villages. Une partie considérable du pays restait donc en dehors de l'administration des villages et était administrée comme terre allodiale par le seigneur même, par l'intermédiaire de ses intendants. L'administration des villages était également dirigée par le seigneur, mais l'exercice de l'administration incombait au maire du village et de ces adjoints élus. Les élections villageoises ont eu lieu également sous la surveillance du seigneur ou de ses intendants; le maire de village avait besoin d'être confirmé dans sa charge par le seigneur.

Jusqu'au XVIII[e] siècle rarement se sont présentés des différends concernant les élections en question. En ces temps de guerres continues, personne n'aspirait à l'honneur d'être élu maire, parce que le souci des requisitionnements et du cantonnement des troupes incombait au maire et aux préposés au village. De temps à autre les tâches y afférentes étaient tellement onéreuses, que les maires ont tout commis pour s'en débarrasser. En effet, le maire ne recevait aucune rémunération et l'exemption des charges publiques dont il jouissait, ne le récompensait guère des dépenses qu'il devait supporter pour l'hospitalité qu'il devait donner aux fonctionnaires du district et aux commissions chargées de différentes conscriptions et de la perception des impôts.

A cause de cela il arrivait à plusieurs endroits qu'on a imposé par contrainte la fonction du maire chaque année à un autre chef de famille de condition servile.

Au XVIII[e] siècle, notamment dans les temps relativement paisibles ayant succédé à la guerre d'indépendance de Rákóczi, il ne semblait plus tellement onéreux d'accepter l'office de maire. C'est démontré aussi par le fait, que parmi les nombreuses règles de droit portant règlement de l'élection du maire et de l'exercice du droit de confirmation du seigneur, on ne trouve pas une qui aurait frappé d'amende le refus de cette fonction.

L'autorité communale, y compris l'administration et la juridiction, était exercée par le maire et les préposés au village élus par les habitants par élection directe ou, dans des agglomérations plus grandes, par élection indirecte. L'étendue des attributions en question était fixée par le seigneur. Là où il était revêtu du droit de haute justice *(ius gladii)* il avait, même au XVIII[e] siècle, droit de vie et de mort. A sa cour seigneuriale *(sedes dominalis)* il était libre de prononcer des condamnations à mort et il connaissait aussi des affaires civiles entre lui-même et ses serfs. Concernant les affaires civiles de moindre importance et les contraventions, il a ordinairement délégué la juridiction au maire du village et il réservait seulement les affaires plus importante à la cour

seigneuriale. Il a remis l'administration quasi totalement au village qui avait un appareil de beaucoup plus approprié pour s'en acquitter. Parmi les villages les attributions les plus étendues ont été conférées aux bourgs, qui sortaient des rangs des autres villages aussi du point de vue de leur organisation intérieure.

a) Les bourgs

On nommait bourgs *(oppidum)* les unités de l'autonomie locale sortant de l'ambiance purement agricole, ayant un marché et parmi ses habitants un nombre plus ou moins grand d'artisans et qui, en dépassant juridiquement les simples communautés rurales, ont acquis des privilèges. Le nom hongrois «*mezőváros*» (en français «ville champêtre») équivalent à celui du «bourg», figure pour la première fois dans le recueil des lois publié en 1634 sous le titre «*Approbatae Constitutiones*» parmi les conditions de la principauté de Gábor *Bethlen*, prince de Transylvanie.[49] Le mot «*mezőváros*» y est usé en opposition aux villes entourées de murs et on a entendu par ce terme une agglomération qui n'est pas entourée de murs mais se trouve au milieu des champs. Cette étymologie du mot peut être retrouvée aussi dans le *Tyrocinium* de János Szegedi (commentaire du *Tripartitum* de Werbőczy) où l'auteur explique que le bourg est une ville au milieu des champs, à l'opposite des «villes enceintes» ou «villes à clefs».[50]

C'était pendant le XV[e] siècle que le développement des bourgs a pris en Hongrie un essor plus grand, de la sorte, qu'à la fin de ce siècle presque une cinquième de la paysannerie hongroise habitait dans un des 800 «*oppida*». Cette époque est celle de la transformation des villages en bourgs, lorsque notamment les bourgs commencent à s'intercaler dans les régions réservées au marchés des villes, ayant pour conséquence la naissance des centres moins grands, qui au fond donnent une organisation adéquate pour écouler le surplus de la production marchande en croissance, à l'aide de leurs marchés hebdomadaires de plus en plus fréquentés, voire au moyen de leurs grandes foires ayant existé déjà à certains endroits, pur vendre leur production artisanale en croissance[51] continue.

[49] Ap. c. II. 1. a. 2. Cond. VII.

[50] «Dicitur autem Hungaris oppidum: Mező-Város, i. e. Campestris civitas; Murata vero Civitas, *Kulcsos* aut *Kerített Város*» Szegedi, Johannes: Tripartitum Juris Hungarici Tyrocinium. Tyrnaviae, 1767. p. 771.

[51] Voir à ce sujet plus amplement: Mályusz, E.: *A mezővárosi fejlődés. (Le développement des bourgs.)* Étude publiée dans le volume: *Tanulmányok a parasztság történetéhez Magyarországon a 14. században. (Études sur l'histoire de la paysannerie hongroise au XIV[e] siècle.* Réd. Székely, Gy.) Budapest, 1953. pp. 128–191; du même auteur: *Geschichte des Bürgertums in Ungarn. Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte.* 1928. (XX) pp. 358 et ssq.; Szabó, I.: *Tanulmányok a magyar parasztság történetéből. (Études sur l'histoire de la paysannerie hongroise.)* Budapest, 1948. p. 10.; Szücs, J.: *Városok és kézművesség a XV. századi Magyarországon. (Villes et artisanat dans la Hongrie du XV[e] siècle.)* Budapest, 1935. p. 255.

La domination des Turcs a apporté des changements considérables aussi concernant l'organisation des villes et des villages. A l'exception de la Grande Plaine hongroise, l'urbanisation s'est arrêtée partout.[52] Au XVIII[e] siècle le nombre des bourgs s'est réduit à 500 ou 600. Ils se sont distingués des autres communes: *a)* par une certaine autonomie comportant le droit d'élire leur maire et leurs fonctionnaires ainsi que par les compétences plus amples des magistrats élus; *b)* par le versement collectif du montant forfaitaire des redevances. En effet, cette autonomie signifiait de prendre part à l'exercice d'un droit important relevant du pouvoir seigneurial de la féodalité. Par effet de cette autonomie les bourgs se sont libérés de la pression exercée par l'autorité des seigneurs; ils sont devenus maîtres chez eux; c'était à eux de tenir en ordre leur propre ménage et ils ont réglé leurs affaires par leurs propres organes. La prestation collective des redevances a rompu enfin le fil qui à travers des redevances attachait le serf à son seigneur. En effet, les habitants des bourgs ne payaient plus directement au seigneur, mais par l'intermédiaire de leur conseil municipal; leurs arriérés n'étaient plus encaissés par les intendants et les huissiers du seigneur, mais par les organes de leur propre autonomie.[53]

Malgré tout ceci, le bourg s'intègre même dans le mécanisme étatique du XVIII[e] siècle comme une communauté de serfs, laquelle du point de vue de ses rapports de droit avec le seigneur est soumise à l'autorité de ce dernier et de sa cour seigneuriale. En conséquence, les règles relatives aux villages des serfs sont *en général* valables aussi aux bourgs: néanmoins *à titre particulier* — notamment en possession de privilèges — les bourgs pouvaient avoir certaines prérogatives dont disposaient les villes royales libres. C'était par effet du privilège lui accordé qu'un bourg devenait une ville privilégiée *(oppidum privilegiatum);* ce sont les lettres de privilèges qui permettaient de constater le contenu de ces derniers. Au XVIII[e] siècle, aux termes des lois y relatives (§ 5 de la loi no 4 de 1741; loi no. 3 de 1791), seul le roi avait la faculté pour délivrer des privilèges;[54] les seigneurs terriens ont cependant en matière de cens conclu des contrats avec leurs serfs, c'est-à-dire avec les villages de ces derniers (y compris les bourgs). Dans ces contrats on a fixé, dans les cadres prévus par la loi et en tenant compte du droit coutumier général et local, d'une part les redevances dues au seigneur et, d'autre part, les attributions cédées par celui-ci aux autorités du village (du bourg) des serfs. Dans les bourgs, aussi des statuts

[52] Les bourgs de la Grande Plaine hongroise se sont grossis en conséquence de la migration de la population des agglomérations ruinées par les Turcs à des endroits plus sûrs, notamment dans les villes.

[53] Voir à ce sujet l'étude de l'auteur de ces lignes: *Az egyházi mezővárosok jogi helyzete és küzdelmük a felszabadulásért a XVIII. században. (La situation juridique des bourgs dépendant des seigneurs ecclésiastiques et leur lutte pour l'affranchissement au XVIII[e] siècle.)* Studia Iuridica Auctoritate Universitatis Pécs Publicata. Fasc. 24. Budapest, 1962.

[54] Anciennement des privilèges ont été octroyés aux bourgs aussi par les seigneurs; l'octroi de tels privilèges a cessé après la bataille de Mohács cependant.

municipaux ont réglé nombre de questions intéressant l'administration et la justice. Les statuts ont dû être homologués par le seigneur, ce qui cependant a été souvent omis lorsqu'il s'agissait de bourgs plus importants, notamment de ceux qui pendant le XVIII[e] siècle ont fini par devenir des villes royales libres (Győr, Pécs etc.) ou aspiraient à la devenir (Eger, Veszprém etc.). Dans les villages des serfs souvent des «lois de village»[55] émises par le seigneur complétaient — surtout en Transylvanie — les sources du droit relatives à l'organisation, aux attributions et à la procédure administrative des villages.

Malgré que les bourgs ne pouvaient pas être des propriétaires de terres nobiliaires (on en peut trouver quelques exceptions basées sur une ancienne coutume) ils pouvaient néanmoins exercer certains droits régaliens mineurs *(iura regalia minora)*, nonobstant le fait que ces droits étaient des accessoires de la propriété terrienne. De tels droits étaient la participation aux revenus des débits de vin *(ius educilli)*, du brassage de la bière *(ius braxationis)*, de la destillation de l'eau-de-vie *(crematicoctio)*, des boucheries *(ius macelli)*, des moulins *(ius molae)*, du droit de la cuisson des briques *(ius exustionis tegularum)* et des droits attachés à la propriété en matière de pêche *(piscatio)*, de chasse *(venatio)* et de l'oisellerie *(aucupium)*. La plupart des bourgs avait le droit de tenir des marchés, en vertu soit d'un privilège royal soit d'un contrat conclu avec le seigneur. Exceptionnellement (comme la ville de Győr) un bourg pouvait exercer aussi le droit de relâche *(ius stapulae)*. Les biens du citoyen d'un bourg, décédé sans héritiers, revenaient aux termes de la loi no. 62 de 1715 au seigneur, qui a évoqué l'héritage. Dans quelques endroits cependant (ville de Pécs) le bourg s'y est opposé avec succès en se faisant fort du droit coutumier.

Les droits autonomes étaient exercés par les bourgs conformément au contrat conclu avec le seigneur au sujet des redevances et, à partir de 1767, conformément au règlement relatif aux censives, émis par Marie-Thérèse. A la réélection des préposés au bourg a assisté souvent, à côté du représentant du seigneur, aussi le *judex nobilium*, qui à plusieurs endroits a même dirigé personnellement les élections.

Après l'entrée en vigueur du décret de Marie-Thérèse sur les censives il arrivait souvent que le conseil de lieutenance a réglé lui-même les rapports entre le seigneur et le bourg. Successivement — surtout sous le règne de Joseph II — la surveillance directe exercée par le conseil de lieutenance sur les bourgs est devenu de plus en plus régulière. Le «*Departamentum publico-politicum*» établi en 1783 au sein du conseil de lieutenance, surveille désormais régulièrement l'administration des bourgs plus évolués (disposant d'un conseil

[55] Imreh, I.: *Székely falutörvények. (Lois des villages des Székely.)* Kolozsvár 1947. Edition de l'Institut Scientifique transylvanien de l'Université Bolyai de Kolozsvár. Plusieurs lois des villages ont été publiées dans les années III, V et VIII. de la revue *Magyar Gazdaságtörténeti Szemle* et dans les volumes IV, V, VI et VII du recueil *Székely Oklevéltár*.

municipal ayant la qualité d'une juridiction de première instance); il fait des enquêtes concernant les plaintes contre les fonctionnaires municipaux et réglemente aussi l'activité des guildes fonctionnant dans les bourgs.[56]

L'organisation intérieure des bourgs — surtout celle des bourgs privilégiés — ressemblait mieux à l'organisation des villes royales libres qu'à celle des villages des serfs. Nous rencontrons aussi dans les bourgs deux organes collégiaux plus importants, à savoir le conseil mineur *(senatus, magistratus)* et le grand conseil *(electa communitas)*. A côté de ces organes figurent au XVIII[e] siècle, même dans les villes plus grandes, l'ensemble des citoyens, la «communauté» entière.

Dans les bourgs l'organe individuel le plus haut placé était le maire. Il présidait le conseil et était au même temps le premier fonctionnaire de la cité. Il n'était pas rémunéré partout, souvent il n'avait que sa part des amendes.

La juridiction était exercée dans les bourgs par le conseil, sous la présidence du maire. Quelques bourgs possédaient aussi le droit de haute justice (Győr); les affaires criminelles mineures et les procès civils relevaient en première instance de la compétence des bourgs; en instance d'appel en connaissait la cour seigneuriale.

Les attributions administratives comprenaient toutes les branches de la police administrative; la police des bâtiments, des marchés, des moeurs et des incendies. De ces fonctions le conseil ne s'acquittait pas directement, mais par ses employés spécialisés, agissant sous sa surveillance. Une importance particulière revenait aux attributions du conseil en matière de finances, notamment à la perception des revenus, à l'effectuation des dépenses et au droit d'ordonnancement. Pendant le XVIII[e] siècle la corruption s'est généralisée dans la gestion financière des bourgs. Il arrivait que le conseil a perçu des citoyens des montants beaucoup plus élevés que ce qu'il devait verser au seigneur, en répartissant l'excédent entre les membres. Les abus ont été constatés plusieurs fois par les délégués des autorités centrales.

Au XVIII[e] siècle, surtout dans sa deuxième moitié, dans les bourgs peu avancés la lutte des classes s'est faite également plus aiguë. La bourgeoisie des villes voulait se libérer des redevances féodales et aspirait au statut juridique des villes royales libres, pour appartenir ainsi aux Ordres du royaume. A ces tendances les seigneurs terriens ont opposé une résistance acharnée et seulement le refus de la prestation des redevances, la saisie arbitraire des droits seigneuriaux par les villes, voire la force des armes les a amenés à transiger avec leurs villes et à renoncer à leurs droits seigneuriaux en échange d'un dédommagement. Dans ses efforts y relatifs la bourgeoisie des villes a été secondée par la Cour, matériellement intéressée dans la question. Il arrivait

[56] Concernant l'activité du Conseil de lieutenance voir: FELHŐ, I. VÖRÖS, A.: *A helytartótanácsi levéltár. (Les Archives du Conseil de lieutenance.)* Budapest, 1961. pp. 178—179.

même que le monarque est intervenu personnellement pour pousser le seigneur récalcitrant à consentir à l'affranchissement d'une ville. Toutefois, pendant le XVIII[e] siècle, seulement quelques bourgs appartenant à la chambre des finances royales ou à certains dignitaires ecclésiastiques ont réussi à devenir des villes royales libres. Les propriétaires terriens sauvegardaient intacts leurs droits sur les communes pour le siècle suivant, qui était le dernier siècle de la féodalité, pour le XIX[e] siècle.

b) *Les villages des serfs*

Au XVIII[e] siècle plusieurs recensements des villages ont été faits en Hongrie. Selon le recensement entrepris entre 1715 et 1720 il y avait 1230 villages de nobles et 6766 villages censifs; selon le recensement de 1778, en tout 8420 villages de nobles et villages de serfs et enfin, selon le recensement ordonné par Joseph II, il y avait 9046 villages en Hongrie et 1751 en Croatie; en 1787 on a recensé 2541 communes en Transylvanie.[57]

En mettant ces données en parallèle avec celle de l'ère du capitalisme, on ne peut pas constater des changements très considérables. A l'époque de la première guerre mondiale le nombre des villages s'élevait en Hongrie (sans la Croatie, mais y compris la Transylvanie) à 12,750. — Mais, nonobstant les changements plutôt insignifiants du nombre des villages, leur structure s'est sensiblement modifiée; sur le territoire d'un seul village de nos jours, il y en avait 2 –3, voire quelquefois 4 —5 à l'époque de la féodalité. Les propriétaires d'une certaine partie d'un domaine, ont établi des villages de serfs à part sur les terres leur échues en partage; d'autre part les copossessions de la petite noblesse d'une part et leurs serfs d'autre part se sont organisés en villages distincts, joint l'un à l'autre (voir les villages Nemesládony, Pórládony; en hongrois Ládony des nobles, Ládony des paysans). Tout ceci a été compensé par l'établissement de nouveaux villages et par l'attribution de la qualité d'un village indépendant à la périphérie d'un autre.

Au XVIII[e] siècle les communes sont pour la plupart des villages de serfs. Selon le système de droit de la féodalité ils étaient entièrement la propriété du seigneur qui a considéré l'autorité communale comme un moyen de contrainte, autre qu'économique, et en a fait usage pour assurer, voire pour augmenter

[57] Les données des recensements des années 1715 à 1720 sont publiées dans l'ouvrage: Acsády, I.: *Magyarország népessége a Pragmatica Sanctio korában. (La population de la Hongrie à l'époque de la Pragmatica Sanctio.)* Budapest, 1896. Quant au recensement de 1773 voir le volume «*Lexicon locorum Regni Hungariae popolosorum anno 1773 officiose confectum*». Budapestini, 1920. Pour le recensement sous le règne de Joseph II, voir: *Az első magyarországi népszámlálás (1784 –1787). (Le premier recensement de la population en Hongrie 1784 –1787.)* Budapest, 1960. Publication de la Bibliothèque de l'Office central de statistique et de la Section archivistique du Ministère des Affaires Culturelles. — Thirring, G.: *Magyarország népessége II. József korában. (La population de la Hongrie à l'époque de Joseph II.)* op. cit. p. 19.

ses revenus. Les exigences des seigneurs se sont augmentées surtout dans la deuxième moitié du XVIII[e] siècle. L'élargissement des marchés des produits agricoles et le passage de plus en plus accentué des propriétaires terriens à l'exploitation allodiale ont poussé ces derniers à élever sensiblement les redevances des serfs, alors que le montant inchangé des impôts d'Etat a continué de grever les terres censives. Pour satisfaire à la nécessité de plus en plus pressante de faire augmenter ses revenus, le propriétaire était obligé de recourir dans une plus grande mesure à des moyens de contrainte autres qu'économiques. A cet effet il a donc mis à profit, en dehors de sa cour seigneuriale, aussi l'autorité communale et a pris en main aussi l'élection du maire et des fonctionnaires des villages. Par contre le gouvernement, pour assurer la rentrée des impôts d'Etat, prend les serfs sous sa protection; concernant les plaintes formées en matière de redevances le conseil de lieutenance prend plus d'une fois parti pour le plaignant. Confiants de cette protection les serfs refusent de rendre au seigneur les redevances augmentées, de la sorte que dans la deuxième moitié du siècle la lutte des classes entre les seigneurs et les serfs devient toujours plus vive.

Les divergences entre la Cour et la noblesse ont éclaté avec une véhémence particulière à la dernière Diète réunie sous le règne de Marie-Thérèse (1764 65). Lorsque les Ordres ont voulu proscrire, ensemble avec son livre, le bibliothécaire de la Cour, Ferenc Adam Kollár, entré en lice pour la sauvegarde des droits royaux,[58] la Cour s'est rendu compte de l'impossibilité de réglementer les redevances serviles par l'intervention de la Diète. A cause de cela, Marie-Thérèse a mis en vigueur par patente royale son règlement relatif aux redevances seigneuriales sans consulter la Diète.[59] L'ordonnance dite *Urbarium* met fin aux efforts des seigneurs visant l'extension de leurs terres allodiales et règle pour la première fois aussi les relations entre les communes et les seigneurs.

Le IX[e] Chapitre de l'ordonnance, relatif aux villages, porte règlement de leur organisation intérieure. Désormais le seigneur peut présenter trois candidats à l'office du maire; le village élit une personne parmi ces derniers en présence d'un délégué du seigneur. Celui-ci a le droit de destituer de son emploi le maire élu, voire de le punir, s'il manifeste un comportement inadmissible. A la

[58] Voir à ce sujet l'article de l'auteur de cette étude: *Egy 200 év előtti országgyűlés évfordulójára. A «Kollár contra Status et Ordines».* (*A propos de l'anniversaire d'une Diète d'il y a 200 ans. «Kollár contra Status et Ordines».*) Jogtudományi Közlöny, 1964. pp. 214–226.); le même article en langue slovaque: *Zápas Adama Františka Kollára s Uhorskou Šlachtou.* Bratislava, 1964. Slov. Akad. Vied. Separatum a Historický Časopis. Année 12, fasc. 2.

[59] Voir le règlement dans le recueil «*Idea urbarialis regulationis Materna-Regiae Mariae Theresiae sollicitudine saluti publici sacrata*». pp. 172 à 284. Concernant l'histoire de la réglementation des redevances seigneuriales voir: Szabó, D.: *A magyarországi úrbérrendezés története Mária Terézia korában. (L'histoire de la réglementation des redevances seigneuriales a l'époque de Marie-Thérèse.)* Budapest, 1933. Dans la série *Fontes Historiae Hungaricae Aevi Recentioris.*

place du maire destitué le village était tenu d'élire un autre, également parmi trois candidats présentés par le seigneur. Les attributions du maire n'ont pas été prévues dans le détail; ces attributions ont été formées en partie sur la base des lois et en partie sur celle des statuts et du droit coutumier. Les compétences du maire embrassaient la surveillance de l'activité économique du village, de l'exécution des corvées publiques; le maire a pris part à l'évaluation des dommages causés par le bétail dans les cultures; il procédait à l'arrestation des malfaiteurs et les soldats maraudeurs, a pris part à l'assiette et à la perception des impôts. En revanche il était dispensé des services à rendre au seigneur ainsi que du versement d'une redevance en argent.

Les autres fonctionnaires du village, notamment les jurés et l'adjoint du maire, nommé «notaire» figurent également dans l'*Urbarium* de Marie-Thérèse. Les jurés et le maire forment ensemble l'autorité communale; le notaire *(scriba)* fait les écritures et fait pour les habitants du village des travaux juridiques simples. Déjà nos chartes du XVII[e] siècle font mention de la fonction du notaire, celle-ci cependant n'est devenue générale que pendant le XVIII[e] siècle. Ce n'était pas nécessaire que chaque village ait son notaire; les villages plus petits ont pu employer un notaire en commun.[60]

Quant à l'élection du notaire et des jurés l'*Urbarium* a accordé des droits autonomes aux villages; dans ces élections le seigneur ne devait pas intervenir.

L'ordonnance règlemente aussi les questions relatives à la gestion économique des villages ainsi que le rôle qui leur revenait en matière d'imposition. A ce sujet l'*Urbarium* étend les droits de surveillance possédés par les comitats. Il ordonne que l'impôt communal *(portio)* soit réparti équitablement entre les villageois, selon les modalités prévues par le comitat et que le seigneur demande compte chaque année de la gestion financière du village. S'il omet de le faire, ce sont les organes du comitat qui contrôlent l'arrêté des comptes.

A fin d'assurer la rentrée des revenus d'Etat, l'*Urbarium* ordonne que l'autorité communale verse les impôts perçus directement à la caisse du comitat; le seigneur n'y doit pas intervenir. En même temps les serfs sont tenus de payer au seigneur ponctuellement leurs redevances pécuniaires, qui peuvent être faites rentrer aussi par voie d'exécution. Celle-ci cependant ne peut avoir lieu que concernant l'arriéré d'un impôt dû aux termes de la patente.

La patente s'est occupée aussi du règlement judiciaire des plaintes formées par les serfs. Des litiges entre les serfs du même seigneur, le seigneur ou son intendant pouvaient être saisis, mais concernant les préjudices causés aux serfs par un intendant du seigneur, seulement celui-ci pouvait rendre justice en première instance; la partie non satisfaite de son jugement avait le droit de se

[60] Alsó, L.: *A községjegyző jogállása. (Le statut juridique du notaire du village.)* Tirage à part des fascicules 31 à 38 de l'année 1925 de la revue *Magyar Közigazgatás;* voir encore: Barta, L.: *A községjegyzői intézmény története Magyarországon. (L'histoire de l'institution du notaire du village en Hongrie.)* Budapest, 1882. Vol. I—III.

pourvoir en appel devant le comitat; au cas de déni de justice par le seigneur, le serf pouvait saisir directement le comitat de sa plainte.[61]

c) *Les «villages nobles»*

L'*Urbarium* de Marie-Thérèse ne contient aucune disposition concernant les communes nobiliaires *(curiales)*. L'histoire de l'administration de ces communes n'a pas été écrite jusqu'ici; nous sommes toutefois renseignés de ce que la fonction du maire y était rempli par le «lieutenant» *(director)*, élu par les copossesseurs nobles de leur sein. Dans les villages de nobles nous rencontrons également le notaire; l'expédition des affaires financières incombait au percepteur *(perceptor)*. Dans quelques-uns de ces villages les documents étaient gardés par un «conservateur» *(conservator)*, assisté par des «compères portant les clefs» choisis parmi les familles des copossesseurs.[62]

Dans les «*sedes*» des soldats nobles des prélats les villages de cette noblesse ecclésiastique avaient une organisation semblable à celle des communes de noblesse.[63] A la tête de ces villages était le «*judex nobilium*» ou le maire, assistés dans les affaires financières par des conseillers et dans les affaires juridictionnelles par des jurés. Les compétences de l'autorité suprême de la *sedes*, c'est-à-dire l'assemblée générale *(congregatio generalis)* s'étendaient aussi sur les affaires communales.[64]

d) *L'organisation des communes*

Aussi en Hongrie l'organisation des communes et le fonctionnement de leur administration étaient réglés par des règles de droit dites «lois du village». Ces règles de droit, nommée aussi «instructions» ont été émises par le seigneur. La loi du village Apátfalva (datée du XVIII[e] siècle) prescrit par exemple que l'assemblée du village soit convoquée pour discuter toutes les questions de majeure importance. A l'assemblée convoquée par le maire du village, tous les membres assermentés du conseil communal devaient assister sous peine d'être punis et sauf la présence de motifs justifiant leur absence. A l'assemblée la première place revenait au maire, la seconde au juge, les autres places ont été occupées par les membres selon leur ancienneté.

[61] Voir concernant tout ceci: KÉRÉSZY, Z.: *Községi közigazgatásunk alaptörvényének (1871: XVIII. tc.) előzményei. (Les antécédents de la loi fondamentale de notre administration communale;* loi no. XVIII de 1871.) Mélanges Illés, Budapest, 1942. pp. 247—300.

[62] ALSÓ, L.: *A nemesi község hatósága és szervezete. (L'autorité et l'organisation des villages des nobles.)* Budapest, 1928. *Separatum* des fascicules 12, 13 et 14 de l'année 1928 de la revue *Magyar Közigazgatás.*

[63] Quelquefois seulement un seul village faisait partie d'une *sedes* des nobles ecclésiastiques comme p. ex. dans la *Sedes* de Bácsa.

[64] Voir la note 25 ci-dessus.

Les jugements ne devaient être prononcées que dans la matinée, «la tête claire»; personne ne devait être puni dans l'après-midi ou dans la soirée, en état d'ébriété. C'était aux assemblées qu'on jugeait aussi les contraventions. Le maire et le conseil n'étaient autorisés que de prononcer des peines pécuniaires ne dépassant pas un florin: les cas les plus graves relevaient de la compétence du tribunal du seigneur.

Beaucoup d'actes punissables étaient du ressort de l'autorité communale. En dehors de détériorations, de larcins de moindre gravité, de perturbation de l'ordre public, souvent les conseils ont été révêtus aussi du pouvoir répressif concernant nombre d'autres actes, comme par exemple l'usage du tabac, jurons, profanation d'une fête, trafic pendant la durée des offices réligieux, querelles effreinées, hausse illicite de prix etc.[65]

La nomination aux différents offices communaux n'est devenu uniforme, malgré les dispositions de l'*Urbarium* de Marie-Thérèse non plus. Dans certains villages le maire et les membres du conseil étaient élus par l'ensemble des habitants du village, tandis que dans certains autres seulement par les habitants possédant des maisons ou de terres dans le village.[66]

Même l'absolutisme éclairé de l'ère de Joseph II n'a apporté aucun changement essentiel aux conditions règnantes. L'abolition du servage perpétuel par Joseph II n'a provoqué aucun changement sensible dans l'organisation intérieure des communes. L'empereur a ordonné aussi que les préposés aux affaires juridiques des comitats défendent les intérêts des serfs; cependant à cause de l'appartenance de classe de ces fonctionnaires, cette mesure n'a apporté à la situation aucun changement appréciable.[67]

Joseph II a pris des dispositions concernant la fonction de notaire également, en ordonnant que seulement deux notaires soient attachés à chacun des *iudex nobilium*, ces adjoints devant expédier les affaires des villages. Les montants économisés par cette mesure devaient être affectés aux écoles villageoises.[68]

Après la mort de Joseph II l'*Urbarium* a été maintenu en vigueur par la loi XXXV de 1791; l'expédition par les tribunaux seigneuriaux des affaires des paysans de condition servile a été également ordonnée. La loi a de nouveau déclaré expressément l'abolition du servage à perpétuité; aucun nouveau règlement des redevances n'a été cependant promulgué, la préparation de ce règlement ayant été confié à une commission déléguée par la Diète portant le nom «*deputatio urbarialis*». Celle-ci cependant était également incapable de faire un

[65] Szabó, I.: *Tanulmányok a magyar parasztság történetéből. (Etudes sur l'histoire de la paysannerie hongroise.)* Budapest, 1948. p. 284.

[66] Kérészy: op. cit. p. 256.

[67] Pour le texte de l'ordonnance sur les serfs consultez dans les Archives Nationales le no. C-13. *Benigna mandata* 29 août 1785. no. 23219. Publié en hongrois par Beér—Csizmadia: *Történelmünk a jogalkotás tükrében. (Notre histoire à la lumière de la législation.)* op. cit. pp. 286—288.

[68] Marczali: op. cit. dans la note no. 13 ci-dessus, pp. 447—448.

travail méritoire et la loi XII de 1792 a maintenu en vigueur la loi XXXV de 1791, à titre provisoire. La loi no III de 1796 a fait la même chose, et ont procédé de même aussi plusieurs lois promulguées au siècle suivant; une règlementation législative des affaires communales n'est intervenue qu'à la Diète de 1832—36. Pendant le XVIII[e] siècle l'organisation des villages a atteint, sur le plan national, seulement un niveau plutôt bas; seulement concernant les bourgs on est arrivé à créer des règlements plus détaillés par des *iura particularia*.

En Transylvanie l'*Urbarium* de Marie-Thérèse n'a pas été mis en oeuvre. Toutefois, une certaine autonomie des villages en tant que collectivités leur a été reconnue; cette autonomie s'est faite valoir surtout sur le terrain du droit civil. En Transylvanie on a toujours admis que non seulement les «villes à clef» et les bourgs, mais aussi les villages *(villa)* puissent posséder des terres arables, prés, pâturages, forêts, vignes, moulins et tous les droits régaliens et revenus qui sont destinés au service du village. La validité des bénéfices attribués aux communes *(communitates)* a été généralement reconnue et confirmée aussi par le *Diploma Leopoldinum* de 1691 (art. 2.) réaffirmant les droits de la Transylvanie. Les communes avaient la capacité active et passive d'ester en justice.[69] En vue d'exercer leurs droits, elles étaient autorisées de tenir des réunions, nommées assemblées de village.[70]

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Dans la Hongrie du XVIII[e] siècle, l'administration locale était bâtie sur la double hiérarchie des *municipia* et des communes. A part les fondements, l'organisation était extrêmement compliquée et au cours du siècle une règlementation sur le plan national a commencé à peine. Dans la deuxième moitié du siècle — surtout pendant l'ère de l'absolutisme éclairé — la règlementation est devenue plus poussée et, sans compter les réformes profondes mais avortées de Joseph II, elle a pénétré même dans les sources du *ius particulare*. Les problèmes résultaient avant tout de l'agonie de la féodalité hongroise et c'était le renversement du régime féodal qui a rendu possible l'amélioration de l'administration. La solution définitive a été cependant réservée à la période de la révolution bourgeoise du siècle suivant.

Landesadministrationsprobleme in Ungarn des 18-ten Jahrhunderts

A. Csizmadia

Der feudalen Staatsordnung entsprechend traten die Organisationseinheiten der Landesadministration in Ungarn ebenso, wie in Siebenbürgen in mannigfaltiger Form auf. Die grundlegenden Einheiten in Ungarn waren die Komitate und die königlichen Frei-

[69] Instructio pro tabula regia iudiciaria 1777, § 23.

[70] Dósa, E.: *Erdélyhoni jogtudomány. (Droit de la Transylvanie.)* op. cit. dans la note 28 ci-dessus, Vol. II. p. 166.

städte, welche sich unmittelbar an die Dikasterien der königlichen Regierung, ans Verwaltungszentrum der Administration, den Statthalterrat und an die das Finanzwesen auf höchstem Stand verwaltende Kammer knüpften. Innerhalb der Komitate waren die Stuhlbezirke die Verwaltungseinheiten niedrigeren Grades. Am niedrigsten Grade der Administration stand die Gemeinde unter gutsherrlicher Jurisdiktion. Ein gleiches niedriges Organ war auch der gutsherrliche Marktflecken, der aber über eine grössere Autonomie verfügte, welche ihm von dem Gutsherrn überlassen wurde.

Ausserhalb dieser allgemeinen Organisationseinheiten zeigte sich der Partikularismus des feudalen Staates in der Landesadministration noch mannigfaltig. Es gab viele Gebiete im Lande, welche der Obrigkeit des Komitates weggenommen waren. Solche waren auf der Grossen-Tiefebene die einstigen Ansiedlungsorte der Jassen und Kumanen, der sogenannte Jassen-Kumanen-Bezirk. Ein solches Gebiet war die Selbstverwaltungsorganisation der vom Fürsten Siebenbürgens Bocskai angesiedelten Haiducken, der Haiduckenbezirk. Diese Bezirke waren der Obrigkeit der Komitate entnommene Selbstverwaltungsorganisationen, welche auf dem Wege ihrer Abgeordneten am Ende des achtzehnten Jahrhunderts ein Sitzungs- und Stimmrecht im Parlament erhielten. Neben manchen, während der Geschichte herausgebildeten und mehr oder minder selbständigen Stühlen und Bezirken hatten eine Rolle noch die prädialen Stühle der Kampfleute der Kirchenhäupter.

Das Administrationsbild des Mutterlandes wurde durch die eine grosse Autonomie besitzende Administrationsorganisation der Nebenländer Kroatien, Slawonien und Dalmatien ergänzt. Im 18. Jahrhundert erlebten noch diese Nebenländer eine bedeutende Umgestaltung in ihrem Gebiete, denn einzelne Teile von ihnen sind während der Türkenkriege zu Militärgrenzgebieten geworden, und ihre vollständige Rückgliederung blieb auf das nächste Jahrhundert.

Wenn das feudale Ungarn im 18. Jahrhundert in seiner Administrationszerteilung ein buntes Bild zeigt, gilt diese Konstatierung für Siebenbürgen noch mehr. Hier blieb die in der Zeit des Fürstentums herausgebildete Union der drei Nationen (Ungarn, Szekler und Sachsen) und der vier Religionen (römisch-katholische, reformierte, evangelische und unitarische) noch im 18. Jahrhundert erhalten und obwohl schon zu dieser Zeit das Rumänentum im grössten Teil Siebenbürgens die Mehrheit bildete, wurde es als eine selbständige Nation nicht anerkannt, und seine Vertreter konnten nur als griechisch-katholische und orthodoxe Bischöfe, als ungarische Adeligen, oder als Deputierte der Städte an den Landstagungen teilnehmen. Eine gewisse Selbständigkeit besass das Rumänentum in den Komitaten Fogaras und Hunyad, gleichwie die Bevölkerung der Militärgrenzgebiete, welche eben im 18. Jahrhundert von Maria Theresia ins Leben gerufen waren. In Siebenbürgen war der Administrationsorganismus wirklich der Union der drei Nationen entsprechend: neben den ungarischen Komitaten, den Szekler- und Sachsenstühlen haben noch die Deputierten der ungarischen Landesteile (Partium), welche während der Türkenherrschaft an Siebenbürgen angeschlossen waren, an den Landstagungen teilgenommen und diese Selbstverwaltungen haben auch die Ortsverwaltung geleitet. Alle diese Nationen haben sich von Zeit zu Zeit auch kollektiv beratschlagt, und so sind ihre Vertretungen auf dem Landstag erschienen.

In der zweiten Hälfte des 18. Jahrhunderts begann auch in Ungarn die Herausbildung der berufsmässigen, bürokratischen Amtsgebarung. Besonders unter der Herrschaft von Josef II. (1780—1790) entwickelt sich stark die Administration und sie verändert sich auch zum guten Teil. Während seiner Regierung bildet sich eine progressive führende Schicht der örtlichen Administration aus, oft aus nichtadeligen Intellektuellen, die auch nach seinem Tode seinen Reformen innerhalb des Feudalismus treu bleiben. Ihre Tätigkeit ist auch im Landstag 1790—91 zu bemerken, in der Arbeit der von dem Parlament delegierten Ausschüsse ebenso, wie in der politischen und juristischen Literatur dieser Jahre. An der Spitze standen besonders die ungarischen Jakobiner, unter ihnen Hajnóczy, der mit seinen Verfassungsentwürfen und anderen Werken auch die Landesadministrationsprobleme Ungarns am Ende des 18. Jahrhunderts lösen wollte. Die Bestrebungen der ungarischen Jakobiner erreichten keinen Erfolg, die Linksentwicklung der französischen Revolution überrascht sogar die adeligen Reformer, und stellt sie an die Seite des Hofes; so bleibt die Lösung der Administrationsprobleme auf die revolutionäre Zeit des folgenden Jahrhunderts.

Der Verfasser fügt zur Erhellung der Kompliziertheit der feudalen Landesorganisation und der Zusammenhänge der Landesadministration eine Tabelle bei, um dem Leser die Orientierung zu erleichtern.

Проблемы провинциальной администрации в Венгрии в 18. веке

А. ЧИЗМАДИА

Соответственно феодальному государственному строю, организационные единицы администрации как в Венгрии, так и в Трансильвании проявлялись разнообразно. Основными единицами в Венгрии были комитаты, и свободные королевские города, которые непосредственно примыкали к дикастериумам королевского правления, к правительственному центру администрации, к совету наместничества, и к королевской коллегии, решающей финансовые дела на высшем уровне. В рамках комитатов более низкой административной единицей были районы. На самой низкой ступени администрации находилось село под юрисдикцией помещика. Таким же низовым органом был и помещичий городок, но он располагал переданным ему помещиком большим самоуправлением.

Кроме этих организационных единиц партикуляризм феодального государства и в провинциальной администрации проявлялся многосторонне. В стране имелись территории, которые были выведены из-под ведомства комитатов. Таким был уезд Яс-Кун и уезд Хайду. Эти уезда были самоуправляющимися единицами, выделенными из комитата, которые в конце 18. столетия через их послов получили право участвовать и голосовать в государственном собрании. Помимо многих, сложившихся на протяжении истории, располагающих той или иной самостоятельностью, областей, округов имелись церковные военные крепостные округа.

Картину администрации метрополии пополняла административная организация союза трех стран, Хорватии—Славонии—Далмации, располагающего большой самостоятельностью. В территориальном отношении это союзное государство в 18. веке претерпело значительные изменения, потому что во время войны турок их отдельные части превратились в военные пограничные территории, воссоединение которых полностью отложилось до следующего века.

Если административно-территориальное деление феодальной Венгрии 18. века характеризовалось большой пестротой, это еще больше характерно для Трансильвании. Здесь сложившийся в эпоху князей союз трех наций (венгерской, секейской, саксонской) и четырёх церквей (римской католической, реформистской, евангелистской и унитарской) сохранился и в 18. веке, и хотя уже в это время румыны преобладали на большой части Трансильвании, её не признавали в качестве самостоятельной нации и их представители могли принимать участие в государственном собрании только как католические духовные лица высшего сана, венгерские дворяне или послы городов. Некоторой самостоятельностью располагали румыны комитата Фогараш и Хуняд, а также народы румынских пограничных территорий, созданных как раз в 18. веке Марией Терезией. Действительно, в Трансильвании организация администрации соответствовала союзу трех наций: помимо венгерских комитатов, секейских и саксонских областей в государственном собрании принимали участие и послы венгерских территорий, (Partium) присоединившихся к Трансильвании еще во время турецкого господства и эти самоуправляющиеся единицы осуществляли местное публичное управления. Эти нации иногда коллективно совещались, а также и выступал их представительство государственном собрании.

Во второй половине 18. века и в Венгрии началось сложение профессионального бюрократического делопроизводства. В особенности во время правления Иосифа II (1780—1790) развивается и в основном преобразовывается администрация. Во время его правления складывается прогрессивный слой местной администрации, часто и из недворянской интеллигенции, который и после его смерти выступает за феодальные реформы и их деятельность видна на первом государственном собрании 1790 года, в работе комиссий, созданных государственным собранием, а также и в политико-юридической литературе этих годов. В особенности во главе стоят венгерские якобинцы, среди которых проекты конституции и иные труды Йожефа Хайноци стремятся разрешить и проблемы провинциальной администрации Венгрии в конце 18. века. Их стремления не увенчались успехом. Сдвиги влево французской революции ошеломляют и склоняют к двору и дворянских реформистов. Таким образом, разрешение проблем администрации остается на революционный период следующего столетия.

Автор для показания сложности феодальной провинциальной организации и освещения связей провинциальной администрации к статье дает таблицу, которая помогает ориентироваться читателю.

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Der neue Wirtschaftsmechanismus und einige Institutionen des Zivilrechts

von

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Der neue Wirtschaftsmechanismus hat neben der Beibehaltung des Rechtstyps in zahlreichen Rechtsinstitutionen eine qualitative Änderung entwickelt. Die wirtschaftsorganisatorische Funktion des sozialistischen Staates bleibt auch unter den Umständen des neuen Wirtschaftsmechanismus unverändert aufrechterhalten. Die Methoden der Wirtschaftslenkung und -Verwaltung ändern sich jedoch bedeutend. Diese Änderung erscheint hauptsächlich darin, dass die spezifischen staatlichen Mittel der Wirtschaftslenkung neue Eigenschaften aufweisen — die von jenen der politischen Verwaltung abweichen. Die Abhandlung befasst sich mit deren rechtlichen Struktur in Verbindung mit dem Eigentum, den juristischen Personen, dem Wettbewerb und den Verträgen.

1. In der marxistisch-leninistischen Rechtswissenschaft ist die ständige Entwicklung des Rechts und der Rechtsinstitute eine allgemein anerkannte wissenschaftliche These. Dementsprechend gelangen das Recht und die Rechtsinstituten, infolge einer ständigen Bewegung, von Zeit zu Zeit zu Kardinalpunkten, die zugleich eine qualitative Änderung bedeuten. Diese qualitativen Wendungen folgen vor allem den *gesellschaftlichen Schicksalswechseln*, sie sind vor allem mit der *Änderung der Gesellschaftsordnung* verbunden. Die Untersuchung der verschiedenen gesellschaftlichen Formen an sich deckte jedoch im Recht und in den Rechtsinstitutionen Änderungen auf, die auch innerhalb der *gegebenen Rahmen* als *qualitative Änderungen* anzusehen sind. Auf dieser Grundlage sprechen wir im Recht des Sklavenhalterstaats von einem Anfangs- und einem entwickelten Stadium und innerhalb der feudalen Rechtsentwicklung zumindest von zwei Etappen. Diese Erfahrungen führten dahin, dass die Rechtswissenschaft zahlreiche Unterschiede zwischen dem Recht der klassischen und der imperialistischen Etappe des Kapitalismus sieht. Hinsichtlich der Vergangenheit erkennt die sozialistische Rechtswissenschaft innerhalb des Rechtstyps und infolgedessen auch innerhalb der Rechtsinstitute qualitative Änderungen an – wobei betont wird, dass das Recht einer bestimmten Gesellschaft hinsichtlich seiner Grundlagen und seines Typs den einheitlichen Charakter im Laufe der Entwicklung beibehält. Fraglich ist, ob die wissenschaftlich bewiesenen Thesen, die auf das Recht und die Rechtsinstitutionen der gesellschaftlichen Systeme der Vergangenheit feststehen, auch für das Recht und die

Rechtsinstitutionen der modernen, fortschrittlichen Gesellschaft der Gegenwart, der sozialistischen Gesellschaft gelten.

Kann man im sozialistischen Recht bloss bei den zwei äussersten Punkten: beim Anfang und bei der Erreichung des Kommunismus von einer qualitativen Änderung sprechen, oder auch innerhalb des sozialistischen Rechts selbst? Meines Erachtens können auch *innerhalb des sozialistischen Rechts Knotenpunkte in der Entwicklung vorkommen, die neben der Beibehaltung des Rechtstyps in den Rechtsinstitutionen als qualitative Änderung bewertet* werden können. Zu dieser Wandlung — zumindest was die mit dem wirtschaftlichen Leben am engsten verbundenen Rechtsinstitutionen betrifft — gelangten wir in unseren Tagen. *Die Wandlungen, die sich heutzutage in den Rechtsinstituten abspielen, führen nicht direkt zum Kommunismus, aber überhelfen in eine zum Kommunismus näher stehende Phase, um durch die planmässige Überholung dieser Phase dann auch selbst überholt zu werden und uns zur obersten Stufe der kommunistischen Gesellschaft zu verhelfen.*

I

Einige allgemeine theoretische Fragen

2. Vor allem scheinen ein *staatstheoretisches* und ein *rechtstheoretisches* Moment dazu geeignet zu sein, die gewissermassen veränderte Funktion des Staates und des Rechts unter den Verhältnissen des neuen Wirtschaftsmechanismus verständlich zu machen.

Die erste Frage ist also die *Rolle des Staates* im neuen System der Wirtschaftsleitung mit besonderer Rücksicht auf die Entwicklung der staatlichen Funktionen und der staatlichen Arbeitsteilung. Was die wirtschaftliche, organisatorische und die kulturelle-erzieherische Funktionen des Staates im allgemeinen betrifft, bleiben diese auch weiterhin *unverändert aufrechterhalten*. Diese Funktionen sind die *grundlegenden Aufgaben* des sozialistischen Staates im ganzen Zeitabschnitt seines Bestehens, oder, genauer ausgedrückt, so lange, bis die gesellschaftliche Entwicklung zur Übernahme dieser Funktionen eine andere, entsprechendere Organisation erzeugt. Allerdings ist das Erlöschen der wirtschaftlich-organisatorischen und der kulturell-erzieherischen Funktionen des Staates nicht das Problem unserer Tage.

Im sozialistischen Staat *vereinigen sich die politische und die wirtschaftliche Gewalt*. Die Einheit der politischen und wirtschaftlichen Gewalt kann aber schwerlich zugleich die *Identität der Organe* und die *Gleichartigkeit der Methoden* auf dem Gebiet der politischen und wirtschaftlichen Leitung bedeuten. Natürlich treffen beide Tätigkeiten in den obersten Staatsorganen unbedingt zusammen, in den Parteiorganen trennen sie sich sogar überhaupt nirgends.

3. Die staatstheoretische Grundlage der Bestrebungen, die sich auf die Umänderung der *Methoden* der Wirtschaftsleitung und -verwaltung richten,

ist darin zu suchen, dass man auch zwischen den *Methoden* der politischen und der wirtschaftlichen Leitung zu unterscheiden hat. Da die politischen Methoden infolge der langen Entwicklung schon gegeben und verfeinert waren, strebten wir bisher danach, auch die Wirtschaftsleitung, besonders aber die Verwaltung der Wirtschaft mit der Hilfe der politischen Methoden zu lösen. Das kam insbesondere darin zum Ausdruck, dass wir uns zur Leitung der Betriebe, der Genossenschaften, im wesentlichen aber auch zur staatlichen Organisierung der ganzen Wirtschaft derselben Methoden bedienten wie zur Verwaltung bzw. Leitung der Polizei, der Vormundschaftsbehörde, der Organe der Betriebspolizei oder Seuchenvorbeugung, der Landesverteidigung usw. Die Mittel und Methoden des Staates haben sich dagegen nach den Eigenschaften jener Gebiete zu richten, mit denen sie zu tun haben. Wirtschaft und Politik sind gar verschiedene Gebiete. Während im Bereich der politischen Verwaltung die Methoden der strengen *Unter-* und *Überordnung*, des *Befehlens* und *Gehorsams* die geeigneten Mittel sind, wo allen Organen, eventuell sogar allen Personen die auf ihren Aufgabenbereich und auf ihre Tätigkeit bezüglichen Vorschriften zentral bemessen werden sollen, können auf dem Gebiet der Wirtschaft diese Methoden politischen Charakters zu keinem befriedigenden Resultat führen, da die Wirtschaft, die wirtschaftlichen Organe auf einer gewissen Stufe die Möglichkeit einer *selbständigen Bewegung* beanspruchen. Deswegen können die zentral vorgeschriebenen Aufgaben und Tätigkeit nicht in jedem Bereich der Wirtschaft einen Erfolg versprechen und eingeleitet werden. Die wirtschaftsorganisatorische Tätigkeit des sozialistischen Staates kann also zur Zeit des neuen Wirtschaftsmechanismus durch die Realisierung zweierlei Bedingungen wirksamer sein und zwar dann, wenn der Staat erstens auf einer bestimmten Stufe *die Volkswirtschaft fest in der Hand hält*, unter dieser Stufe aber – zweitens — *den volkswirtschaftlichen Einheiten die möglichst freieste Bewegung zulässt*. Die Stufen zu bestimmen ist ziemlich schwer, aber wir wollen es versuchen. Die Nationalversammlung, der Präsidialrat, die Regierung und sonstige organisatorische und Verwaltungsorgane des wirtschaftlichen Lebens können folgende von den allgemeinen bis zu den die wirtschaftlichen Einheiten berührende Aufgaben haben:[1]

a) Schaffung von Gesetzen, Verordnungen mit Gesetzeskraft und innerhalb dieser, ausnahmsweise — von Regierungsverordnungen, die die allgemeinen Wirkungsbedingungen der Wirtschaft bestimmen, allgemeinverbindlich sind und die grundsätzlichen Verhältnisse der Wirtschaftsorganisationen und der Staatsbürger regeln.

b) Die Ausarbeitung der Wirtschaftspolitik zusammen mit den entsprechenden Parteiorganen.

[1] Samu, M.: *Az új gazdasági mechanizmus állam- és jogelméleti vonatkozásai. (Staats- und rechtstheoretische Beziehungen des neuen Wirtschaftsmechanismus).* (Manuskript)

c) Bestimmung der zur Durchführung der gegebenen Wirtschaftspolitik nötigen wirtschaftlichen Stimuli. (Steuer, Kredit, Preispolitik, verschiedene Dotationssysteme.)

d) Die Überwachung der volkswirtschaftlichen Vorgänge durch regelmässige Kontrolle sowie die Fassung von allgemeinen Beschlüssen, um die Fehler oder Mangelhaftigkeiten zu korrigieren, die für die Hauptrichtungen der wirtschaftlichen Entwicklung eine Gefahr darstellen bzw. in der Wirtschaft massenhaft auftreten.

e) Bestimmung von Betriebsschutz- und Genähmigungsregeln und die Kontrolle ihrer Einhaltung.

f) Beurteilung von streitigen Rechtsfragen, die zwischen wirtschaftlichen Organisationen und Personen entstehen.

g) Im Bereich des Staatseigentums die Gründung von Betrieben, die Bestimmung ihres Tätigkeitsbereiches, die Kontrolle der Betriebe und sonstige Aufgaben, die die Rechtsnorm über die staatlichen Betriebe (Regierungsverordnung Nr. 11/1967. (V. 13.) vorschreibt.

Unter dieser Stufe soll es keine Möglichkeit gegeben werden in die Tätigkeit der Wirtschaftsorganisationen bzw. Personen unmittelbar einzugreifen, ausgenommen einige ausserordentliche Fälle (wie Krieg, Naturkatastrophen usw.). So darf es besonders nicht vorkommen, dass das staatliche Leitungsorgan sich durch unmittelbare Weisungen in den *unmittelbaren Produktionsprozess* einmischt.

Bei der Ausgestaltung der verschiedenartigen Kooperationen zwischen den Wirtschaftsorganen muss der freien Willensbestimmung im Rahmen der rechtlichen Regelung — ein weiter Raum gegeben werden. In diesem Kreis muss es besonders gesichert werden, dass die sozialistischen Wirtschaftsorganisationen über das ihnen anvertraute Vermögen *quasi wie Eigentümer* verfügen können, sowie dass ihre Vereinigung mit einer anderen Organisation, ihr Austritt aus einer Vereinigung oder die Erweiterung bzw. Veränderung ihres Tätigkeitskreises nicht verhindert werden.

Das staatliche Eigentumsrecht

4. Das Wesen des staatlichen Eigentumsrechts im Sozialismus können wir am besten von dem allgemeinen Begriff des Eigentumsrechts ausgehend, von der inhaltlichen Seite dieses Begriffes erfassen. Das Eigentumsrecht kann ja auch in dem Falle, da es nicht in einer einzigen Form verwirklicht wird, in einem allgemeinen Begriff mit einheitlichen Inhaltsmerkmalen erfasst werden.

Die Rechtslage der Adressate von Eigentümerbefugnissen gibt meistens gute Anhaltspunkte zum Wesen und Gepräge der gegebenen Form des Eigentumsrechtes. Bei den weiteren Untersuchungen möchte ich darum von einer

Begriffsbestimmung des subjektiven Eigentumsrechts ausgehen, die meines Erachtens am meisten annehmbar ist. »Das Eigentumsrecht ist das Recht der Personen zu Besitz, Gebrauch und Verfügung über eine Sache, das sich direkt vom Gesetz ergibt und nicht durch die Gewalt anderer Personen bedingt ist.«[2] Der Umstand, wem das Eigentumsrecht bzw. eine oder mehrere Befugnisse aus diesem und zwar mit der erwähnten Ausschliesslichkeit, zustehen bestimmt die Grundzüge der gegebenen Eigentumsform. Sind mehrere Personen bzw. Organisationen berechtigt, so ist entscheidend, wie die einzelnen Eigentümerbefugnisse diesen zugeteilt sind. Kurzgefasst, wenn wir wissen wollen, wer der Eigentümer ist, müssen wir bestimmen, wer die Eigentümerbefugnisse ausschliesslich ausübt.

5. Wenn wir das sozialistische staatliche Eigentumsrecht von der Seite der Eigentümerbefugnisse betrachten, ist es auffallend, dass diese Befugnisse bezüglich der verschiedenen Objekte des sozialistischen staatlichen Eigentumsrechts nicht, oder nicht in ganzem von denselben Organisationen ausgeübt werden.

Das sozialistische staatliche Eigentumsrecht kann von dem Gesichtspunkte aus, ob die Eigentümerbefugnisse unter verschiedenen staatlichen Organen verteilt sind oder nicht, in zwei Teilen gegliedert werden. So können wir zwischen dem *Vermögen der Unternehmen* und dem Staatseigentum *ausserhalb* des Vermögens der Unternehmen unterscheiden.

Das Eigentumsrecht über das Vermögen der Unternehmen weist folgende Eigenschaften auf: *Die einzelnen Befugnisse, die den Inhalt des Eigentumsrechts ausmachen, sind unter den staatlichen Unternehmen, Wirtschaftsorganen und den lenkenden, gründenden Organen verteilt.* Die einzelnen Befugnisse stehen den erwähnten Organen und Organisationen direkt aus dem Gesetz folgend und in der Weise zu, dass die Eigentümergewalt im bestimmten Kreise von der Gewalt einer anderen Person nicht abhängig ist. Die Eigentümerbefugnisse der Gründungsorgane hängen nicht von den Unternehmen und die der Unternehmen nicht von den Gründungsorganen ab.

Vor allem müssen wir die Eigentümerbefugnisse vor Augen halten, die den lenkenden *Gründungsorganen* zustehen. Diese Befugnisse sind im wesentlichen in zwei Gruppen einzuteilen. Es gibt allgemeine, sich aus dem Eigentumsrecht ergebende Befugnisse, und eine ausserordentliche Eigentümerbefugnis. Ein allgemeines ist das Recht zur Gründung eines Unternehmens. Zu dieser Gruppe gehören weiters das Recht zur Ernennung und Ablösung des Leiters eines Unternehmens, sowie zur Beurteilung seiner Arbeit. Hierher zählen auch die Befugnisse zur allgemeinen Auswertung der Betriebstätigkeit und das Recht der Kontrolle.[3]

[2] Világhy—Eörsi: *Magyar polgári jog (Ungarisches Zivilrecht).* (Universitätslehrbuch) II. Auflage. Budapest, Tankönyvkiadó, 1965. I. Bd. S. 262.

[3] Regierungsverordnung Nr. 11/1967. (V. 13.) über das staatliche Unternehmen § 2., §§ 10—12., § 23.

Ausserordentlich ist das Recht und die Verpflichtung zur Sanierung. Die Rechte zur Revision und Sanierung können wir als ausserordentliche Rechte und zugleich Verpflichtungen betrachten, weil es zur Ausübung dieser Befugnisse nur ausnahmsweise und in gesetzlich festgelegten spezifischen Fällen kommen kann.[4]

Nach allgemeiner Auffassung kann das Recht des Begründungsorgans in die Gruppe der Eigentümerbefugnisse eingeteilt werden, wonach dieses Organ das Unternehmen ausnahmsweise für eine bestimmte Tätigkeit anweisen kann. Meines Erachtens ergibt sich dieses Recht nicht von den Eigentümerbefugnissen, obwohl dies von dem Gründungsorgan ausgeübt wird.[5] Die Grundeigenschaft der Anweisung ist ihr *Ausnahmecharakter.*

Die beispielsweise Aufführung in der Verordnung[6] weist weit über die Grenzen eines Normalfalls hinaus. Nach allgemeiner Auffassung steht dem Staat in Ausnahmefällen immer der Eingriff in die Eigentümerbefugnisse zu. Ich kann unter den vorstellbaren Formen der in Ausnahmefällen getroffenen solchen Massnahmen keine Unterschiede in der Hinsicht feststellen, dass der Staat diese Massnahmen gegen Adressate eines bestimmten Teiles des *staatlichen Eigentumsrechts* oder *andere* Eigentümer richtet. Dass dieses Recht durch das Gründungsorgan ausgeübt wird, ist meines Erachtens bloss eine technische Frage und das Gründungsorgan kann auf Grund eigener Berechtigung kaum entscheiden. In jedem Falle besteht weiters die Lage, dass die Gesichtspunkte der normalen Wirtschaftstätigkeit beim Ergreifen solcher Massnahmen unbeachtet bleiben, zur gleichen Zeit ist jedoch das Organ, das die Anweisung erlasst, verpflichtet, die nachteiligen wirtschaftlichen Folgen der Massnahme möglichst abzuwehren.

Ein weiterer, unter den Befugnissen aus dem staatlichen sozialistischen Eigentum nicht erwähnter Teil der Eigentümerbefugnisse steht den Wirtschaftsorganen des Staates zu. Dazu gehören: das Recht zum Anfangsvermögen, das Ausüben einer Tätigkeit, die die intensivste Verwendung der Produktivkräfte des Unternehmens sichert, die Bestimmung des Betriebsplans, die Ausübung der Rechte des Arbeitsgebers, Verfügungsrecht über das Vermögen des Unternehmens auch die Investierung aus eigenen Kräften inbegriffen, das Recht zur Vereinigung und zum Zusammenschluss. Die Mittel des Unternehmens können im allgemeinen nicht entzogen werden. Das Ergebnis der Betriebstätigkeit wird *direkt vom Unternehmen* enteignet. Der Staat erhält

[4] Idem §§ 16—19.
[5] Idem § 24.
[6] »Das Gründungsorgan kann dem Unternehmen für eine bestimmte Tätigkeit nur ausnahmsweise Anweisung geben, wenn das Interesse der Volkswirtschaft (Lösung von Landesverteidigungsaufgaben, Erfüllung einer internationalen Verpflichtung usw.) mit wirtschaftlichen Mitteln nicht, oder nicht genügend wirksam durchgesetzt werden kann.« Reg. Verordn. Nr. 11/1967. (V. 13.) § 24.

einen Teil des Gewinns nicht als Eigentümer, sondern in Ausübung der Staatsgewalt, auf Grund *des Rechtes zur Besteuerung.*[7]

6. Aus obigen Erwägungen folgt, dass *die Theorie der operativen Verwaltung,* die die Rechtslage der Wirtschaftsorgane des Staates theoretisch erklärt, aufgegeben werden muss. Der Begriff der operativen Verwaltung ist für solche Umstände zutreffend, unter denen die Rechte und Pflichten der Unternehmen und anderer Wirtschaftsorgane des Staates *ausschliesslich* von den Verfügungen der lenkenden Organe abhängen. In dieser Lage kann wirklich keine Rede von Eigentümerbefugnissen sein, weil es keine solchen in Rechtsregeln verankerten, eins für allemal geltenden Befugnisse vorhanden sind, die das Unternehmen von allen äusseren Einflüssen frei ausüben könnte.

Die Reform der Wirtschaftslenkung hat an dieser Lage geändert. Der Staat bestimmt im Bereich der allgemeinen Normungstätigkeit, welche Rechte dem Gründungsorgan, welche dem Unternehmen zustehen. Das Unternehmen übt die Rechte, die ihm zustehen, im Kreise der Befugnisse als *Eigentümer* aus. Als Eigentümer, weil dieses Recht sich direkt aus dem Gesetz ergibt und von der Gewalt einer anderen Person unabhängig ist. In die Ausübung dieser Befugnisse wird sich unter den Verhältnissen des normalen Wirtschaftslebens und im Falle einer Tätigkeit im Rahmen der Rechtsnormen — niemand einmengen.

Aus den gesagten folgt, dass das staatliche sozialistische Eigentum in seinem heutigen Entwicklungsstadium eine *spezifische Form des geteilten Eigentums* ist. Der spezifische Charakter ergibt sich daraus, dass die Organisationen bzw. Organe, die die Eigentumsbefugnisse besitzen, nicht in die *gleiche Ebene* fallen, und obwohl ihre Rechtsverhältnisse gleicherweise Eigentumsrechtsverhältnisse, *die Rollen ihrer Befugnisse* aber keinesfalls identisch sind. Die dem Unternehmen zustehenden Befugnisse fördern die *wirtschaftliche Selbständigkeit,* während mittels der Befugnisse der lenkenden Gründungsorgane der volkseigene Charakter des Betriebsvermögens hervorgehoben wird. Diese Befugnisse gewähren die Beachtung der gesamtgesellschaftlichen Interessen in der Betriebswirtschaft, und bieten den entsprechenden Staatsorganen die Möglichkeit zur Beeinflussung des Unternehmens bezüglich der Art und Weise der Ausübung der Eigentümerrechte. So ist das Betriebsvermögen einerseits Eigentum des Unternehmens, andererseits jedoch über die *Vermittlung des Staates Volkseigentum.*

Mit der überlieferten Eigentumrechtstheorie kann man gar nichts im Falle von Unternehmen *in gemischtem gesellschaftlichem Eigentum* anfangen. Die Reform ermöglicht das Zustandekommen von »sekundären staatlichen Unternehmen«[8] indem sie erlaubt, dass Vereinigungen von Unternehmen eine

[7] § 2. Abs. 2., § 3. Abs. 1., § 8., § 14., § 15.

[8] Eörsi, Gy.: *A gazdaságirányítás új rendszerére való áttérés jogáról (Über das Recht des Überganges zum neuen System der Wirtschaftslenkung).* Budapest, Közgazdasági és Jogi Kiadó, 1968. S. 208.

Organisation mit selbständiger Rechtspersönlichkeit bilden. Sie erweitert die Handlungsfreiheit der landwirtschaftlichen Produktionsgenossenschaften zur Gründung von Organen mit eigener Rechtspersönlichkeit, und ermöglicht die Errichtung von Rechtspersonen mit gemischtem gesellschaftlichem Eigentum. In diesen gemeinsamen Unternehmen können nicht einmal die Befugnisse in ihrer Gesammtheit zur Geltung gelangen, die bei den »primären« staatlichen Unternehmen durch das Gründungsorgan zweifellos ausgeübt werden. (Z. B. Ernennung und Enthebung von Direktoren und Vizedirektoren, Aufhebung und Umorganisierung des Unternehmens, Ausübung gewisser Aufsichtsrechte, Bildung von Trusts und Zwangsvereinigungen.) Die mit dem »puren« staatlichen Unternehmen zusammenhängenden Teilbefugnisse des Gründungsorgans wirken in dem neuen Unternehmen nicht mehr. Gegen die Weiterwirkung spricht das Interesse an der Stabilität solcher Unternehmen, und an der entsprechenden Geltung der Wirtschaftsfreiheit, die im Wirtschaftskreis anderer sozialistischen Organisationen (z. B. Genossenschaften) in höherem Masse gesichert ist. Die staatlichen Befugnisse des Eigentumsrechts können nicht direkt zur Geltung kommen, sogar auch nicht in indirekter Form in der Weise, dass sie durch das an dem gemeinsamen Unternehmen beteiligten staatlichen Unternehmen wirken, das Unternehmen vertritt ja nicht sein Gründungsorgan. Höchstens können die für das beteiligte Unternehmen verbindlichen Massnahmen auf das gemeinsame Unternehmen durchschlagen, so ist also das Eigentumsrecht an einem solchen Unternehmen ein indirektes, durch die beteiligten Unternehmen vermitteltes Eigentumsrecht, und in dieser Hinsicht ist es charakteristisch, dass der beteiligte Staat nur durch die *bei den beteiligten Unternehmen* getroffenen Massnahmen eine Wirkung auf das Unternehmen mit gemischtem Eigentum ausüben kann. Für den nicht-staatlichen Teilnehmer ist keinesfalls der *Staat*, sondern *das staatliche Unternehmen* der Partner.

7. Die eigentumsrechtliche Lage des Staatsvermögens, das zugleich kein Vermögen eines Unternehmens bildet, ist abweichend. Hinsichtlich dieser Vermögensobjekte steht *die Gesamtheit der Eigentümerbefugnisse direkt dem Staat zu.* Der Staat ist nur durch die allgemeinen Regeln des Eigentumsrechts und andere vom Staat erlassene allgemeine Normen bezüglich Besitz, Gebrauch, Verfügung von diesem Teile des Staatseigentums gebunden. Hierzu gehören von den Objekten des staatlichen sozialistischen Eigentums *die unbedingt ausschliesslichen Objekte* des staatlichen sozialistischen Eigentums, ausserdem diejenigen Geldmittel, die im Zuge der Erfüllung der Verpflichtungen von Produktionseinheiten in den verschiedenen Sektoren der Wirtschaft dem Staate gegenüber einfliessen, die Produktionsmittel und andere Güter, die der Staat keinem seiner Wirtschaftsorgane zum Gebrauch zugewiesen hat.

Von grösster Bedeutung in dieser Gruppe sind die Geldmittel. Der Staat kann eigentlich sich auf diese Vermögen stützend von wirtschaftlichem Gesichtpunkte aus gesehen — durch seine entsprechenden Organe seine Eigen-

tumsbefugnisse bezüglich des Betriebsvermögens ausüben und in erster Linie mit dessen Hilfe andere Sektoren der Wirtschaft beeinflussen. *Die allgemeine wirtschaftslenkende Funktion der öffentlichen Gewalt des Staates wird dadurch mit der Rechtslage des Eigentümers verknüpft und deswegen können wir sagen, dass es zwischen der behördlichen Tätigkeit des Staates und seiner Eigenschaft als Eigentümer obgleich die beiden rechtlich richtig in zahlreichen Beziehungen nur abgesondert betrachtet werden können — auf gewissen Ebenen und Punkten Verbindungen zustandekommen.*[9]

III

Die juristischen Personen

8. Nach der sozialistischen Umorganisation der Landwirtschaft wird im sozialistischen Staate die grundlegende wirtschaftliche Tätigkeit im Rahmen der juristischen Personen durchgeführt. Ich möchte von dem weiten Problemengebiet der direkte wirtschaftliche Tätigkeit ausübenden juristischen Personen drei Probleme herausgreifen. Das erste ist *die Rechtspersönlichkeit* der juristischen Person; das zweite die Umstände *des Zustandekommens und der Auflösung* der juristischen Person; das dritte ist *der Gegensatz und die Übereinstimmung der staatlichen Normen und des freien Willens der in der juristischen Person vereinten Menschen und wirtschaftlicher Einheiten in der Ausgestaltung der inneren Verhältnisse der juristischen Person.*

9. Die allgemein gebrauchten Lehrbücher und andere Schriften über die juristische Person beweisen, dass die sozialistische Rechtswissenschaft und Gesetzgebung bisher den Grundsatz der *relativen Rechtsfähigkeit* der juristischen Person vertraten.[10]

Im neuen Wirtschaftsmechanismus, wo die im Wirtschaftsleben als juristische Person auftretenden Einheiten in allen Richtungen weite Möglichkeiten vor sich haben, und sich dementsprechend auch ihre Verantwortlichkeit verschärft, bedeutet die These der relativen Rechtsfähigkeit eine *unbegründete Beschränkung.* Wenn wir von den juristischen Personen Selbständigkeit, Initiative, Unternehmungslust verlangen, im wesentlichen also die Forderung stellen, dass sie für die Gemeinschaft, die sie vertreten entsprechend Sorge tragen, weiters, dass sie ihren Verpflichtungen der Gesellschaft gegenüber im Rahmen der sozialistischen Zusammenarbeit durch selbständige Tätigkeit entsprechen, darf man ihre Tätigkeit keinesfalls durch unbegründete Beschränkun-

[9] Mehrere Verfasser halten jedoch die alte Auffassung vom Eigentumsrecht auch unter den Umständen des neuen Wirtschaftsmechanismus für stichhältig. Vollständig: Eörsi, Gy.: op. cit. S. 167—199. Mit gewissen Korrektionen: Világhy, M.: *Az állam és vállalata. (Der Staat und sein Unternehmen.)* Jogtudományi Közlöny, 1967. Nr. 10—11. S. 577.

[10] »Der Umfang der Rechtsfähigkeit der juristischen Person richtet sich nach ihrer Bestimmung in der Ungarischen Volksrepublik und nach den Geboten der sozialistischen Zusammenarbeit.« Világhy—Eörsi: op. cit. S. 135.

gen einengen, und ihre *Rechtsfähigkeit an* einen in Rechtsregeln, Statuten, Gründungsurkunden und Satzungen *streng umschriebenen Tätigkeitskreis binden.* Jede starre *Profilgebundenheit* muss aufgelöst werden.

Wie soll man also theoretisch die Rechtspersönlichkeit der juristischen Personen auffassen und diese in der Weise regeln, dass die Planmässigkeit der Wirtschaft nicht beeinträchtigt wird? Theoretisch müssen wir *die uneingeschränkte Rechtspersönlichkeit* der juristischen Person anerkennen. Praktisch ist diese uneingeschränkte Rechtspersönlichkeit folgendermassen auszulegen. Beim Zustandekommen jeder juristischen Person muss man die Hauptaufgabe, das *Haupttätigkeitsgebiet* bestimmen, die die Gründung der juristischen Person veranlassten. Neben der Verwirklichung der Hauptaufgabe soll jedoch die juristische Person berechtigt werden jedwede andere Tätigkeit auszuüben, bis sie die in der Gründungsurkunde bzw. im Genehmigungsbeschluss umschriebene Haupttätigkeit durchführt. Demgemäss kann man gegen die juristische Person so lange nicht einschreiten (weder durch Verwaltungsmassnahmen, noch dadurch, dass ihre Verträge für ungültig erklärt werden) bis sie diese bestimmte Hauptaufgabe gleichfalls entsprechend erfüllt. Man kann auch widrigenfalls keine Sanktionen verwenden, wenn bewiesen wird, dass sie die in der Gründungsurkunde und im Genehmigungsdokument festgesetzte Hauptaufgabe ohne ihr eigenes Verschulden *nicht mehr erfüllen konnte,* oder diese für die juristische Person und für die Volkswirtschaft *unvorteilhaft oder unnötig* geworden ist, und die juristische Person zufolge dieser Änderung sich auf eine *vorteilhaftere* bzw. *notwendige* Tätigkeit umgestellt hat.

Als Beispiel würde ich die Rechtspersönlichkeit der landwirtschaftlichen Produktionsgenossenschaft erwähnen. Die Hauptaufgabe der LPG als juristischer Person ist die landwirtschaftliche Produktion und die damit eng zusammenhängende Tätigkeit. Es kann jedoch nichts im Wege stehen, dass die LPG auf eigenes Risiko nach entsprechendem Beschluss und vorschriftsmässigem behördlichem Verfahren auch eine andere Tätigkeit ausübt (z. B. Errichtung einer Verkaufsstelle, einer Baubrigade, Bearbeitungstätigkeit, Eröffnung einer Wagner- oder Schmiedewerkstatt usw.). Diese Möglichkeit scheint durch das neue LPG-Gesetz genügend gesichert zu werden. Bis die LPG ihre in der Gründungs- und Genehmigungsurkunde bestimmte Aufgabe erfüllt, gibt es keinen Anlass wegen der Abweichung von der Hauptaufgabe einzuschreiten.[11]

[11] Wir müssen die Regierungsverordnung über die Erweiterung der Wirtschaftstätigkeit der landwirtschaftlichen Grossbetriebe (18/1967./VI. 29.) für eine fortschrittliche Rechtsregel halten. Diese Reg.-Vo. und das neue LPG-Gesetz haben die Rechtsfähigkeit der LPG-s theoretisch uneingeschränkt erweitert, indem sie nur verlangen, dass sie zur Ausübung gewisser wirtschaftlicher Tätigkeiten Erlaubnisse bei dem zuständigen Organ des Bezirksrates beantragen. Dieses Organ hat jedoch kein Recht über den Antrag mit Ja oder Nein zu entscheiden. Es ist nur berechtigt, zu untersuchen, ob die beabsichtigte Tätigkeit den wirtschaftlichen Interessen, Bedürfnissen, vor allem den Interessen der LPG entspricht, oder ob die hygienischen und polizeilichen Vorschriften genügend beach-

Wenn die Tätigkeit der juristischen Personen nicht mehr durch direkte Anweisungen gelenkt wird, muss die juristische Person selbst bestrebt sein, eine rentabele Tätigkeit auszuüben. Aus diesem Grunde darf man nicht ausschliessen, dass sie eine von dem im Gründungsdokument umschriebenen Tätigkeitsgebiet abweichende, gesellschaftlich nützliche, für sie vorteilhafte Tätigkeit erprobt, sogar ohne besondere Umorganisierung und Erschütterung ihre ganze Tätigkeit auf einen für sich und für die Volkswirtschaft nützlicheren Kurs umstellt.[12]

tet wurden. Wenn die geplante Tätigkeit diesen Bedingungen entspricht, muss er die Bewilligung erteilen. Anders können wir es so ausdrücken, dass die LPG die Ausübung einer Tätigkeit, die den Bedingungen entspricht mit Recht beansruchen kann. Die LPG hat die Möglichkeit Aufarbeitungs-, Dienstleistungs-, und – wie die Rechtsregel ausdrückt — »andere ergänzende« Tätigkeiten auszuüben.

[12] Diese Auffassung wird kritisiert. Die erörterte Theorie — sagt man — »geht wahrscheinlich in erster Linie von der Lage der LPG-s aus«. Dort kann die Nebentätigkeit in einem weiten Bereich dadurch begründet werden, dass die Beschäftigung der Werktätigen auch zu einer Zeit gesichert werden muss, da die Haupttätigkeit nicht genügend Arbeit benötigt. Auf anderen Gebieten jedoch ist die Erweiterung im Widerspruch mit dem Erfordernis, dass die Produkte und Dienstleistungen von Fachleuten stammen müssen (Qualitätsschutz). Dies aber kann bei den Nebenbeschäftigungen nicht gewährleistet werden. Es kann sogar für die Volkswirtschaft schädlich sein, wenn gewisse Produkte in grossen Mengen, vielleicht auch teuer, hergestellt werden, und das Unternehmen gegebenenfalls auf eine Tätigkeit verzichtet, die zu seinem Hauptaufgabenkreis gehört, um sich mit zweifelhaften Nebenarbeiten zu beschäftigt. Übrigens, wenn das Gleichgewicht des Marktes hergestellt wird, ist auch die Versuchung, viele Nebenbeschäftigungen zu unternehmen, geringer. Eörsi: op. cit. S. 203–204. Diese Theorie ist nicht nur auf die Genossenschaften gültig: Eine Fadenfabrik unterhält eine kleine Werkstatt in der die schadhaft gewordenen oder bereits so gelieferten Spindel repariert werden. Da es viele solche Fälle gibt und der Lieferbetreib die Spindel oft mit Verspätung liefert, entsteht der Vorschlag: wir sollen selbst Spindel herstellen, in der eigenen Werkstatt. Der Plan macht keine grosse Investition nötig, und mit eigenen Mitteln können wir bessere Spindel herstellen, als die traditionellen Lieferanten. Im alten Mechanismus wäre es unmöglich gewesen, weil die Spindel ein anderes Unternehmen in seinem »Profil« herstellt. Dieses Profilunternehmen liefert wohl schlechte, unverlässliche Ware, darum bezahlt es zuweilen Konventionalstrafe, sehr selten vielleicht auch Schadenersatz — was es kaum beeinträchtigt. Trotzdem bestellt die Fabrik von Jahr zu Jahr die Spindel bei dem Unternehmen — wegen des *Profils*, wegen der *Zielgebundenheit*.

Im neuen Mechanismus lockern sich die Bindungen. Eine Fadenfabrik beginnt die Spindel herzustellen. Die Produktion ist ununterbrochen, wird wegen Mangel an Spindeln nicht eingestellt, das Endprodukt wird billiger — weil die Spindeln billiger und verlässlicher zur Verfügung stehen. Sie sind mehrmals zu verwenden, die Qualität der Produkte wird auch besser. Andere Fadenfabriken erkundigen sich, wie man es hier macht. Wir machen es selbst – Könnt ihr nicht helfen? Wir können. Nunmehr arbeiten zwei oder mehr Fabriken sicher, ohne Schwierigkeiten wegen der Spindelversorgung. Das Profilunternehmen beschwert sich. Kein Wunder, seine Ruhe, die Herrschaft der Mittelmässigkeit ist weg. Es wäre gut, wenn ein Befehl dazwischenkäme: aufhören!

Ein Betrieb, der Kessel herstellt, bezieht die Wärmeregler von einem anderen Werk. Es wurde ja zum letzteren »profiliert«. Ingenieure und Arbeiter haben ständige Sorgen wegen der schlechten Wärmeregler. Morgen stellen sie die Geräte selbst her, übermorgen beliefern sie auch andere Kesselfabriken. Sollen sie die Produktion einstellen?

Eine Erntemaschine steht auf dem Feld, zusammen mit dem Traktor. Beide warten auf Keilriemen. Diese sind aber nicht zu haben. Eine LPG strengt sich an, und beginnt Keilriemen herzustellen. Es gelingt. Man sagt jedoch: es ist ja nicht erlaubt. Der Leiter der LPG antwortet: die Riemen werden doch benötigt. Der Besteller äussert sich: *Keilriemen geht vor Profil!* (Von den Beispielen, erörtert an der gemeinsamen Sitzung der wissenschaftlichen Studentenzirkel der Universität für Volkswirtschaft »Karl Marx« und der Juristischen Fakultät der Eötvös Loránd Universität, 1968.)

10. Im Kreise des Zustandekommens der juristischen Personen stellt die immer breitere Tendenz ihrer *vertraglichen Gründung* einen neuen Zug dar. Zahlreiche wirtschaftliche Organisationen kommen auf Grund des freiwilligen Beschlusses von Grundtypen der wirtschaftlichen Organe (staatliches Unternehmen, Genossenschaft) zustande. Ein Teil dieser Organisationen erreicht das Niveau der juristischen Persönlichkeit. Die neueste Rechtsnorm über das staatliche Unternehmen ermöglicht die Gründung von Vereinigungen und gemeinsamen Unternehmen.[13] Die landwirtschaftlichen Produktionsgenossenschaften vereinigen ihre Kräfte im Rahmen der einfachen Vereinigung, in gemeinsamen Unternehmungen oder im genossenschaftlichen Unternehmen. Ein gemeinsames Merkmal aller aufgezählten neuen organisatorischen Formen ist, dass sie für irgend eine Vereinigung der Tätigkeiten der im Wirtschaftsleben beteiligten traditionellen juristischen Personen zustande kommen.

Zuweilen taucht innerhalb der bisher auch wirtschaftlich einheitlichen juristischen Personen die Organisierung von selbständig rechnungsführenden wirtschaftlichen Einheiten auf.

Eine besondere Stellung nehmen gewisse *neue* Interessenvertretungen ein, wie die territorialen Verbände und der Landesrat der Produktionsgenossenschaften (TOT). Die Produktionsgenossenschaften, ihre Verbände und der Landesrat stehen zueinander keinesfalls im Verhältnis der Subordination im herkömmlichen Sinne, im Gegenteil, diese Organisationen üben ihre Tätigkeit unter Aufsicht der Produktionsgenossenschaften aus. Zur gleichen Zeit verfügen sie jedoch über eine selbständige Rechtspersönlichkeit. Ihr Aufgabenkreis ist sehr breit: Absatz von Waren, Einkauf von Materien und Geräten, die in der Produktion benötigt werden, Verbreitung von Neuerungen, neuer Produktionsverfahren, direkte Fachberatung, Rechtsschutz usw.

11. Die aufgezählten neuen wirtschaftlichen Organisationsformen haben meistens entsprechende Rahmen in unserem Rechtssystem. (Andererseits sind

Der Qualitätsschutz verlangt keinesfalls eine strenge Profilgebundenheit. Über die Waren fällt einerseits der Markt sein Urteil, andererseits muss die Qualität durch Normativbestimmungen und Qualitätsvorschriften im voraus bestimmt werden. Die überflüssige Mehrproduktion ist mit Hilfe von Marktinformationen zu verhindern. Damit das Unternehmen seine Hauptaufgaben der Nebenbeschäftigungen wegen nicht vernachlässigt, soll man wirtschaftliche Mittel verwenden. Es ist wahrscheinlich, dass mit der Herstellung des Markt-Gleichgewichtes auch die Versuchung der Nebentätigkeiten geringer wird. Heute aber gibt es noch kein solches Gleichgewicht, und wenn es auch erreicht wird, so wird es nur für kurze Zeit wirken, da die Bedürfnisse sich ständig erneuern, und wenn wir die Bewegung verhindern, kann ein Gleichgewicht der Mittelmässigkeit entstehen.

[13] Die staatlichen Unternehmen miteinander und auch mit anderen sozialistischen Wirtschaftsorganisationen, weiters die letzteren miteinander, zur Verwirklichung gemeinsamer wirtschaftlicher Zielsetzungen die mit ihrem Tätigkeitsbereich zusammenhängen.

a) können nach den Regeln des Zivilrechts und in dessen Rahmen eine Vereinigung (§ 34—37.)

b) oder in der Form einer Handelsgesellschaft (Aktiengesellschaft, Gesellschaft mit beschränkter Haftung) ein gemeinsames Unternehmen (§ 38.) gründen. (Reg. Verordn. Nr. 11/1967. [V. 13.] § 7.)

diese Regeln nicht genügend ausgearbeitet.) Wir kennen jedoch zahlreiche solche Vereinbarungen, wirtschaftliche »Organisationen«, die in die »approbierten« neuen organisatorischen Formen nicht einzuordnen sind. Hier denken wir vor allem an solche Wirtschaftsorganisationen, die meistens auf dem Gebiet der Verwertung zwischen verschiedenen sozialistschen Organisationen zustande kamen, und die in der nächsten Zukunft wahrscheinlich noch mehr verbreitet werden. Einige von ihnen haben sich einen so verzweigten Aufgabenkreis gewählt und eine Organisation entwickelt, die selbst früher oder später notwendig machen, dass man sie für juristische Personen erklärt.

Wir müssen jedoch anerkennen, dass weder unser sozialistisches Recht, noch unsere sozialistische Rechtswissenschaft zur Legalisierung dieser neuen Gebilden vorbereitet genug war. Das Gesellschaftsrecht fehlt sozusagen völlig in unserer Zivilistik. Was wir haben, ist nur die im ZGB geregelte *zivilrechtliche Gesellschaft*. Ausser dem Zivilrecht im engeren Sinne finden wir den Kern unseres sich neu entwickelnden Gesellschaftsrechts in dem LPG-Recht wieder. Die Institutionen jedoch, die im LPG-Recht verankert sind, namentlich die einfache wirtschaftliche Kooperation und das gemeinsame Unternehmen, sind in ihrer heutigen Form leider nur auf einem zwar nicht unwesentlichen Gebiet des Wirtschaftslebens zu verwenden.[14]

Die kodifikatorischen Vorarbeiten sind nunmehr für die Ausgestaltung eines allgemeinen sozialistischen Gesellschaftsrechts im Gange. Einige Normen der zivilrechtlichen Gesellschaft sind bereits geändert worden.[15] Nachdem aber die zivilrechtliche Gesellschaft in jedem Rechtssystem lediglich die einfachste, kurzfristige oder sogar ad-hoc-artige Kooperationsform bildet, kann die Modifikation der bezüglichen Rechtsregeln des ZGB-s keine endgültige Lösung herbeiführen. Unsere bisherigen Rechtsnormen beinhalten keine oder nur mangelhafte Normen bezüglich der neuen Formen der Kooperation.[16] Die alten Formen können jedoch unter den sozialistischen Umständen nicht immer verwendet werden. Ohne eine vollständige Aufzählung anzustreben möchte ich einige Kriterien anführen, die meines Erachtens beim Entwickeln eines neuen Gesellschaftsrechts von grundlegender Bedeutung wären:

a) Die *Gleichberechtigung* der assoziierten Organisationen, aller Beteiligten muss gesichert werden. Von diesem Gesichtspunkte aus ist es gleichgültig, in welcher Form des sozialistischen gesellschaftlichen Eigentums ein Mitglied der Gesellschaft ihre Tätigkeit ausübt, d. i. die beteiligten staatlichen Unternehmen und andere sozialistische Organisationen müssten gleiche Rechte haben.

[14] Auch andere Verfasser empfehlen dem Gesetzgeber die Erfahrungen der gemeinsamen Unternehmungen von Genossenschaften bei der Vorbereitung der Rechtsregeln, die die Rechtslage der »sekundären«, von sozialistischen Organisationen gegründeten Unternehmen zu beachten. Erdősi: op. cit. S. 209.

[15] Die Verordnung mit Gesetzeskraft Nr. 39/1967. §§ 19—20 hat den § 571 und § 575 Abs. 1. des ZGB geändert.

[16] Vgl. Világhy, M.: *Az egyesülésről. (Über die Vereinigung.)* Jogtudományi Közlöny 1967. Nr. 9. S. 509—521.

b) Das neue sozialistische Gesellschaftsrecht muss die *demokratische Verwaltung* der Gesellschaft sichern. Dies bedeutet vor allem die Gewährung eines »pro Kopf«-Stimmrechts der Mitglieder bei der Entscheidung aller wesentlichen Fragen.[17]

c) Die *wichtigsten Kennziffern* der Wirtschaft müssen für die Öffentlichkeit zugänglich sein. Die Publizität ist auch für den Zweck nötig, dass andere Organisationen, die die Angliederung erwägen, vor ihrer Entscheidung die Lage der Gesellschaft kontrollieren können.

d) Die neuen sozialistischen gesellschaftsrechtlichen Normen müssten sichern, dass die für Handelszwecke gegründeten Gesellschaften nur aus *sozialistischen juristischen Personen* bestehen, soweit es sich um inländische Mitglieder handelt. Die juristischen Personen sind in der Ungarischen Volksrepublik Träger ausbeutungsfreier Verhältnisse, so wird gesichert, dass die von ihnen gebildeten Gesellschaften derselben Natur sind. Man darf andererseits die Bestrebungen der Staatsbürger zur Gründung von Gesellschaften nicht verhindern. Auf diesem Gebiet ist eigentlich nichts zu tun, weil die im ZGB geregelte zivilrechtliche Gesellschaft für einen solchen Zusammenschluss die entsprechenden rechtlichen Rahmen bietet.

e) Das neue Gesellschaftsrecht müsste des weiteren *das Verbot des Ausschlusses von der Gewinnbeteiligung* sichern. Bei der Gutheissung jeder Dispositivität muss hier eine strenge Kogenz gelten.

f) Die neuen Organisationen müssen für den Eintritt *offen* sein. Es muss ermöglicht werden, dass jedermann, der sonst den Bedingungen entspricht, frei eintreten kann. Wir können bereits heute beobachten, dass sich den Gesellschaften nachträglich andere anschliessen.

g) Das zu entwickelnde neue Gesellschaftsrecht soll endlich gewähren, dass *der sozialistische Staat eine weitgehende Kontrolle* über die zustande gekommenen wirtschaftlichen Gebilden im Interesse der Gesellschaft ausübt. Wir müssen hier den Schutz der Gesellschaft betonen, weil die Mitgliedorganisationen offensichtlich alles tun werden, um ihre internen Verhältnisse normal zu gestalten, es ist jedoch bei weitem nicht sicher, dass sie ihre bedeutende Wirtschaftsmacht nicht zur Erlangung des Übergewichts allen aussenstehenden gegenüber benützen. Auf dem Gebiet der Kontrolle müsste der Staat das Einschreiten gegen monopolistische Bestrebungen als seine Hauptaufgabe betrachten.

[17] Einen anderen Standpunkt vertritt Eörsi op. cit. S. 218—219. Wenn die beteiligten Organisationen an der Vereinigung materiell gleichmässig interessiert sind und das Risiko der Teilnehmer verschieden ist, können diese je nach ihrer Teilnahme eine andere wirtschaftliche Auffassung vertreten. Von der Vereinigung kann eine Organisation zurückgehalten werden, wenn die mit geringen Anteilen beteiligten Mitglieder diejenige trotz ihres beträchtlichen Anteils majorisieren können. Dieses Gegenargument ist beachtenswert.

IV

Die Monopolunternehmen

12. Unter den Umständen des neuen Wirtschaftsmechanismus müssen wir die monopolistische Lage einzelner Unternehmen beachten. Die Monopollage ist bei den neuen Wirtschaftsverhältnissen beachtenswert, weil die Unternehmen, die über eine grosse wirtschaftliche Macht verfügen und im wesentlichen ausschliessliche *Hersteller* gewisser Produkte im ganzen Lande, bzw. für gewisse Dienstleistungen allein zuständig sind, oder den Vermittlungshandel in der Hand haben, die freiere Geld-, Waren- und Marktverhältnisse anderen Unternehmen und den Abnehmern gegenüber ausnützen.

Die Vorteile der Konzentration, Spezialisierung der Massenproduktion begründen aus technischen, betriebs- und arbeitsorganisatorischen Gesichtspunkten die Zweckmässigkeit solcher grossen Unternehmen, die gewisse Produkte im ganzen Lande allein herstellen.[18] Aus technischen Gründen können wir also die Organisierung solcher Grossbetriebe für richtig halten. Wir müssen jedoch beachten, dass die Befriedigung der Ansprüche der Gesellschaft nicht nur eine technische Frage ist. Die Produktion hat nicht nur technische, betriebswirtschaftliche und arbeitsorganisatorische, sondern auch gesellschaftliche Seiten. Das Unternehmen ist nicht nur eine Produktionsstätte, sondern auch Träger gesellschaftlicher Verhältnisse. Wenn die technokratische Anschauung der gesellschaftlichen Seite gegenüber vorherrscht, kann das Grossunternehmen diese Überlegenheit schädlich missbrauchen. Die hohe technische Organisiertheit kann gesellschaftlich auch unnütz sein, wenn diese hochentwickelte innere Organisiertheit unter solchen wirtschaftlich-gesellschaftlichen Umständen verwirklicht wird, die den Gesellschaftsinteressen entgegenwirken.

Das Dasein des Monopoliums kann unter den geänderten Verhältnissen an und für sich gewisse Gefahren mit sich bringen. Es kann nachteilig auswirken, indem die Monopollage das Bequemsein und die Vernachlässigung der technischen Entwicklung herbeiführen kann. Sie kann weiters nachteilig auf dem Gebiet der vertraglichen Verhältnisse aus dem Gesichtspunkte des Verbrauchers und anderer Unternehmen auswirken, weil diese zur ausgelieferten Lage des Käufers und zu Preiserhöhungsbestrebungen führen kann.[19]

Noch grössere Gefahren werden heraufgeschwört, wenn die Wirtschaftsmacht des Unternehmens in der Monopollage noch auch durch eine behördliche Kompetenz (z. B. territoriales Preisbestimmungsrecht) erweitert wird, oder wenn es in den zivilrechtlichen Beziehungen über bedeutende rechtliche Vorteile den Vertragspartnern gegenüber verfügt.

[18] Vgl. Beschluss der ZK-Sitzung der MSZMP (Ungarische Sozialistische Arbeiterpartei) von 25—27 Mai 1966.

[19] Vgl. Beschluss der ZK-Sitzung der MSZMP von 25—27 Mai 1966.

Die behördliche Kompetenz der Monopolunternehmen muss daher stufenweise abgeschafft werden. Da aber die Abschaffung dieser behördlichen Befugnisse längere Zeit beansprucht, müssen wir dafür Sorge tragen, dass die Ausübung dieser Rechte *mit der Haftung für die verursachten eventuellen Schäden verbunden sei*. Für die Begründung dieser Haftung scheint die Regelung des Schadenersatzes für im behördlichen Wirkungsbereich verursachte Schäden im ZGB ungenügend zu sein.[20] Wir müssten also dafür sorgen, dass für die Monopolunternehmen mit behördlichem Wirkungsbereich (z. B. MÁV – Staatsbahnen) neue spezifischen Schadenersatzregeln erlassen werden.

Wenn auch die Monopollage geniessenden Unternehmen keine behördliche Kompetenzen haben, können wir in zahlreichen Fällen feststellen, dass diese Unternehmen – besonders die Betriebe der kommunalen Dienstleistungen – ihrer Rechtslage nach viel vorteilhafter auftreten können, als die mit ihnen Vertrage abschliessenden Konsumenten (z. B. das Unternehmen für Fernheizung und Warmwasserversorgung von Budapest und ähnliche Unternehmen). Nachdem der Verbraucher ihnen ausgeliefert wird, können sie ihm z. B. die Erhöhung der Preise der Dienstleistungen einfach mitteilen, ohne vorher dies anzukünden. Sie sind auch bei Geltendmachung ihrer Rechte in vorteilhafterer Lage, und im Interesse der Eintreibung der Preise bzw. Gebühren können sie von dieser Lage aus erfolgreicher auftreten. Der Verbraucher kann nicht einmal den Gegenwert einer Dienstleistung *zurückhalten*, die mit Verschulden des Unternehmens ausblieb, sondern nur *zurückfordern*. So ist er gezwungen, den ganzen Mechanismus der Justiz in Bewegung zu setzen, wenn er die Verpflichtung einer Gegenleistung los werden möchte.[21] Die Verantwortung der dienstleistenden Monopolunternehmen ist auch dem Charakter ihrer Tätigkeit nicht angepasst. Sie haften nämlich für die Unterbrechung ihrer Dienstleistungen für einige Tage, oder für mangelhafte Dienstleistungen nicht. Die Normen der Haftung sind so geformt, dass sie nicht den Verbraucher in den Mittelpunkt des Schutzes setzen, und das Unternehmen sehr leicht die Haftung loswerden kann.[22] Es ist allgemein bekannt, dass der Ausfall der Fernheizung, der Warmwasserversorgung und ähnlicher Dienstleistungen auch für eine kurze Zeit viel Ärger dem Konsumenten verursacht, und ihm verhältnismässig bedeutenden Schaden zufügen kann.

Einige Unternehmen versuchen ihre mit der Erweiterung der Vertragsfreiheit zusammenhängende Möglichkeiten dazu zu verwenden, dass sie ihre Monopollage mangels kogenter Regelung mittels Verträge wieder erlangen. Die Rechtsregeln des Überganges zum neuen Wirtschaftsmechanismus haben im allgemeinen den sog. »Zwangsbahnenverkehr« der Güter abgeschafft (die

[20] ZGB. § 349.

[21] 1/1963. ÉM-NIM — gemeinsame Verordnung der Ministerien für Bauwesen und Schwerindustrie, §§ 20., 23., 25.

[22] Zit. Verordnung §§ 12., 20., 25.

verbrauchende, bearbeitende oder weiterleitende sozialistische Organisation durfte die Produkte nur von bestimmten sozialistischen Organisationen beziehen). Andererseits wurde ermöglicht, dass die Abnehmer die Kapazität des Industriebetriebes oder deren gewissen Teil für sich vorbehalten (Belastungsverträge)[23] und die so gebundene Kapazität später durch konkrete Bestellungen ausfüllen. Das Handelsunternehmen belastet damit es seine Monopollage sichert die ganze Kapazität, nimmt eine vorherrschende Stellung auf dem Markt ein, und verhindert dadurch, dass andere (Kleinhandelsunternehmen, Konsum- und Verwertungsgenossenschaften) unmittelbar dem Hersteller ihre Bestellungen geben. Ein für diesen Zweck geschlossener Vertrag ist laut unserer neueren Rechtsregeln nichtig.[24]

Die älteren Normen für die Verträge der Monopolunternehmen und besonders für die Verantwortung wegen Vertragsbruchs müssen einer Revision unterzogen werden - und die heutige Regelung die ein »Hausrecht« der Monopolunternehmen geworden ist, müssen wir durch solche Regel stufenweise ablösen, die der Partner Gleichberechtigung gewähren.

Im Zuge der Kontrolle der Tätigkeit eines jeden Unternehmens muss man auch die kleinsten, für das Unternehmen als unbedeutend erscheinenden Vertragsbrüche untersuchen, und in dem Falle, wo das massenhafte Auftreten dieser kleinen Vertragsbrüche auszuweisen ist, müssen wir nötigenfalls auf dem Verwaltungswege auftreten.[25]

V

Der Vertrag

13. Es lohnt sich ein wenig bei dem Problem *der neuen Merkmale und Rolle* der Verträge, in engerem Sinne der zivilrechtlichen Verträge verweilen.

Ein wenig vereinfacht: *das Schicksal des Vertrages wird durch das Schicksal der Warenverhältnisse bestimmt.* Dieser Satz birgt eigentlich zwei Gedanken in sich. Erstens kann der Vertrag als rechtliche Kategorie entstehen, wo Warenverhältnisse existieren, und Verträge werden wir haben, bis Warenverhältnisse

[23] »Mit dem Kapazitätsbelastungsvertrag übernimmt der Lieferbetrieb die Verpflichtung, für den Besteller eine bestimmte Kapazität vorzubehalten. Die Vertragspartner sind verpflichtet binnen der vertraglich festgesetzten Frist zur Auslastung der vorbehaltenen Kapazität laut des durch den Besteller bestimmten Sortiments Lieferverträge abzuschliessen.« Reg. VO. Nr. 10/1966. (II. 14.) § 60.

[24] »Es ist verboten eine Vereinbarung abzuschliessen, wonach der Markt aufgeteilt, oder ein bestimmter Kreis der Verbraucher aus gewisser Einkaufsmöglichkeit ausgeschlossen, oder deren Wahl unter den Einkaufsquellen beschränkt wird.« Reg. VO. Nr. 25/1967. (VIII. 20.) § 9. Abs. 1.

[25] Das Gericht oder das Vertragsgericht kann gegen das Unternehmen eine Geldbusse verhängen, wenn es mit ihrer gegen die Rechtsregeln oder behördlichen Verfügungen verstossenden bzw. im Gegensatz zu den Grundsätzen der sozialistischen Wirtschaft geführten Tätigkeit das Gesellschaftsinteresse verletzt bzw. erheblichen Schaden verursacht, oder die berechtigten Interessen der Bevölkerung ernsthaft gefährdet. Reg. VO. Nr. 1/1968. (I. 16.) § 2.

bestehen. Zweitens: in den Gesellschaften, wo es Warenverhältnisse gibt, hängt die Rolle und Wirksamkeit des Vertrages in hohem Masse davon ab, welchen Geltungsbereich die staatlich-politische Macht diesen Warenverhältnissen zulässt.

Die Warenverhältnisse bestehen in der ganzen Periode des Sozializmus. Daraus folgt, dass der Vertrag unter den Umständen der sozialistischen Gesellschaft eine Rolle spielen kann und spielt. In den verschiedenen Entwicklungsstufen der sozialistischen Gesellschaft ist jedoch die Rolle der Warenverhältnisse und der Verträge nicht immer gleich.[26]

11. Bei der heutigen Entwicklungsstufe der Verträge ist das erste Merkmal und Bestimmungsmoment die Geltendmachung *der Vertragsfreiheit und der Gleichberechtigung.* Der neue Aufschwung ist aus der Erkenntnis entstanden, dass es in keinem Staat gelungen ist die weitverzweigten und verwickelten Beziehungen der wirtschaftlichen Einheiten auf administrativem Wege gut zu lösen. Diese können wirkungsvoll nur durch eine Anzahl Verträge und Vereinbarungen realisiert werden, die vom freien Beschluss der Partner und auf der Basis der Gleichberechtigung entstehen, und zwar in der Form der Waren-, Markt- und Geldverbindungen. Auf Grund der Vertragsfreiheit beschliesst jede Wirtschaftseinheit in jedem Sektor der Volkswirtschaft selbst, *ob sie einen Vertrag abschliesst, mit wem und welchen Vertrag sie eingeht* (die gemischten und typischen Verträge inbegriffen) *und welchen Inhalt des Vertrages sie akzeptiert.*[27]

Nach der vollen Entfaltung der Reform werden unsere Unternehmen mit Ausnahme der einzelnen Grossinvestitionen keine Vertragspflicht haben.[28]

Den sozialistischen Organisationen steht im Warenverkehr — mit Ausnahme einiger beschränkenden Massnahmen — das Recht der freien Partnerwahl zu. Die Gewährung der freien Partnerwahl hat mehrere frühere Schranken abgeschafft. Die Beschränkungen *nach Sektoren und Eigentumsformen* wurden aufgehoben. Während früher die staatlichen Unternehmen und andere Wirtschaftsorganisationen, sogar in vielen Beziehungen auch die Haushaltsorganisationen sich nur an Wirtschaftsorganisationen innerhalb des staatlichen Sektors um Befriedigung ihrer Bedürfnisse wenden durften, und nur in dem Falle mit einer Organisation eines anderen Sektors einen Vertrag abschliessen konnten, wenn sie im staatlichen Sektor keine entsprechende Partner finden

[26] Für die Rolle des Vertrages im sozialistischen Wirtschaftsleben und die Entwicklung dessen im sozialistischen Wirtschaftssystem siehe: SÁRÁNDI, I.: *Der neue Wirtschaftsmechanismus und das Recht.* Jogtudományi Közlöny, 1968. Nr. 2. S. 74.

[27] Die sozialistischen Organisationen (staatliche Unternehmen, Institute, Haushaltsorgane, gesellschaftliche Organe, Genossenschaften, deren Organisationen und Unternehmen usw.) können die Produkte auf Grund von Marktbeziehungen — binnen der Rahmen der Rechtsregeln — an jede sozialistische Organisation verkaufen, oder von jeder solchen Organisation kaufen.

Die sozialistischen Organisationen wählen selbst auf Grund der Rechtsregeln und des Gepräges des Marktverhältnisses die zweckmässigsten Vertragsarten. Reg. VO. Nr. 25/1967. (VIII. 20.) § 1. Abs. 1—2.

[28] Vgl. EÖRSI: op. cit. S. 64.

konnten, können sie heute mit staatlichen Unternehmen oder Genossenschaften gleichfalls in Verbindung treten, ohne dass sie durch die Reihehaltungspflicht beschränkt wären. Eine Zeit lang durften die Unternehmen eines Ministeriums ohne Sondergenehmigung für die Unternehmen anderer Ministerien keine Arbeit leisten. Die Einführung der Reform hat auch diese Beschränkung abgeschafft. Im wesentlichen wurden alle territoriale Beschränkungen aufgehoben, und die Unternehmen oder Genossenschaften können ihre Einkäufe von jedweden Verwaltungsgrenzen unabhängig abwickeln. Der Verbraucher — ob er ein Produktionsmittel selbst verwendet oder es weiterverkauft — hat das Recht von dem Grosshandelsunternehmen oder direkt vom Herstellerbetrieb die zu seiner Aufgabe benötigten Produkte zu beziehen.

15. Nachdem die Unternehmen selbst entscheiden, welche Form der nunmehr differenzierten Verträge sie wählen, ist die Zeit der *rechtlich gesicherten Alleinherrschaft* gewisser Vertragsarten vorbei. *Es wird nicht durch staatliche Massnahmen* entschieden, in welchem Masse die einzelnen Vertragstype im Verkehr erscheinen sondern durch den Charakter der Wirtschaftsbeziehungen und die Ansprüche der Partner in denselben. Die Partner bestimmen nunmehr frei, welche Vertragsart sie in Anspruch nehmen. Sie haben sogar das Recht, ihre Verhältnisse mittels *gemischter* oder *atypischer* Verträge zu regeln.

In diesem Sinne dürfen die sozialistischen Organisationen unter den *traditionellen*, ihre Beziehungen früher massenhaft abwickelnden, heute jedoch vielseitig reformierten Vertragstypen wählen (Liefervertrag, Produktenverwertungsvertrag). Sie können die *neuen* Vertragsformen wählen, die eben zur Zeit des Überganges zum neuen Wirtschaftsmechanismus ausgearbeitet wurden (Werkverträge zwischen den Unternehmen, Kapazitätsbelastungsvertrag, Gesellschaftsvertrag, Vertretungsvertrag, Vertrag über Kauf von Lager). Die Werkverträge haben weitere, in der Form von allgemeinen Bedingungen spezialisierte Untertypen (Bauvertrag, Planungsvertrag, technologischer Montagevertrag). Es steht weiters den Partnern auch das ganze Arsenal der traditionellen zivilrechtlichen Verträge zur Verfügung. Von diesen spielen heute besonders der Kaufvertrag und der Komissionsvertrag eine wichtige Rolle.

Das sozialistische Zivilrecht kennt keinen Vertragstypenzwang. Zufolge der freien Vertragstypenwahl können die sozialistischen Organisationen ihre Verkehrsbeziehungen durch *gemischte* und *atypische* Verträge regeln. Vom Willen des Gesetzgebers sind z. B. gemischte Verträge die Forschungs- und Produktenentwicklungsverträge. Besonders der erste beinhaltet gemischte Elemente von Auftrags-, Werk- und Lieferverträgen. Auch die Partner können selbst, je nach der Art der wirtschaftlichen Beziehung, die einzelnen Elemente mehrerer Verträge mischen, sogar haben sie die Freiheit atypische Verträge auf Grund der allgemeinen Regeln des Obligationsrechts abzuschliessen.[29]

[29] Laut § 198 des Zivilgesetzbuches wird jede Vereinbarung, die den allgemeinen Vorschriften des Vertragsrechts entspricht und den Verpflichtungen und Rechten

16. Wir müssen noch das Problem berühren, ob die allgemeinen Bedingungen der Liefer-, Werk- und Produktenverwertungsverträge den Inhalt der Verträge zwischen sozialistischen Oganisationen in Richtung der schematischen Erstarrung beeinflussen. Die breite Diskussion über die allgemeinen Vertragsbedingungen führte eindeutig zu dem Standpunkt, dass die allgemeinen Bedingungen keinesfalls in dieser Richtung auswirken dürfen. Es kam auch in der Frage zu einer übereinstimmenden Meinung, dass diese von dispositivem Charakter, und primär von zivilrechtlicher Natur normmässiger als früher sein müssen. Es müssen die Bestimmungen wegfallen, die behördliche Kompetenzen, Verteilungsfunktionen und andere verwaltungsrechtliche Elemente beinhalteten. Die Bedingungen müssen die Vertragsverhältnisse der Partner fördern und den Vertragsabschluss erleichtern.[30]

17. Es ist interessant zu untersuchen, in welchem Masse die sozialistischen Organisationen die freie Vertragswahl bisher verwendet haben. Freilich können wir nach einem einzigen Jahr allgemeingültige Feststellungen für das ganze Gebiet der Wirtschaft kaum machen. Wir können bei dieser Untersuchung höchstens jene Gebiete beachten, bei denen die Umlaufzeit der Waren verhältnismässig kurz ist, zufolge dessen die neuen Antriebsfaktoren ihre Wirkung schneller entfalten können. Da das untersuchte Gebiet so abgegrenzt werden musste, liegt es an der Hand, dass nicht alle erwähnte Vertragsarten von diesem Gebiet berücksichtigt werden konnten.

18. Im Kreise des die *Übereignung von Sachen* bezweckenden Verkehrs werden die wirtschaftlichen Beziehungen der sozialistischen Organisationen auch weiterhin durch die *Liefer- bzw. Produktenverwertungsverträge geregelt.* Die beiden Vertragsformen sind jedoch von zahlreichen früheren Merkmalen befreit worden. Die Aufhebung des Systems der verbindlichen Planziffern, die stufenweise erfolgte Abschaffung der Vertragspflicht und der verbindlichen Geltendmachung der Ansprüche aus diesen Verträgen, Abschaffung der sog. Zwangsumlaufbahnen, die Ausbreitung der Dispositivität, das Ausscheiden der Werkverträge von den Lieferverträgen, die Gewährung einer sehr breiten Autonomie für die Vertragspartner, die Abschaffung der Kompetenz der Vertragsgerichte zum Vertragsabschluss, Abänderung und Aufhebung der Verträge im allgemeinen machen diese Verträge immer geeigneter zum Ausdruck wirtschaftlicher Beziehungen, die der sozialistischen Massenproduktion entsprechend im Kreise der Massenverwertung entstehen.

Die fraglichen Vertragsarten, besonders der Liefervertrag, nehmen heute eine faktische, also nicht durch Rechtszwang bedingte Hegemoniestellung ein und zwar aus weiteren Gründen, die teils von zufälliger, vorübergehender

entspringen, als Vertrag qualifiziert auch im Falle, wenn der Inhalt des Vertrages den Regeln eines bestimmten Vertragstyps nicht adäquat entspricht.

[30] ANDÓ, A.: *Az új szerződési rendszer és a Polgári Törvénykönyv Novellája. (Das neue Vertragssystem und die Novelle des Zivilgesetzbuches.)* Döntőbíráskodás, 1968/3. p. 85.

Natur sind. (Viele Lieferverträge wurden noch vor der Einführung des neuen Wirtschaftsmechanismus abgeschlossen, die Partner wollen ihre traditionellen Verbindungen nicht ändern, beiderseitige Vorsicht ist zu verzeichnen, die Betriebsapparate waren auf die Einführung der neuen Formen nicht genügend vorbereitet.)

19. Der *Typ des Kaufvertrages* ist vorderhand in dem Warenverkehr zwischen sozialistischen Organisationen von periferialer Bedeutung. An diesen Randgebieten finden wir oft Zeichen eines lebhaften sozialistischen Handelsgeistes und hoher Anforderungen, andererseits aber sind auch die sehr niedrige Qualität oder die Inkurrenz solche Faktoren, die die Verwendung der Kaufverträge fördern. Im Falle von besonders guten und begehrten Waren verpflichtet sich der Verkäufer kaum für eine längere Frist, nach der Herstellung des Produktes melden sich ja die Abnehmer ohne vertraglichen Zwang. Wenn die Ware demgegenüber schwer abzusetzen ist, wird der Käufer keine langfristige Verpflichtungen eingehen, sondern tritt mit seinem Kaufwillen beim Erscheinen der konkreten Absatzmöglichkeit auf. Durch Kaufverträge kommen die vom Export zurückgebliebenen Produkte und die Rohstoffe in den Inlandverkehr, die bei gewissen Betrieben als Nebenprodukte oder Abfälle entstehen. Der Lagerkauf ist eine von dem Kleinhandel und von Konsumgenossenschaften mit Vorliebe verwendete Art des Kaufs.

20. Das Kommissionsgeschäft enthebt die Besteller der Verpflichtung das Risiko aus unverkauften Beständen zu tragen. Bei neuartigen, unbekannten Waren verwenden so der Hersteller wie der Handel zur Einführung diese Vertragsart sehr gerne. Der Herstellerbetrieb kann in dieser Weise sich über das Urteil des Marktes orientieren, während die Handelsorganisation das Produkt nicht auf unbestimmte Zeit im Falle der Inkurrenz auf Lager halten muss. Der Kommissionsvertrag wird besonders für solche Produkte verwendet, die den schnellen Änderungen der Mode ausgesetzt, saisonartig oder schnell verderblich sind. Minderwertige Waren übernimmt der Weiterverkäufer gerne als Kommissionswaren, anstatt sie zu kaufen.

In der Organisierung der Kooperation mittels Produktenaustausch ist der *Kapazitätsbelastungsvertrag* bereits weit verbreitet. Die Betriebe, die Endprodukte herstellen, binden durch diese Verträge die Kapazität der Partner, die ihrerseits die benötigten Grundstoffe herstellen. Die bevorratenden Grosshandelsunternehmen schliessen solche Verträge mit den die Endprodukte herstellenden Betrieben ab. Diese Art der Verträge ist sehr geeignet so dem Hersteller wie dem Besteller eine gewisse Sicherheit zu gewähren, zugleich aber birgt sie die Gefahr in sich, dass der Kaufmann durch die Belastung der ganzen Endproduktenkapazität die mehrspurigen Verwertungs- und Einkaufsmöglichkeiten wieder einspurig gestaltet, indem er ausschliesst, dass die Kleinhandelsunternehmen und andere Verbraucher sich unmittelbar an den Herstellerbetrieb wenden.

21. Die an dem Warenverkehr beteiligten sozialistischen Organisationen verwenden oft die *Gesellschaftsverträge* für die Organisierung ihrer Verkehrsbeziehungen. In einem Teil der Gesellschaften üben die Partner auf beiden Polen des zwischen ihnen bestehenden Warenverhältnisses ihre Tätigkeit aus. In anderen Fällen schalten sie auch das Warenverhältnis aus, und arbeiten engst an der Verwirklichung ihrer gemeinsamen Ziele zusammen. Eine spezifische Erscheinungsform der ersten Verbindung ist das *Geschäft in gemeinsamen Betrieb*. Der die Endprodukte herstellende Betrieb schliesst mit einem Kleinhandelsunternehmen oder mit einer Konsumgenossenschaft so eine Vereinbarung ab, wonach der Betrieb des Geschäftes auch weiterhin in den Händen von letzterem bleibt, demgegenüber jedoch werden im Geschäft nur Produkte dieses Endproduzenten feilgeboten. Der Industriebetrieb übernimmt die Verpflichtung, das Geschäft mit Waren zu versorgen. Gewinn und Verlust werden laut der Vertragsbedingungen zu einem gewissen festgesetzten Prozentsatz verteilt.

Es kommt oft vor, dass sozialistische Organisationen zur Abwicklung eines bestimmten Geschäftes sich vereinigen. Das Interesse an der gemeinsamen Unternehmung ist in diesem Falle äusserst stark, die Verknüpfung jedoch nur vorübergehend.

Die Gesellschaften, die auf einer höheren Ebene engere Verbindungen zwischen den Partnern herstellen und so in eine »höhere Klasse« einzuordnen sind, schaffen das Warenverhältnis zwischen den Partnern ab und stellen ein richtiges Kollektiv auf, ohne dass die rechtliche Selbständigkeit und die selbständigen Interessen völlig aufgehoben wären. (Unterhaltung eines gemeinsamen Geschäftes zu gemeinsamen Kosten, Beteiligung des den Grundstoff herstellenden Betriebes an der Verwertung des Endproduktes, Beitrag zu den Investitionen des Partners mit der Bedingung, dass einen Teil der Produkte der Beitrag leistende Partner bekommt usw.)

Die sozialistischen Organisationen regeln ihre wirtschaftlichen Beziehungen, indem sie durch die freie Typenwahl gemischte und atypische Verträge abschliessen. Leider hat der vertragliche Typenzwang, der trotz der obligationsrechtlichen Hauptregel unter den sozialistischen Organisationen faktisch entstand, die Anschauungen der sozialistischen Rechtswissenschaft über den allgemeinen Begriff des Vertrages vor vielen praktischen Juristen verhüllt. Daraus folgt, dass ein Teil unserer Juristen beim Ausbau einer wirtschaftlichen Verbindung ausschliesslich das Problem untersucht, in welche Vertragstype das gegebene Wirtschaftsverhältnis einzupferchen ist. Darum müssen wir dafür Sorge tragen, dass der allgemeine Begriff des Vertrages immer wieder erörtert und die freie Vertragswahl in der Praxis in breitem Kreise verwendet werde.

22. Ein wichtiges Merkmal unseres zivilrechtlichen Vertragssystems nach der neuen Entwicklung besteht darin, dass seine Rolle nicht nur durch Vermittlung von Sachen und Tätigkeiten wächst, sondern *dass es im Zustande-*

kommen von neuen Wirtschaftsorganisationen ein immer wichtigerer organisatorischer Faktor wird.

Im Interesse der weiteren Entwicklung unseres Vertragssystems müssen wir von diesen Verträgen binnen kürzester Zeit möglicherweise die noch vorhandenen *Verwaltungselemente* sowie die kleinen und grossen *verwaltungsrechtlichen Beschränkungen entfernen.* Das System der zivilrechtlichen Verträge kann in dieser Weise über die bereits erreichten Ergebnisse hinaus ein wirksames Mittel der Organisierung der Verbindungen zwischen den sozialistischen Wirtschaftseinheiten werden.

The New System of Economic Management and Certain Institutions of Civil Law

by

I. SÁRÁNDY

The legal regulation of the new system of economic management resulted in a qualitative change of a number of legal institutions leaving however the type of law unchanged. The function of economic organization of the socialist state has survived also under the circumstances of the new system of management. The methods of economic management and direction have, however, undergone a substantial change. This change has in the first place manifested itself in the new features of the government direction of economy, differing from those of political administration. The legal structure of this is dealt with in the paper with respect to the institutions of ownership, juristic persons, competition and contracts.

Новый хозяйственный механизм и отдельные институты гражданского права

И. ШАРАНДИ

Выражающее новый хозяйственный механизм правовое регулирование при сохранении правового типа вызвало качественные изменения во многих правовых институтах. Хозяйственно-организаторская функция социалистического государства сохраняется и в условиях нового хозяйственного механизма. В то же время методы управления и руководства народным хозяйством значительно изменятся. Изменение главным образом проявляется в том, что специальные государственные средства хозяйственного управления в отличие от политического руководства — приобретают новые черты. Статья рассматривает правовую структуру этого в отношении собственности, юридических лиц, соревнования и договоров.

В условиях нового хозяйственного механизма необходимо обращать особое внимание на монопольное положение отдельных предприятий с тем, чтобы они не могли использовать это их положение в отношении общества, других, находящихся в связи с ними, предприятий и потребителей. Ограничение монопольных организаций следует достигнуть, с одной стороны, пересмотром относящегося к ним прежнего правового регулирования, путем отмены их властных компетенций и в отдельных резких случаях путем наложения на них хозяйственного штрафа.

В новом хозяйственном механизме особенно важное значение приобретают товарные отношения, вообще всегда существующие при социализме, и соответственно этому их первоочередное юридическое выражение, договор. О дальнейшем развитии договорной системы свидетельствует расширение договорной свободы. Сама хозяйственная организация решает — за небольшим исключением — заключает ли договор, с кем заключет

его, договор какого типа и с каким содержанием заключает. В новой системе отменены распоряжения, ограничивающие право избрания партнера, обязанность по обязательному заключению договора существует редко, не государственное распоряжение решает, какой из типов договоров в какой мере должен применяться в обороте, договорную систему характеризует высокая дифференциация, помимо предусмотреиных законом видов имеет место применение и смешанных, а также атипичных договоров. Наконец, договор становится важным организатором и в создании «вторичных экономических единиц».

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Administrative and Legal Problems of the Transformation in Parish Organization

by

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Reforming parish administrative system and constituting larger parish units is a central problem in the administration of *all* countries in Europe.

Reforms of parish administration indicate in the majority of countries two types of changes which are closely interrelated: the characteristic features of parish organization as evolved by history have been undergoing changes and the traditional territorial compass and institutions of administration have been gradually adapted to the new conditions and requirements.

The shaping of the new territorial compass as well as the administrative and legal institutions of parishes is inseparable from the requirements of a rational and up-to-date administrative organization. It is a fact likewise that all major reforms in administration — and developing parish administration means such a reform — are most closely linked up with the social system and the needs of economic development of the given country.

When the reforms of parish administration are prepared and implemented it is mainly the problems of the *new* territorial, administrative units which are placed in the foreground of interest and the study of relationships *within* the confines of parish is somewhat relegated into the background: the moulding of the legal status of units which had previously an autonomy in organization and law. Nevertheless, if the problem is disregarded and is approached from a merely technocratic aspect results in giving prominence to the authoritative, administrative nature of parish regrouping and parish amalgamations which have become ripe and necessary and the constitution of rational settlement districts are frequently impeded.

No doubt, when these problems are analyzed in a comparative way it is often difficult to make distinction between parishes of a comprehensive authority and sub-divisions formed within these and endowed with certain structural autonomy and specific powers. That is the reason why in comparative writings on administration as a result of the mechanical comparing of organizational solutions which are akin as far as their *form* is concerned mistakes which distort the *substantive* characteristics of parish administration reforms are a common occurrence.

The patterns of structural, legal relationships within the new greater parish and parish districts vary on a relatively large scale. It is intended in the paper to distinguish *four types* and thus include in categories the major characteristics of parish reforms the differentiated settlement of relations between parishes and their sub-divisions.

Reforming the parish system and constituting greater parishes is one of the central problems of the administration in all countries of Europe. Various modes of solving the problem were analyzed in another paper[1] and for this reason analysis in this paper will be confined to the evolving of the relation-

[1] *Községi reformtendenciák . . . (Reform tendencies regarding parishes . . .)* Állam és Igazgatás, 1966. október; 1967. július—augusztus.

ship between parishes and their sub-divisions and the discussion of certain aspects of parish reforms.

It may be described as a general phenomenon in local government in the countries of Europe that the administrative and legal province of territorial units constituted in *earlier epochs* for the purpose of discharging public duties of local characters have ceased to accord with *changed* conditions and the extended scope of public duties. These contradictions are particularly discernible in respect of parishes.

It is for this reason that local government reforms were set as one of the principal objectives to delimitate the best possible compass of territorial administrative units and agglomerates of settlements. The amalgamation of parishes and small settlements into greater territorial, administrative units constitutes an important pre-requisite of raising the standard of local services and of the efficient and economical employment of the material resources available for developing economy, social and cultural services. Examining the matter from another angle: a rational development of the local government system requires likewise the amalgamation of small parishes into greater units.

To examine this process merely as the amalgamation of parishes into greater territorial units and restrict it to the changes occuring in administrative and legal relationships would mean oversimplifying the matter. Reforms in the parish system in the majority of countries indicate essentially two closely correlated changes. One of these is the transformation of the characteristic features of the parish pattern as evolved in the course of history; the second consequential mainly upon the former – is the gradual adaptation of the traditional territorial divisions and legal institutions of administration to the conditions newly emerged.

One of the central problems of the reforms of territorial administration which have been carried out or have become the question of the day in socialist countries is to bring about a harmony between parishes, and in general administrative, legal institutions of basic administrative units and the requirements of economic and social development.[2]

At first approach it would appear that a rational structure and efficient, economical functioning of local government in modern states gives rise in a completely similar manner to the problem of developing the parish system

[2] I intend to elaborate this subject in the second part of this paper to be published at a later date. In order to indicate the importance of the problem I would like to evoke the Decree-Law adopted on April 8, 1968 by the Presidium of the Supreme Soviet on the "Basic Rights and Duties of Parish and Settlement Soviets"; simultaneous with that a resolution was adopted by the Soviet Council of Ministers to strengthen the material and financial resources of these. According to the terms of the statutes now cited the authority of the Soviets' plenary sessions to adopt decisions has been modified and considerably extended; the forms of their relationships with institutions not subordinate to them, their sources of income, etc. have come under regulation. In essence a very important *new regulation* of the status of rural soviets has thereby been started in the Soviet Union.

and the extension of the compass of basic administrative units in countries of different socio-economic systems. No doubt the compass as well as the administrative and legal institutions of newly constituted parish units and agglomerates created through amalgamating settlement areas are determined also in socialist countries very largely by geographic, economic conditions, the structure of settlement as evolved in the course of history, the extent of locally administered public duties and services and the traditions of parish autonomy. The greater part of the administrative and legal solutions applied in carrying out parish reforms are governed by these factors.

However, just as it would be wrong and forced to disregard the above factors contributing to solutions in parish reforms it would equally lead to conclusions which are not right and out of keeping with reality to restrict the examination of local government reforms in socialist countries solely to the factors outlined. It is clear that the establishing of the new compass of parishes and the shaping of their administrative and legal institutions cannot be torn asunder from the requirements of a rational and up-to-date administrative organization. But it has also been a recognized fact by now that the preparation of a comprehensive administrative reform - and this is what the developing of the parish system is concerned with cannot be separated from the social structure, the requirements of economic development in the given country. The character and order of territorial extent, structure and institutions shaped in the objectives laid down in administrative reform projects are evolving in accordance with the above consequently have a decisive effect on the modes applied in solving the administrative and legal relationships within parishes and settlements coming under parish authority.

Thus it may be said that the regulation of all these relationships appearing in organizational and legal patterns is governed in the last resort by political considerations. It also follows from this that the implementation of parish reforms is not merely tantamount to constituting new, rational patterns of parishes, or territorial, administrative basic units but the enforcing of requirements inherent in the system of government in socialist societies, like the increasing of the influence and participation of the local population in the conduct of local public affairs — mainly through the effective materialization of the directing and controlling role of elected local representative bodies.

To determine an up-to-date socialist parish pattern requires therefore the simultaneous concerting of the prevailing conditions of various nature and the requirements. To evolve such a pattern is rendered more difficult because its criteria are moulded in compliance with the changes in economic conditions and the democratic evolution of the political system of society. It is obvious that to effect comparison with regard to parish reforms in socialist countries exclusively on the ground of structural aspects and legal institutions is susceptible of providing a ground for reaching certain incomplete, superficial con-

clusions in respect not only of local government reforms in Western countries but also in respect of such reforms in socialist states.

In order to be able to actually become familiar with the substance of parish reforms in socialist countries, the more important characteristics of the parish patterns already established or taking now shape, an oversimplified comparison between structural aspects and legal institutions would certainly be insufficient! It is only by effecting a comparison between socio-economic conditions manifest in structural solutions and legal institutions and their role in the political set-up of local bodies that a ground is provided for comparing the essential features of parish organizations and institutions.

This deduction applies particularly to the analysis of the structural and legal relationships of parishes and sub-divisions within these. When parish reforms are prepared and implemented — it is easy to understand — the administrative and legal institutions of the newly created basic units come into the forefront of public interest. The study of *relationships within parish communities* is relatively relegated into the background and the same applies to the examination of the evolving of the status of previously existing units which enjoyed autonomy from the aspect of organization and law, let alone sub-divisions of parishes which have specific powers, the problems of structural and legal relationships between basic administrative units, detached small settlements, villages, agglomerates of farmsteads, etc.

How does the administrative and legal status of formerly autonomous parishes develop within the frames of the newly constituted parishes or parish agglomerates? Whether the historically shaped sub-divisions of parishes which, as small villages, settlement agglomerates having specific powers were attached to the former parish organization, will continue to exist within the newly constituted parishes and if so, what pattern will be found for them?

These are problems the analysis of which is closely connected with the comparative study of parish reforms. The manner in which these are solved is coupled namely not only with the efficiency and economical conduct of local services and administration but exert a decisive effect upon the pattern and possibilities of the local materialization of democratic principles. When this problem is disregarded and is approached from a purely technocratic angle — as has been shown by experience — results usually in placing the authoritative, administrative character of the amalgamation of parishes into the foreground. This view, in turn, impedes parish amalgamations which have become ripe and necessary and the constitution of rational settlement agglomerates.

No doubt, when these problems are studied — particularly when the common and specific aspects of the structural — legal solutions which are very much different in various countries are examined — it is often difficult to make a distinction between parishes of general authority and within these their sub-divisions which have a certain measure of autonomy and specific powers.

Patterns of organization in administration and local institutions are so much diversified that when comparisons are made in Hungarian and foreign literature on comparative law in a mechanical way between organizational solutions which are similar as to their *form* mistakes which distort the substantive aspects of parish reforms are frequently encountered.

Owing to the complexity of these problems and in order to provide a ground to reveal their substance in a differentiating (distinctive) way the following topics will be examined separately:

a) the development of the structural and legal relationships in parishes and in their sub-divisions in Western countries;

b) the development of relationships of parishes, administrative and territorial basic units amalgamated from several settlements, districts and their sub-divisions in socialist countries.

This field excels in displaying a wide range of varied forms of organization and legal solutions. To attempt to make a system based on a comparative description of these is essential and necessary because it provides opportunities not only *to get an insight into the administrative and legal variants* of the reorganization but contributes toward ascertaining the *characteristics of the main trends evolved.*

The administrative and legal relationships of parishes and their sub-divisions in Western countries

The characteristic features of the parish reforms now being carried out in Western countries were extensively examined in another paper. Thus in this context only a reference is made to the feature that the trend of the evolution of relationships in new parishes and districts in the structural and legal sphere is governed foremost, of course by the *principal objectives* the parish reforms are directed at.

When certain simplifying of the matter is effected and by resorting to a generalization needed to make an analysis of administrative and legal solutions the variants of the relationships of parishes and their sub-divisions in Western countries may be classified in various *types.*

The principal characteristic features of the types and the differentiated solutions adopted therein vary over and above of those factors already mentioned as a matter of course according to

a) *the extent envisaged to be attained by the parish reform*, and whether the new parishes resulting from the amalgamation are constituted of *parish communities which had a relatively separate standing* or of *settlements built over adjacent land;*

b) it is a problem related in part to the former whether conforming to various geographical and natural conditions as well as the traditions evolved during the historical evolution of local government: should a certain structural and legal independence although in a changed pattern and with more restricted powers of some parishes and units of settlements be *retained,* or should such units of settlement be amalgamated within the entities of new parishes and their previous unrestricted autonomy from the structural and legal aspect be completely put an end to?

c) lastly, the trend of the evolution of the role of parishes is largely affected by the contingency where the traditional institutions of parish continue to remain unchanged but their scope of authority and powers are gradually concentrated within *territorial and administrative organs of a higher level,* or alternatively the problem of making local government activity more economical and efficient is solved by widening the organizational patterns of cooperation between parishes ranging from the simple, voluntary cooperation to compulsory association.

If the statements now outlined are transferred to the changes in the characteristics of the bourgeois parish pattern as moulded by historical development the administrative and legal forms of relationships between parishes – more precisely districts of parishes and their sub-divisions may be classified in *four types.*

ad 1. The *first type* comprises legal solutions adopted or now being carried out of reforms in France and the Scandinavian countries.

These solutions are characterized mainly

a) by the constitution essentially of *parish districts* by means of amalgamation out of previously separately existing settlements autonomous parishes;

b) by providing opportunities for *creating as required by necessity or preserving* local organs having certain autonomy, serving local interests and provide some primary services in parishes which were formerly independent or settlements with distinct powers side by side with district organs within the confines of territorial, administrative basic units constituted through amalgamation or division into districts;

c) by the formation of various *inter-parish associations* – which come into being either voluntarily or in certain instances in a compulsory manner – in order to make the amalgamation of districts easier and for the simultaneous discharging of one or more local functions.

ad 2. The *second type* includes structural and legal solutions appearing, mainly in Switzerland, Austria and Denmark in single parishes, or within the various patterns or relationships and those between several communities.

The principal characteristic features of the appearance of parish organization in these countries are:

a) due to geographical and other natural conditions and the historically moulded traditions of local government the *traditional structural patterns and institutions of parishes are upheld;* no major changes are wrought with respect to the legal status of sub-divisions in single parishes which have had distinct powers and an separate settlements;

b) changes introduced in these countries affecting parish structure with the objective of increasing the efficiency, economical operation as well as the expanding of services prevail not in creating parish districts and amalgamating parishes but mainly in the formation of *inter-parish associations* destined to discharge certain functions and *mixed (joint) companies* engaged in local economic activity extending to one or more parishes.

ad 3. The *third type* of parishes and the relationships between these comprise structural and legal solutions evolved in the execution of long-term objectives set for local government reforms in Belgium, The Netherlands, and in part in the German Federal Republic.

Unlike what has been described above the direction of the implemented reforms, laid down in statutes or in drafts prepared by government organs is characterized by the following aspects:

a) the re-drawing of parish boundaries in areas with densely populated settlements structure is materialized in the *amalgamation of parishes and settlements as well as in the mergers* of their public authorities and institutions;

b) when reforms are implemented this process usually involves the complete winding up of the independent administrative and legal status of settlements forming previously autonomous parts of parishes;

c) the status of former autonomous parishes and their sub-divisions is reduced in new basic territorial, administrative units emerging as a result of amalgamations to merely making these parishes (sub-divisions) territorially distinct constituencies or electoral wards within the entities newly created.

ad 4. The pattern of relationships prevailing in *territorial, administrative units in England is substantially different* from those described above and displays particular features.

The administrative and legal relationships which may be ranged within this type are determined by the general characteristics of English local government. Mainly the following should be singled out of these:

a) the structure of English local government differs from the system, adopted on the Continent, consisting of organs built upon each other in pyramid-shaped pattern, in other words: it does not constitute any hierarchy of territorial administrative units the base of which were the parish dominated in a pyramid-like shape by the district, county, or province respectively;

b) the system of local government is constituted, in the main, of local authorities formed in the course of historical evolution destined to discharge various functions and with varying scopes of authority — coming under dif-

ferent legal categories and placed *side by side*. This is to say that *within a single unit of settlement, simultaneously several autonomous local government authorities* may directly be authorized to discharge various duties;

c) in English urban and rural districts comparable to the parishes and parish circuits on the Continent the organs traditionally operating in parishes have survived to these days although their import and role have been gradually diminishing;

d) the requirements connected with making local government more adapted to modern conditions prevail principally in *concentrating the local authorities' powers within high-level local government organs or agencies of the central government;*

e) local associations are constituted or floated — in part within limits provided for in statutes or in less rigid form, applicable to private companies, for the purpose of providing certain local services in a more efficient and economical way which, however *do not form parts of the system of government organs* and their operation is governed *by the judicial practice and the related statutory regulation applicable to private associations.*

The structural and legal solutions adopted within basic English local government units are remarkable not only on account of their character which differs from any other ones but also as a result of the impact they have been exerting upon reforms on the continent, particularly the solutions adopted with respect to greater parishes and to relationships within parish districts.[3]

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The various patterns of the relationships of settlements belonging to parishes and parish districts in Western countries do not, of course, appear invariably and exclusively in the types outlined above. These forms frequently display differences in conformity with the particular characteristics of settlement structure in various regions within one and the same country. It happens in several instances that the centralized administrative trends of parish amalgamations produce unforeseen, strong social and political opposition which necessitates the resorting to the application of certain "transitional" structural and legal solutions.

Existing parishes and settlements having distinct public powers but doomed to terminate their existence as such might deem that the meeting of their specific needs would be jeopardized within the frames of the parishes to be formed and might spare no effort to retain or evolve the structural legal safeguards of their own.

[3] RIVERO, J.: *Droit administratif.* 3. edition. Paris, Dalloz, 1969. 347 p.

The evolution of the administrative and legal status of settlements within parish districts in France

As has been pointed out it is a *common* feature of local government reforms in the stage of being implemented in France and the Scandinavian countries that their materialization is aimed at shaping a *new model* of basic territorial units and that in consequence of the amalgamation essential changes are brought about with respect of the legal status of the overwhelming majority of parishes and settlements. As a result of the reorganization new districts are constituted. Under the relating statutes the new basic territorial and administrative units are termed in France "rural and urban districts" while in Sweden the denomination "*parish*" has been retained; the *scopes of authority* exercised within these confines are divided between the district organs — the importance of which has been increasing and those of the formerly autonomous entities. Simultaneous with this trend goes the expansion of the efficiency and influence of governmental guidance in administering local affairs.

In addition to these common features there are of course considerable divergencies to be found in respect of the evolution of relationships within districts and the parishes belonging to the former in France on the one hand, and those of parishes constituting parts of settlements in Scandinavian countries on the other. For this reason the major structural and legal characteristic traits of specific solutions will be analyzed one by one. In France the reform of parish administration which is now in the stage to be carried out soon is directed essentially at attaining a dual objective:

a) efforts are made by amalgamating in districts parishes spread now in large numbers over vast areas to shape such new structures in local government which will bring about *qualitative* changes in the traditional system of parishes;

b) simultaneous with re-arranging parishes in districts a deconcentration of administration is introduced to the effect that scopes of authority in territorial administration will be concentrated in the hands of the *préfets* — who are officials appointed by the central government administration on department and district level.

The need to bring about cooperation and to develop various patterns of relationships between the numerous and economically feeble parishes has appeared in France already at an earlier epoch. Immediately upon the adoption of the 1958 constitution essentially the reorganization of the *entire system of parishes* has become the order of the day. The evolving of new local government structures was made easier by constitutional provisions by virtue of which the previous constitutional restrictions on the regulation of the types of territorial administrative units were lifted whereby an opportunity was

afforded to lay down in statutes the new patterns of territorial administration. Already at the time when special powers had been conferred upon the government – on January 5, 1959 — a Government Decree was issued (No 59—30) in which the amalgamation of parishes in a settlement area in urban districts *(district urbain)* is laid down as the principal direction of the territorial reorganization of parishes. Although no specific, formal provisions on parish districts are found in that Government Decree the creation of the latter is prompted essentially by identical motives and objectives. The formation of parish circuits is, in the main, tantamount to create a transitional stage towards the merger of parishes.[4]

As a consequence of the above it has become a much debated question of the French parish reform *how will the character, structure, scope of authority of the districts be shaped and what relationships will appear between parishes constituting parts thereof?* The requirements of bringing up-to-date administration and the strong political and social traditions of parish autonomy come into conflict in the issue: is the creation of districts tantamount to a stage on the road leading towards *parish mergers* or a cooperation between parishes effected within the frames of a new public institution?

French parish districts display in a sense traits similar to those found in parish mergers commenced in Sweden in the fifties. It will reverted to subsequently in detail; it is however to be mentioned here that the confines of new parishes were redrawn in Sweden through the merger of several – formerly autonomous – parishes of a settlement area but within these — as required by necessity — the former parishes and settlements may be constituted as municipal sub-divisions. But while in Sweden the districts constituted through parish mergers are the equivalents of the new parishes, in France the term "*district urbain*" itself has been much debated. This dispute is of course not simply about the use of terms; it has arisen in consequence of the difficulty of defining the nature and, legal character of the districts as laid down in the 1959 Government Decree.

The well-known French scholar of administrative law J. Rivero[5] made the observation on this point that the amalgamation of parishes in districts had been inspired also by the law of England. No doubt English districts – rural and urban – and their French counterparts show several similitudes. But when they are compared in a realistic way it must be kept in mind that they constitute parts of two territorial administrative systems which are basically different. In England the creation of districts has not involved qualitative changes and comprehensive integration in the system of local authorities where the principle of specialization prevails. In France, contrary

[4] Bourjol, M.: *Le district urbain.* Paris, Berger-Levrault, 285 p.
[5] Rivero: *Droit administratif.* Paris, Dalloz, 1965. 347 p.

to the position in England, districts tend in the direction toward bringing about basic, qualitative transformation in the traditional system of parishes. This statement is supported also by the fact that in the territorial re-arrangement of parishes and in the formation of new district administration structures in France the *joint* effect of economic, political, technological, demographic factors is asserted and that the formation of districts constitutes an organic part of the re-shaping of the *entire* territorial administration embarked upon.[6]

The views on the character of parish districts differ both in official circles and in legal writings in France. It is held by some that districts are nothing but functional organizations set up for specific purposes and indicate the crisis of local public institutions; it is again the view of others that these are such basic territorial administrative units that will *replace* the traditional parishes.

It is a fact that it may be inferred from the 1959 French government decree referred to above that districts in France are but the specific categories of inter-parish associations and afford opportunities for parishes in a specified settlement area to discharge certain functions jointly. Under the terms of that Government Decree namely a *district may be formed* within the confines of a *department* — upon application submitted by two-third of the parish councils concerned provided these represent at least half of the population of the settlement area in question or upon application submitted by half of the population. In the contingency where the parishes situated in a settlement area come under the competence of different *départements* authorization by the Minister of the Interior is required to create the district. In addition to the above there is possibility to form districts upon decisions adopted by higher authorities. Districts can be formed *ex officio* in consultation with the *department* council or councils concerned upon orders issued by the Conseil d'Etat.

Considering what has been set forth above there are two courses open for creating districts:

a) a deconcentrated and, in part, decentralized process. In this case the initiative to create districts comes within the authority of the parishes concerned; decision in the matter rests with central government organs or agencies acting on the latters' behalf.

b) a centralized process. In the course of this process the *Conseil d'État* decides *ex officio* on creating districts after consultation with the department council or councils concerned.

[6] Bourjol: op. cit. p. 17.

The provisions of the above-mentioned Government Decree relating not only to the formation but the structure and operation of districts are relatively flexible and involve strongly empirical requirements. Parishes are namely accorded certain opportunities to have their particular conditions and circumstances met with in the confines of the districts structure to be formed. It is the intention of the government to avail itself of the experiences thus gained in gradually evolving the *various types of districts.*

Both the flexibility and empirical nature of the legal regulation and the possibility of taking into account to an extent local conditions and requirements afford a basis for asserting various views when the character and functions of districts are appraised.

A well-known expert of French local government and particularly the structural and legal problems relating to districts, M. Bourjol holds that districts — although having some features similar to those of inter-parish associations — reach beyond the latter both in respect of their creation and the trends of their evolution. These amount rather to the establishment of a *new local, territorial organization of public authorities* — he holds further — than a cooperation between parishes within the limits of traditional public institutions. However, he does not define the character of districts either: he holds that districts are hybrid formations which passed beyond inter-parish associations but which are not local public authorities taken in the traditional meaning of the term. In essence, districts are organizations *standing above parishes* which are aimed at evolving local bodies and administrative units wider than the existing ones; essentially the same conclusion is arrived at by J. Rivero.[7]

This view is supported by the trend of evolution of the powers and sources of revenue of district organs. While the organs of inter-parish associations exercise powers conferred upon them by the associated parishes, the creation of a district results in the district organs completely taking over the direction of administering local services, and the related powers of parishes are, in effect, *extinguished.* The financial resources of inter-parish associations are provided through *contributions* paid by the parishes concerned as laid down in the association's charter of constitution; districts, on the other hand, appropriate directly a part of the *local rates* levied on the parishes, etc.

The scope of authority of districts is restricted more in theory than in practice; the powers they have follow from their nature of public authorities and are of a comprehensive character and have precedence over the parishes. The directing committee of the inter-parish association is constituted on the ground of the principle of equal representation of the component parishes; the number of the members of the *district council* taking into account the

[7] RIVERO: op. cit. pp. 346—347.

significance of the parishes and the safeguarding of balance between them is fixed in the constituting resolution; the members of district councils are elected by parish councils. It is not obligatory for every parish to delegate one or more members into the district council: they may elect a *common* delegate by agreement, who may also represent specific local pressure groups (Groupe de pression). Although the fact that district council members are elected in an indirect way lends some association character similar to the district but under legal provisions the possibility is open for the *direct election of district* council members.

The structure of district organization is similar to that of the parishes. The council elects a *president and deputy president* who execute council resolutions and discharge their functions as unpaid voluntary workers and who constitute jointly the *district office*. The president's powers are similar to those of the parish *maires*. As required by necessity they may organize a specialized apparatus the status and duties of which are governed by the district's powers.

The fact that there are no provisions on the possibility of withdrawing of parishes of which the district has been constituted or the eventual dissolution of the district, also warrant the conclusion: the creation of districts is not connected with the idea of inter-patish association but rather with a structural pattern leading toward parish mergers.

Beside the regulation of the status of parishes *within the districts* in France the shaping of the position of the traditional parish sub-divisions, settlements, is of secondary importance. The problem is only of a relative significance also for the fact that owing to the characteristics of the French local government organization as evolved in the course of historical evolution frequently minor units of settlements were recognized to have the status of parishes; in 1959 e.g. the number of parishes of less than 100 inhabitants was more than 3500 and the number of parishes below 500 inhabitants was over 23,000![9]

In order to render the amalgamation of parishes easier and to concert various services, the government resorts in respect of parishes with less than 300 inhabitants – as a temporary measure – within a wide scope, to the organizational and legal possibilities afforded by *parish sections* (section de commune) and *parish sectors* (secteur de commune) which latter are considered as specific public institutions.

Parish sections were usually established, similarly to local communities in other European countries, when a part of the parish, forming a distinct settlement had property of its own. The section took charge of the management of its property as an organ of the parish council. In case a conflict arose between the interests of the parish and the parish section a special arbitration committee representing the respective interests was elected. In case communi-

[9] Op. cit. p. 324; BOURJOL: op. cit. p. 198.

cation between small settlements constituting a parish was rendered difficult only by geographical impediments, long distances, etc. – the parish council appointed a *deputy* (adjoint spécial) who was authorized to exercise certain powers of the parish *maire* in the outskirts.

In case new settlements were concerned the possibility is open under statutory provisions (Government Decree No 59 150, January 7, 1959) to vest – with a temporary character – a specific *parish sector* (secteur de commune) with discharging public functions which is directed by an *administrative committee.*

The position – although of secondary importance – of the traditional sub-divisions of parishes has been described because it is held by the critics of local government reforms that the constituting of districts in France will result in the structural and legal status of parishes being the components of a district gradually becoming similar to that of parish sections.

The new parish model and local municipalities in Sweden

Local government reforms in the Scandinavian countries which have a relatively thin settlement structure but comprise numerous parishes, particularly in Sweden, are aimed at evolving *extensive parish units.* In Sweden e.g. as a result of the territorial re-arrangement of parishes carried out in the 'sixties 2500 parishes were amalgamated into 800 new parish units; but it is intended that the number of parishes will be further reduced. It is envisaged to create approximately 500 parishes – essentially parish districts – step by step – each of which would have a population round the optimum, 10,000.[10]

As a consequence of the amalgamation of parishes the distances between the new seat of the parish and parish organs and the formerly autonomous parishes have become considerably longer. The latter are not always satisfied as to the prospects of their particular needs being observed and some direct services properly administered within the frames of the new parishes.

These factors in the first place – and in addition frequently the strong impact of the traditional parishes – warrant the formation of parish subdivisions with a *distinct legal status* in the area under the competence of the parish.

On the ground of the provisions of the Act on parishes adopted in Sweden on December 18, 1953 in rural settlements not having the status of autonomous parishes "*should particular reasons be extant*" – taking into account the specific problems of parish parts – so called *municipia* may be established.

[10] LANGENFELT, P.: *Principles for a new division of Sweden's municipalities.* Local government throughout the world. Oct. 1962. pp. 43., 46.; BRUMSTRÖM, K. J.: *Some aspects of communal amalgamation. Problems in Finnish local government.* Ekenäs, 1964. pp. 42–43.

These local communities are bound to apply the laws on urban development, building, fire-protection and public health and are of course also bound to undertake responsible charge of the matters which have served as a ground for their establishment. (Act quoted Section 79).

The same legal rules shall apply to parts of parishes which constitute distinct municipia when discharging functions of their own – as those applicable, in general, to parishes, from however does not follow that these could be considered autonomous parish units! For the management of their affairs they elect each a *municipium council and committee* without their area being divided into electoral wards; they are authorized to draw on loans to the amount of the government subsidy granted for them and a fixed percentage of their revenue, etc. Should special reasons warrant, the structural and legal status of the municipia may be laid down differently from the above. (Section 82).

In this structural set-up *formerly existing parishes wound up as such in consequence of the amalgamation are thus not transformed into mere geographical boroughs or electoral wards of the new parish but constitute within the confines of the latter local public authorites with distinct structure and scope of authority.* They discharge specified public functions and administer some primary services independently; they are authorized to engage employees for such purposes in given instances. Their scope of authority being more restricted compared to that of parishes their responsibility is correspondingly more limited and does not extend beyond executing duties connected with their establishment.

The legal status of parish sections in the structure of Swiss parishes

As has been indicated in the foregoing the *present evolution of parish organization* in Switzerland, Austria and Denmark is carried on, due in part to geographical conditions and the structure of settlements, in part to the social traditions of local government *essentially within the limits of the traditional parishes.*

The shaping of the territorial pattern reaching beyond parish boundaries is characterized in these countries not primarily by the amalgamation of parishes but by inter-parish associations, the floating of local mixed or joint companies, the managing of local sevices under licence by firms, etc.

As the various patterns now mentioned of the trend of cooperation between parishes and other settlements have been examined in detail by the present author in another paper the position of parish subdivisions within the Swiss parish organization will be described at this place mainly with a view to present the differentiated legal status of parish sub-divisions. It is laid down in legislation relating to parishes and in force in various cantons of

Switzerland that smaller settlement units situated within parish boundaries-villages, larger agglomerates of detached farms are authorized to constitute — "*in case of a recognized necessity*" — local communities with distinct legal status (sections de communes, fractions de communes) which discharge duties defined in legislation on parishes and their own statutes, have their own powers, carry out the management of their property on their own, may engage employees, etc.[11]

These local communities have been emerging in the course of historical development usually out of frequently not adjacent smaller rural settlements which had owned usually common property, and had had interests of their own. They have continued to exist within the unified bourgeois system of parishes and a distinct legal status has been conferred upon them. In some cantons the "citizens communities" which are property-owners, and religious, associations (confrérie) have likewise preserved their rights and formed particular communities within parish confines. The legal status of local communities parish sections was thus frequently rooted in the *traditions of customary law* and was considerably differing in certain communities. However, a growing number of the functions of parish sections were taken over by the parishes; a part of these particular structural patterns has been gradually absorbed and the legal status of parish sections has been made uniform in the cantons under the legislation relating to parishes.[12]

As has been pointed out under legal provisions in force authorization to create parish sections cannot be granted unless "*in case of recognized necessity*" and by an act of the cantonal representative body. The establishment of new parish sections is — as a rule — not considered desirable. Experience has namely shown that benefits deriving from having distinct legal status were in some instances overshadowed by the disadvantages involved by separate organization. Therefore a cantonal government may, after soliciting the views of the parishes and parish sections concerned propose that parish sections existing without proper reasons be disbanded. There are views according to which should some parishes have really such particular interests and needs that cannot be satisfied within the confines of a single parish it is more conducive to split up the parish than to create parish sections with distinct legal status.[13]

Should a new parish section come to be established, the cantonal representative body shall define in the instrument of constitution the boundaries, functions, assets of the parish section and what rates and duties it is authorized

[11] Loi sur les communes. Canton du Vaud. Chapter XII. Les fonctions des communes, Loi sur les communes. Canton de Bern. 19. IX. 1917. Chapter V. Sections 68—72.

[12] Exposé des motifs et projet de loi sur les communes. 1955. Canton de Vaud. pp. 44—49.

[13] Ibid. p. 46.

to collect, etc. In certain cantons (Berne) parish sections define their duties, structure and forms of operation in special regulations; these are, in turn, submitted for approval to the competent parish councils and cantonal organs.

As it may be clear from the above, parish sections are, in respect of the discharging of their duties, juristic persons vested with the powers of public authorities; from this aspect they essentially have a standing similar to that of parishes but in every other respect they constitute parts of the latter. Matters coming within their scope of authority are attended to, similarly to the parish organization, by the parish council and its executive committee.

The winding up of parish sections in the new Belgian parish organization

The characteristics of the solutions which may be included within the *third type* of the administrative and legal relationships of parishes and subdivisions within the latter are unlike the types described in the foregoing that the implementation of parish reforms *goes hand in hand with the complete amalgamation of the settlement units thus affected;* formerly autonomous parishes and villages with distinct legal status are considered in the new parishes to be mere geographically separate settlements and electoral wards. These are thus not by any means — or at most temporarily and in a very restricted measure subdivisions vested with particular powers in the new parish organization.

Parish reforms of this kind are introduced mainly in *countries* with a *dense network of settlements* Belgium, The Netherlands. Distances between settlement units to be amalgamated are relatively not large in some provinces in these countries usually these are situated in not too extensive areas; frequently parishes built close to each other or small settlements linked together by economic, production, trading, communication and transport relationships are thus affected.

To provide the characteristics of what has now been said it will suffice to outline the re-shaping of the legal status of the Belgian parish sections in the new parish organization established through amalgamation. In Belgium namely the 1961 Act on the implementation of parish reform provides also for the winding up of parishes and their sections having distinct legal status amalagamated in new territorial units.[14]

[14] Loi d'expension économique, de progres social et de redressement financier. «Les sections de communes sont supprimées.» Section 93. Moniteur Belge. 1961. II. 15. No. 39. Simultaneous with that para (3) Section 132 and Section 149 of the Act on parishes were repealed which regulated the relationships and legal disputes between parishes and parish sections.

The parish sections now mentioned — like their Swiss counterparts, constituting local communities within the Cantons, parishes — meant the population of smaller parishes and agglomerates of detached farms situated in the parish area which had historically vested privileges and property; that property was administered by the parish councils but the income thus accruing could be expended only in the interests of the sections' community (water supply, drainage, street-lighting, fire protection, road maintenance, etc).

Unlike the local communities of Swiss parishes, parish sections in Belgium had no representative bodies vested with distinct public authority; their particular legal status was manifest rather in that they delegated an equal number of representatives into parish councils, their budget was kept apart within the parish budget. In case they considered the distribution of parish taxation to be detrimental for them they could lodge objections with the Province Council.

The fact notwithstanding that under the terms of statutes only parishes and not parish sections were recognized juristic persons judicial decisions in relevant legal disputes upheld the ownership of parish sections over their property and the right to dispose of it even *against* parishes. There were instances when submissions by parish sections objecting to parish council decisions and province organs' resolutions reached as high as the *Conseil d'État*.

The particular powers of parish sections the privileges they were vested with and preserved also under the uniform Act on parishes frequently anachronistic had been criticized many times also in earlier periods. It happened namely not infrequently that some parish sections owned more property and received larger income than the entire parish of which they were parts.

Under the 1961 Act on the re-arrangement of parishes not only the specific status is wound up but also the particular corporate rights of villages coming under parish authority are extinguished. This makes the opposition of parish sections against present reforms of territorial administration easy to understand.

The specific features of the legal status of basic local government units in England

It has been mentioned earlier that the elementary unit of local government in English rural areas is the *parish* which in this context and in the administrative and legal sense — does not mean a continental parish but is used actually to denote small settlements, villages vested with particular authority as developed in the course of historical evolution. Its origins reach back to the ecclesiastical unit, called parish which had played important role in administering local affairs in earlier ages. The foundations of its legal status

were laid down essentially in the 1894 Local Government Act.[15] Under this Act certain local government functions were conferred upon parish bodies, parish meetings and parish councils.

While parishes on the Continent are, in their majority, the basic units of local government the English parish is, from the aspect of its functions and responsibilities — more similar to local communities, to parish sections vested with specific organizational and legal status. Its activity comprises the administering of the property owned jointly by small separate settlements and the management of the local supply of certain primary services. When the status of parish is examined and when similitudes with continental parish communities and — respectively — parish sections are ascertained, it should be kept in mind that beside the parish the organs of at least two major local government authorities — rural district — and county-councils — also discharge directly local governmental functions in parishes.

The *parish meeting* of enfranchised parishioners may be regarded as a specific organ of local government in settlements, with less than 300 inhabitants. Parish meetings are, therefore, not representative bodies but essentially the surviving patterns of direct democracy. In part they recall memories of the old Saxon "*foalkmoot*" and the Swiss parish assemblies (Assemblée de commune), but their powers are more limited than those of the latter. In case the population of a parish reaches or exceeds 300 inhabitants the county council is *bound* to take action for the formation of a *parish council*. In rural settlements with a population between 100 and 300 the parish meeting decides whether a parish council should be formed, while in respect of parishes with less than 100 inhabitants the county council acts within its discretion.

Members of the *parish council* are elected every three years by secret ballot. Its president is elected by the council from its own members or enfranchised local parishioners. The formation of a parish council does not result in the automatic winding up of the parish meeting;[16] frequently the council itself is elected at a parish meeting. Authorization by the parish meeting is required to effect certain local expenditure, it has a right of petition and it also serves as a forum to discuss complaints raised in respect of the activities of higher municipal authorities and district organs. It may discharge some administrative duties as well. It follows from all these that it is a "local public authority" of a particular nature. Parishioners may thus come simultaneously under the authority of several local bodies (parish meeting, parish council, district council, county council).

[15] WADE, E. G. PH.: *Constitutional Law.* VII[th] ed. London, Longmans, 1960. p. 337; JACKSON, W. E.: *The Structure of Local Government in England and Wales.* London, Longmans, 1954. op. cit. p. 27.

[16] It should be mentioned as a characteristic feature that in the 'sixties approximately 3000 parish meetings and 7500 parish councils were existing in English rural settlements.

Parish meeting may be held when required but it is to be convened at least once annually. In settlements where no parish council has been formed, parish meetings shall be convened at least twice annually. In case a parish council has been formed the meeting exercises certain control over resolutions adopted by the council. In some parishes namely joint property is administered by the council, it is engaged in matters connected with rural planning and development and discharges several duties of public health authorities. In addition, its scope of activity can be widened — within narrow limits — by duties defined in the adaptive Acts on the undertaking voluntarily of certain tasks, and in the 1957 Parish Council Act: it may buy, for public purposes, houses or building sites, may take measures in respect of street lighting, the construction of pathways, playgrounds, public baths and laundries, lay out parking areas, conduct extra public library service. It is however not authorized to levy rates and its right of disbursement is very limited.[17]

In parishes where no council has been formed a *committee of representatives* shall be formed of the president of the parish meeting and the members of the local council elected to the district council. In case the parish is represented by a single member in the district council additional candidates may be nominated to membership in the council. This committee is a corporate executive organ which conducts its operational activity in accordance with resolutions adopted by the parish meeting.[18]

It was conceived in 1894 that the structure of English rural administration now outlined — the system of parish meetings, parish councils — would be developing to be a significant organization of local government. The increasing migration of the population from rural areas the rapid process of urbanization however results in extending the boundaries of local units and involves an enhanced role of the district units. Accordingly parish organs lost a major part of their functions which have come to be taken over by other units of local government. The whithering away of parish meetings was concomitant with the increasing centralization in administrative activity and a discernible lack of interest in local affairs. To point out a few characteristics it may be mentioned that the number of parishes in rural areas having only parish meetings has diminished between 1957 and 1960 by about 1000 units.[19] It was particularly in the period after 1945 that the shifting of local scopes of authority to units of higher grade has been going on at a more rapid pace: tasks connected with public education, public health, town and country development were, in part, conferred as regards the direction of

[17] *Powers and duties of parish councils.* CROSS, A. C.: *Principles of Local Government Law.* London, Sweet-Maxwell, 1962. pp. 436–438; JACKSON: op. cit. pp. 26–27.

[18] JACKSON: op. cit. p. 28.

[19] JACKSON: op. cit. p. 27; BOURJOL, M.: *Les districts urbains.* Paris, Berger-Levrault, 1963. p. 80.

their administration — on county organs. It has been mentioned that county councils have already a considerable authority in respect of the election of parish councils; this authority extends to re-arrangement or division of parishes, to the transfer of various functions from an organ to another. The parish meeting can, e.g. upon a suggestion from the county council, delegate a part or the entirety of its powers to the parish council. Parishes, on the strength of resolutions adopted by parish meetings can unite under a *common parish council* without constituting any separate administrative district, etc.

In our days parish meetings as patterns of direct democracy have rather a theoretical than a practical significance. They are discharging functions diminishing in number and decreasing in significance; the import of parish councils has likewise been reduced although their usefulness in sounding local public opinion, assessing the needs of small settlements, coordinating services in parishes coming under the authority of a district is recognized.[20] In recent years there have been some efforts discernible at reviving the activity of parish councils: the *National Association of Parish Councils* has been formed which represents the particular interests of rural settlements in the course of the preparation of reform projects and draft legislation on local government undertaken by government and Parliament.

Observations in summing up

The structural patterns of and legal solutions relating to parishes and their sub-divisions vary in different countries in a relatively wide range-from local communities vested with a scope of authority and organized public authority of their own to settlements which are are mere geographical or electoral ward areas.

When describing the types of the solutions as outlined in the above it was my intention to characterize the adaptation of the traditional bourgeois parish models to modern requirements and the trend of the moulding of the parish public authority organization and its powers.

It has been shown by experiences gained from parish reforms and their implementation that the regulation of the status of small parishes and settlements within the structure of large parishes is far from the best in most countries in Western Europe. In keeping with the process of the winding up of former parish representative bodies in consequence of amalgamations or of the strong limitation of their scopes of authority and that in parishes consisting of several settlements, it is the preponderance of parish section with a larger population which prevails the influence of the administrative appa-

[20] Robson, W. A.: *Local Government in Crisis.* London, Allen-Unwin Ltd., 1966. pp. 93., 107.

ratus has been increasing over that of elected bodies in parishes, parish sections. As Rivero put it the distance between those who administer and who are administered and the traditional concept of decentralization has been growing.[21]

It is thus easy to understand that the shaping of the organization of public authorities in parishes constituted of several settlements and parish sections of the relating scope and pattern of activity is a particularly sensitive issue in the local government reforms of all Western countries.

Verwaltungsrechtliche Probleme der Umgestaltung der Gemeindeorganisation

von

J. Halász

Die Reform des Verwaltungssystems der Gemeinden und die Ausgestaltung von grösseren Gemeindeeinheiten stellen ein zentrales Problem in dem Verwaltungssystem *aller* europäischen Staaten dar.

Die Verwaltungsreformen der Gemeinden sind die Zeichen zweier eng zusammenhängenden Änderungen in meisten Staaten. Die sind: die Umwandlung der geschichtlich ausgestalteten Merkmale der Gemeindeorganisation sowie die stufenweise Anpassung der überlieferten Gebietseinteilung und Institutionen der Verwaltung an die neuen Bedingungen und Erfordernisse.

Die Ausgestaltung der neuen Gebietrahmen und verwaltungsrechtlichen Institutionen sind unzertrennlich mit den Erfordernissen einer rationellen und zeitgemässen Verwaltungsorganisation verknüpft. Zugleich sind alle bedeutenden Verwaltungsreformen — wie auch im Falle der Entwicklung der Gemeindeverwaltung — mit dem Gesellschaftssystem und den Bedürfnissen der Wirtschaftsentwicklung des konkreten Staates verbunden.

Die vergleichende Untersuchung der Merkmale der Gemeinde-Verwaltungsreformen ist nur unter Berücksichtigung der in den verwaltungsorganisatorischen Lösungen und Institutionen verkörperten gesellschaftlich-wirtschaftlichen Umstände und der Stellung der örtlichen Organe im politischen System möglich.

Im Zuge der Vorbereitung und Verwirklichung der Gemeindeverwaltungsreformen treten in erster Linie die Probleme der *neuen* Gebiets- und Verwaltungs-Grundeinheiten in den Vordergrund, während die Untersuchung der Verbindungen innerhalb der neuen Gemeinde oder des neuen Gemeindebezirkes in dem Hintergrund bleibt. Das gilt auch für die Änderung der Rechtslage der früher organisatorisch und rechtlich selbständigen Einheiten. Die Vernachlässigung dieses Problems oder dessen allein technokratische Beurteilung führen jedoch leicht zu einem behördlich-administrativen Charakter der Gemeinde-Umgruppierungen, wodurch die benötigten Gemeinde-Zusammenziehungen und die Ausgestaltung von rationellen Siedlungsgruppen gehindert werden.

Bei der vergleichenden Analyse obiger Probleme ist es oft zweifellos schwer zwischen den Gemeinden mit allgemeiner Kompetenz und den über gewisse organisatorische Selbständigkeit und Befugnisse verfügenden Untereinheiten innerhalb der Gemeinden zu unterscheiden. So kommen in der vergleichenden Fachliteratur infolge des mechanistischen Vergleichs formell nahestehender organisatorischer Lösungen Irrtümer vor, die die wesentlichen Merkmale der Gemeindereformen verzerren.

Die Formen der organisatorisch-rechtlichen Verbindungen innerhalb der Grossgemeinden und Gemeindebezirken in den westlichen Staaten sind verhältnismässig abwechslungsreich. Die Abhandlung versucht mittels Aufstellung von vier Typen eine Gruppierung der wichtigeren Merkmale der Gemeindereformen und eine differenzierte Einordnung der Verbindungen zwischen den Gemeinden und ihren Untereinheiten durchzuführen.

[21] Rivero: op. cit. p. 347.

Административно-правовые проблемы преобразования организации сел

Й. ХАЛАС

Реформа системы управления селами и создание более крупных сельских единиц является центральной проблемой управления *всех* европейских стран.

Реформы управления селами в большинстве стран свидетельствуют о двух, тесно взаимосвязанных друг с другом изменениях: о преобразовании исторически сложившихся характерных черт сельской организации, а также о постепенном приспособлении традициональных территориальных рамок и институтов общественного управления к новым условиям и требованиям.

Отражающиеся в административно-организационных разрешениях и институтах общественно-экономические обстоятельства и сопоставление роли местных органов в политической системе совместно дают лишь основу для сравнительного исследования характерных черт реформ управления селами. В этом отношении статья даёт многостороннее анализирование возникающих вопросов.

Recensiones

Шарлош: Возникновение правовой системы Венгерской Советской Республики*

О государстве и праве Венгерской Советской Республики, провозглашенной 50 лет тому назад, 21 марта 1919 года, вышло в свет уже много монографий и статей. Настоящая монография историка права Белы Шарлоша, известного автора многих, ранее опубликованных статей и книг о праве и правовой практике Венгерской Советской Республики, по нашему мнению, означает поворотный пункт в исследовании права Венгерской Советской Республики. Ибо, с одной стороны — и как это наглядно отмечает сам автор в предисловии — «естественно, иначе мы оцениваем здание, после того, как оно построено и смотрим его внешний вид, и совсем иначе, если знаем по каким проектам, статическим соображениям его строили, из чего состоят его составные элементы», с другой стороны, работа, которая в свете большого числа документов, показанных и использованных автором, по существу впервые показывает деятельность центральных органов Венгерской Советской Республики и в первую очередь деятельность Народного Комиссариата Юстиции по подготовке конкретных законодательных актов, дает картину о методах редакции законодательных актов, во многих отношениях творческого использования советского примера. Раскрывая неизвестные до сих пор планы в определенных областях, показывает планируемые в то время направления построения правовой системы. И не в последнюю очередь, способствует изменению многих таких, субъективного характера оценок, которые касались, в первую очередь, практической деятельности юристов, занимающих руководящие функции в Венгерской Советской Республике.

Первая глава работы занимается руководящими личностями юридической жизни Венгерской Советской Республики, анализом их практической деятельности. Самую интересную и подробную характеристику автор дает Золтану Ронаи, руководителю Народного Комиссариата Юстиции, который до революции был социал-демократом, входил в группу Эрвина Сабо, для его поведения во многих отношениях характерным был буржуазный радикализм, а позже самоотверженно служил делу Венгерской Советской Республики: был одним из самых активных членов Революционного Правительственного Совета, им был организован Народный Комиссариат Юстиции и отчасти революционные трибуналы, для Комиссариата Юстиции обеспечил такую широкую компетенцию, которой раньше и затем позднее подобное министерство не располагало, с кодификационной точки зрения он и Комиссариат Юстиции осуществлял работу по пересмотру и очень часто по полной формулировке всех, подлежащих опубликованию, законодательных актов — помимо прочих, временной и окончательной конституции. Подобно этому подробную характеристику, автор дает деятельности Фэрэнца Ракош, председателя будапештского революционного трибунала, позднее председателя госу-

* Sarlós, B.: *A Tanácsköztársaság jogrendszerének kialakulása* Budapest, Közgazdasági és Jogi Könyvkiadó, 1969. 448. p.

дарственного военного революционного главного трибунала, одновременно заведующего отделом Народного Комиссариата Юстиции, автора многих проектов кодексов об организации суда и процессуально-правового кодекса, учитывая и то, что Ракошу принадлежит в последствии немалая роль в том, что работу Ронаи и народного комиссариата история партии и юридическая литература на протяжении длительного времени оценивали скорее отрицательно. Наконец, Шарлош вспоминает о народном комиссаре внутренних дел Енё Ландлер и народном комиссаре внешних дел Бела Кун, деятельность которых, направленная на создание правовой системы Венгерской Советской Республики, в наши дни почти забыта. Как это показывает автор, Ландлер подготовил, между прочим, распоряжение о местных советах, а затем разработал вопрос о их конституционном урегулировании, и Бела Кун, кто был идейным руководителем Венгерской Советской Республики, выступал за подготовку конституции и руководил её разработкой, принимал решающее участие в вынесении многих, имеющих основополагающее значение правовых решений.

Вторая глава под заглавием «Кодификация» рассматривает отдельные стороны проводимой в Народном Комиссариате Юстиции работы по подготовке и редактированию законодательных актов. Изданные в первые дни Республики законодательные акты коллегиально были обсуждены Революционным Правительственным Советом, а работу по сформулировке их проводили на месте Ронаи или кто-нибудь другой. Но это разрешение — как показывает автор — позже уже слишком загружало работу Правительственного Совета, а это излишним, поскольку законодательные акты не были подготовлены надлежащим образом. В последствии из неорганизованности в подготовке законодательных актов вытекало и то, что после принятия законодательных актов различные народные комиссариаты сами передавали в официальное издание, газеты свои постановления за различной нумерацией, за различными подписями и без того, чтобы между отдельными постановлениями была обеспечена какая-нибудь гармония. Поэтому повторное предложение Ронаи, которое было направлено на то, чтобы впредь в официальном издании не опубликовывались никакие постановления без кодификационного пересмотра и одобрения Народного Комиссариата Юстиции, было принято в начале апреля без дискуссии по нем, и таким образом начиная с этого времени, по существу каждый издаваемый законодательный акт проходил кодификационную ревизию.

Народный Комиссариат Юстиции свои сложные и требующие юридической подготовки задачи осуществлял использованием значительной части прежнего аппарата, действующей под контролем. Как известно, сам Ленин указывал на то, что знания буржуазных специалистов может использовать и социализм, более того, осуществляя соответствующий контроль в своих интересах должен использовать, данная глава книги Шарлоша направлена на показание того, что руководимый коммунистами старый кодификационный аппарат свои задачи выполнял в основном добросовестно, служив интересам пролетарской диктатуры.

В третьей главе, анализирующей вопросы сложения новой правовой системы, автор в первую очередь исследуя право Венгерской Советской Республики вцелом констатирует, что в них применительно к особенностям внутриполитического и внешнеполитического положения нашли свое отражение основные принципы классиков марксизма, относящиеся к государству и праву. Так в особенности воззвание «Ко всем!» и программа партии, принятая на конгрессе объединенной партии, содействовали передаче для более подробного урегулирования основные принципы классиков. Вслед за этим подробно рассматривает обстоятельства возникновения конституции, полностью излагает до сих пор неизвестную речь Ронаи, служащую обоснованию конституции, и излагает материал дискуссии, одним из вопросов которой было то, каким образом и в какой форме

конституция должна определить основные черты нового государственного и общественного строя. По этому вопросу — как пишет автор — Ронаи придерживается той, принятой в последствии, точки зрения, согласно которой «Мы не делаем заявлений, а мы объясняем и хотим, чтобы конституция была и пропагандистским документом». Затем автор занимается разработкой регламента и положения об организации Союзного Центрального Исполнительного Комитета, затем сложением судопроизводства, и, наконец, анализирует чрезвычайно важные, и можно считать развитые, проекты кодексов о судейской власти, об организации судов и судебном процессе.

Последняя глава книги вцелом показывает историческое значение правовой системы Венгерской Советской Республики с точки зрения её социалистического содержания, формальной разработанности и с точки зрения принципа социалистической законности, сопоставив первое венгерское социалистическое право с правотворчеством и правовыми целями венгерской буржуазной революции и борьбы за свободу 1848-49 годов, осуществление которых стало невозможным из-за вскоре наступившего поражения революции.

Работа Белы Шарлоша носит исторический характер, при помощи исторических средств раскрывает, каким образом, в каких условиях сложилось, формировалось право, которое до сих пор по существу было нам известно лишь в свете готового текста изданных законодательных актов. В процессе разработки автор с богатого архивного материала ударение переносит на основные отрасли революционного права, но в то же время дает обзор всего нового права с самого его рождения. Таким образом, работа касается не только историков права, но и представителей всех отраслей права, кто желает получить сведения о социалистических революционных предпосылок нашего права и о попытке создания первой венгерской социалистической правовой системы. И именно потому, что предметом монографии является все правотворчество Венгерской Советской Республики, правотворческая практика революционного периода, работа заслуженно вызывает интерес не только у представителей исторических и отраслевых правовых наук, но и у представителей теории права, тем более, что сам автор выдвигает много проблем, носящих выраженно характер теории права и дает ответ на основе результатов исследований.

Ч. Варга

J. Bacsó: L'adoption[1]

L'adoption est une des institutions du droit de la famille qui éveille un très grand intérêt dans tous les pays du monde. A l'Est et à l'Ouest on cherche également à assurer au mineur adopté une ambiance de famille, à rendre plus avantageux son statut juridique et à donner des garanties aux adoptants qu'il pourront élever l'enfant adoptif comme s'il était leur propre enfant. La monographie de Jenő Bacsó sur l'adoption est également dominée par ces idées.

Le livre de l'éminent auteur est une étude monographique des questions ayant trait à l'adoption, élaborée à un niveau scientifique élevé. L'auteur n'analyse au fond que les aspects juridiques de l'adoption. Néanmoins il ne se borne pas à l'analyse des problèmes purement juridiques de cette dernière mais s'étend aussi sur le côté psychologique et pédagogique des questions qui se posent en connexion avec l'adoption. Il ne se limite pas à l'analyse et à la critique des règles en vigueur du droit de la famille et du droit civil hongrois, mais il porte attention aussi à la manière dont les règles de l'adoption se sont formées dans les sociétés de l'antiquité, à l'évolution historique et à la réglementation actuelle de cette institution juridique ainsi qu'aux tendances de sa réglementation dans les systèmes de droit capi-

[1] Bacsó J.: *Az örökbefogadás*. Budapest, Közgazdasági és Jogi Könyvkiadó, 1968. 983 p.

talistes. Ensemble avec la législation hongroise en vigueur, il examine également les règles de droit régissant l'adoption dans les autres pays socialistes. Il fait nombre de propositions très intéressantes en vue de la modification des règles du droit hongrois en vigueur; par ses propositions l'auteur désire de renforcer encore davantage le statut juridique et le statut familial de l'enfant adoptif vis-à-vis les adoptants et la famille de ces derniers.

L'ouvrage est divisé en six parties principales; un index analytique très détaillé et des tables de matière en allemand et en français le rendent plus maniable aux lecteurs hongrois et étrangers.

Dans la première partie, portant le titre: «La place et l'importance de l'adoption dans la société» l'auteur approche son sujet de deux différents côtés. C'est en partant d'une analyse des questions de l'éducation prises dans l'acception plus étendue du mot et, d'autre part, de celle du rôle et de l'importance de la famille, qu'il arrive à constater la valeur de l'éducation de l'enfant en cercle de famille et de l'ambiance familiale en général. En reconnaissant cette valeur, il est à la recherche des institutions sociales et juridiques capables de suppléer au foyer familial. Parmi les institutions il considère l'adoption comme la plus appropriée. En effet l'adoption, au moins dans le droit socialiste, assure à la fois l'éducation dans une famille et l'intégration en fait et en droit de l'enfant adoptif dans la famille des adoptants.

C'est la même partie qui traite les origines historiques et le développement de l'institution de l'adoption. Le développement historique est présenté au lecteur avec des renvois abondants à la littérature y afférente, s'étendant sur le terrain de l'histoire et de la philosophie aussi.

Dans la deuxième partie de l'ouvrage traitant les moyens juridiquse assurant la mise en oeuvre de l'adoption, l'auteur souligne la nécessité de ce que dans tous les systèmes de droit les règles relatives à l'adoption soient établies en tenant compte du but que l'adoption doit atteindre dans l'ordre social respectif. Dans la suite l'auteur s'occupe de quelques questions générales ayant trait à la naissance et à l'extinction de l'adoption ainsi qu'aux effets juridiques qu'elle provoque.

Dans les différents systèmes juridiques on connaît deux formes principales de l'adoption, à savoir le contrat et l'autorisation par l'autorité. Néanmoins, même dans les pays où la forme contractuelle est dominante, la validité du contrat est souvent soumise à l'approbation de l'autorité; par contre là où l'adoption prend naissance à la suite de l'autorisation par l'autorité, c'est la déclaration des parties qui est sanctionné par l'acte de l'autorité. La différence essentielle ne consiste donc pas dans cet aspect formel de l'adoption, mais plutôt dans la question de savoir si en accordant ou refusant l'approbation, l'autorité examine seulement la présence formelle des conditions légales de l'adoption où, en dehors de cela, également le fait si c'est réellement dans l'intérêt de l'enfant adoptif qu'il soit confié aux soins des adoptants. Le droit hongrois, comme du reste les droits socialistes en général, accepte cette dernière thèse, ce qui cependant ne dispense pas le juriste, et l'auteur non plus, du devoir d'examiner les questions ayant trait aux déclarations relatives à l'adoption, notamment les déclarations de l'adoptant et de l'adopté (c'est-à-dire de son réprésentant légal) visant la création d'un lien d'adoption, comme aussi aux déclarations des parents par le sang de l'enfant adoptif contenant leur consentement à l'adoption. L'auteur traite également le problème des vices éventuels des déclarations dont il s'agit.

La loi hongroise sur le droit de la famille et la jurisprudence formée sur la base de cette loi distingue les cas où l'adoption cesse d'être valable et où elle s'éteint (est résiliée). *De lege ferenda* l'auteur fait la proposition que sauf le cas où l'adoption cesse d'être valable en conséquence de la naissance d'un lien de famille qui fait perdre tout son intérêt, il ne soient admis ni la cessation de la validité, ni la déclaration de cette cessation, ni celle de la nullité de

l'adoption, mais que seule sa résiliation puisse avoir lieu. Nous sommes entièrement d'accord avec cette proposition, et ceci d'autant plus, parce que les différences qui existent dans le droit civil entre les conséquences juridiques de la cessation de la validité, de la déclaration de cette cessation ou la déclaration de la nullité et la résiliation, ne sauraient entrer en ligne de compte que concernant les effets produits par l'adoption dans le domaine du droit des successions. Les effets fondamentaux produits par l'adoption sur le terrain du droit de la famille ainsi que ses effets accessoires (port de nom, création de la qualité de proches) ne sont pas de nature de permettre l'application des règles du droit civil relatives à la nullité, puisque la déclaration de la nullité avec effet *ex tunc*, c'est-à-dire le renversement des rapports de droit avec effet rétroactif est une conséquence juridique qui n'est applicable qu'aux relations marchandes et non pas aux relations de famille.

Quant à la réglementation de la naissance et de l'extinction de l'adoption l'ouvrage révèle une manière de voir qui est peut-être plus favorable à l'adoption qu'elle ne devrait l'être. Ainsi par exemple, il passe quelquefois outre — sans pondération et justification suffisantes — au consentement des parents requis par la loi et il consentirait à l'annulation de l'adoption — sauf le cas ou l'adopté a atteint l'âge majeur — seulement lorsque l'intérêt de l'adopté la commande, en négligeant complètement les intérêts légitimes des adoptants et éventuellement ceux des parents par le sang de l'adopté.

En ce qui concerne les problèmes généraux des effects juridiques de l'adoption, il convient de mentionner les explications de l'auteur cherchant une réponse à la question, si dans les conditions du socialisme, il est compatible aux objectifs de l'adoption que concernant les conséquences juridiques de cette dernière, ou au moins concernant certaines de ces conséquences, la loi accorde aux parties la faculté de choisir. Le premier et le plus important de ces problèmes est celui du choix entre l'adoption complète et incomplète. Ces deux formes de l'adoption ne correspondent cependant plus à «*l'adoptio plena*» et à «*l'adoptio minus plena*» traditionnelles. En effet, par le fait que tous les systèmes de droit socialistes admettent l'adoption de mineurs seulement, le transfert des droits de surveillance des parents est devenu un élément constitutif nécessaire de l'adoption. Par l'adoption complète l'auteur entend le cas, où l'adopté entre en des liens familiaux non seulement avec les adoptants mais aussi avec la famille et la parenté de ces derniers et où cessent quasi toutes ses relations avec sa famille par le sang. (Des exceptions sont constituées seulement par les empêchements de mariage résultant d'une parenté par le sang et la poursuite pénale de l'inceste.) Par contre il entend par l'adoption incomplète le cas où des liens de parenté naissent seulement entre l'adopté et les adoptants et non pas avec la famille de ces derniers aussi; dans ce cas les liens de parenté entre l'adopté et sa famille par le sang ne subissent pas d'interruption.[2] L'adoption parfaite ne doit pas être forcément tenu en secret, même si l'auteur préférerait qu'elle le soit, pourvu que l'adoption soit basée sur le consentement volontaire des parents par le sang.

Quant à l'adoption complète et incomplète, prises au sens de la terminologie de l'auteur, la loi hongroise sur la famille prend une position intermédiaire, en tant qu'aux termes de la loi l'adopté entre en relation de parenté aussi avec la famille de l'adoptant — dont la loi sur la famille et le code civil tirent les conséquences à la fois sur le terrain du droit de la famille et sur celle du droit des successions — sans qu'il soit entièrement détaché, par effet d'aucune de ces lois, de sa propre famille par le sang.

[2] La distinction entre l'adoption complète et adoption incomplète — même si concernant certains détails pas entièrement dans la forme proposée par l'auteur, est déja réalisée par quelques-uns des systèmes de droit socialistes. La légitimation adoptive du droit français diffère sensiblement, même si non concernant ses effets juridiques, mais en tout cas concernant les conditions de sa naissance, de l'adoption complète, telle qu'elle est connue par la législation des pays socialistes respectifs.

De lege ferenda l'auteur propose qu'une distinction soit faite entre l'adoption complète et adoption incomplète et admettrait même que l'adoptant et l'adopté puissent décider de commun accord sur la forme de l'adoption à appliquer.

Les deux parties suivantes de l'ouvrage analysent séparément les effets qui résultent ou qui peuvent résulter, sur le terrain du droit de la famille ou du droit des successions, des liens entre parents et enfants ainsi que des liens de parenté plus étendus que les premiers. Dans son analyse l'auteur tient compte du fait que dans notre droit positif les questions dont il s'agit peuvent se présenter de deux façons différentes, notamment concernant les relations qui existent d'une part entre l'adopté et ses père et mère adoptifs et la famille de ces derniers et, d'autre part, entre l'enfant adopté et ses père et mère par le sang et la parenté de ceux-ci.

Dans les relations entre adopté et adoptants les droits et obligations respectifs des parents et de l'enfant posent beaucoup moins de problèmes que ce n'est le cas concernant la situation des père et mère par le sang, consécutive à l'adoption.

En tenant compte des intérêts de l'enfant adoptif, l'auteur soutient qu'en ce qui concerne les questions relatives à la surveillance des père et mère, ainsi que les effets juridiques des liens de parenté, notamment en particulier les obligations et les droits de la parenté en matière d'aliments, les liens avec la parenté par le sang soient rendus plus souples, voire ignorés lorsqu'il s'agit d'une adoption complète. Quant aux rapports successoraux entre l'adopté et ses père et mère par le sang ainsi que la famille de ces derniers l'auteur est du même avis. Il rappelle que la recherche des liens par le sang, dans l'intérêt d'une succession dans un héritage qui en règle est peu important, comporte pour l'adopté des inconvénients sensibles et que, d'autre part, il apparaît peu équitable que préjudice soit porté aux droits du père ou de la mère survivants où aux droits d'un époux en secondes noces du défunt par des droits de succession d'un enfant adopté qui a été élevé dans la famille des adoptants desquels il a reçu tout, sans avoir reçu quoi que se soit de ses parents par le sang, auxquels il n'a rien donné non plus.

En droit hongrois l'adoption prend naissance par effet du passage en force de chose jugée de la décision de l'autorité de tutelle autorisant l'adoption et elle s'éteint également en vertu d'une décision de cette autorité ou d'un jugement du tribunal ayant l'autorité de la chose jugée. Or, ce fait soulève le problème assez important, même si pratiquement pas trop fréquent, de savoir si l'adopté peut ou non avoir un droit de succession lorsque l'adoptant meurt après que les déclarations concernant l'adoption ont été faites, mais avant que l'adoption ait été autorisée par l'autorité, ou bien, inversement, lorsque l'adoptant meurt pendant que la procédure engagé en vue de la résiliation de l'adoption est en cours. Selon l'avis de l'auteur la solution équitable — même s'il était difficile de la déduire de nos règles de droit en vigueur — serait, que le droit de succession soit admis dans la première hypothèse et refusé dans la seconde.

Il convient de mentionner encore les explications de l'auteur, dans la partie consécutive de l'ouvrage, relatives à l'inscription de l'adoption aux registres de l'état civil ainsi qu'aux connexités qui existent entre l'adoption d'une part et la nationalité, la qualité de proches, la relation de travail et certaines règles du droit pénal d'autre part.

La dernière partie de l'ouvrage donne un résumé des idées, à l'aide desquelles l'auteur voudrait donner un développement ultérieur à la réglementation juridique de l'adoption. Parmi celles-ci la première place revient à la distinction, déjà mentionnée, qu'il faudrait faire entre adoption complète et incomplète. A part de cela, l'auteur fait aussi concernant nombre de questions moins importantes des suggestions qui méritent d'être retenues, dont l'explication détaillée dans ce court compte rendu ne seraient pas à la place comme ne le serait non plus une polémique avec quelques-unes des nouvelles idées avancées de l'auteur.

E. WEISS

Varia

Consultation hungaro-soviétique sur des problèmes du développement des soviets et des conseils locaux

Du point de vue de la réalisation des exigences visant le développement progressif de l'organisme d'Etat – exigences qui dans la période actuelle de l'évolution avancent toujours plus au premier plan des intérêts – une importance éminente revient à la solution des questions de principe, théoriques et pratiques, ayant trait à l'organisation et au fonctionnement des conseils locaux, notamment au renforcement de leur caractère d'organes représentatifs du pouvoir d'Etat et à l'éclosion de leurs marques démocratiques. Bien entendu, les problèmes du développement des organes représentatifs du pouvoir d'Etat ainsi que des organes administratifs ne sauraient être imaginés sans tenir compte du développement de l'organisme d'Etat socialiste, considéré dans son ensemble. Le motif en est que les organes locaux du pouvoir et de l'administration d'Etat sont des organes locaux socialistes unifiés du pouvoir et de l'administration d'Etat. Sur le territoire où ils exercent leurs attributions, ces organes sont en même temps l'incarnation du pouvoir d'Etat; ils sont le chaînon de l'organisme d'Etat socialiste, dont le fonctionnement s'attache le plus directement à la satisfaction des besoins de la population et des citoyens. Il résulte de ce fait que dans la sphère de l'organisation et du fonctionnement des conseils locaux des problèmes spécifiques se présentent, qui dans une certaine mesure ont des répercussions sur le développement et la formation de l'ensemble de l'organisme d'Etat aussi.

L'actualité d'une analyse des questions étant en connexion avec le développement des conseils locaux est soulignée également par nombre d'exigences nouvelles formées par l'évolution de l'Etat et de la société. Dans cet ordre d'idées il convient de mettre en relief les deux circonstances suivantes.

Au cours des dernières années dans les pays socialistes européens les questions de l'édification économique sont portées au premier plan; c'est surtout le système de la direction de l'économie qui exige une application étendue de solutions spécifiques résultant de la situation particulière des différents pays socialistes, de leurs traditions nationales, du différent niveau de leur évolution sociale et économique qui se manifestent en premier lieu dans la réglementation concrète.

C'est dans cet esprit qu'a eu lieu au mois de novembre 1968 la deuxième des consultations hungaro-soviétiques des juristes; consultations qui commencent à avoir un caractère traditionnel. Le thème de cette consultation avait trait aux questions actuelles, aux questions de principe et théoriques, aux questions du développement des organes locaux du pouvoir et de l'administration d'Etat. La rencontre organisée par l'Institut des Sciences juridiques et politiques de l'Académie des Sciences de Hongrie s'est révélée très fructueuse et très utile:

a) la consultation a offert une possibilité très ample de renseignements et d'échanges d'informations réciproques concernant la réglementation juridique de l'administration locale et la possibilité d'une meil-

leure connaissance des nouveaux éléments et tendances se manifestant dans cette réglementation ainsi que de la connaissance des tâches d'actualité;

b) la consulation a rendu possible en outre d'avoir des reformations plus précises sur les tendances principales et des résultats des recherches poursuivies par les sciences soviétique et hongroise du droit dans le domaine en question et de coordonner avec plus d'exactitude les thèmes des recherches;

c) concernant beaucoup de questions les discussions de la rencontre ont contribué à l'élucidation des problèmes théoriques et à une meilleure connaissance des manières de voir et des opinions respectives.

A la rencontre ont pris part des délégations nombreuses soviétiques et hongroises.[1] La consultation — ayant eu lieu dans les locaux de l'Institut des Sciences juridiques et politiques de l'Académie des Sciences de Hongrie — a été ouverte par un discours de l'académicien Imre Szabó, directeur de l'Institut, puis István Kovács, membre correspondant de l'Académie, directeur adjoint de l'Institut a indiqué les principaux problèmes relatifs au développement des conseils locaux, figurant à l'ordre du jour. La variété des sujets discutés ou faisant l'objet d'un échange de vues est démontrée par le fait qu'à la consultation 13 rapports (dont 7 soviétiques et 6 hongrois) ont été présentés; tous ces rapports contenaient une analyse approfondie des différents aspects de l'organisation et du fonctionnement des conseils locaux. L'espace nous manque pour faire ici un compte-rendu détaillé de toutes les questions discutées à la rencontre. Nous sommes néanmoins persuadés que même un bref aperçu des thèmes à l'ordre du jour de la réunion suffira de mettre en relief l'utilité et l'importance des consultations de cette nature entre pays socialistes.

[1] La délégation soviétique était présidée par *A. E. Lounier*, directeur adjoint de l'Institut des Sciences juridiques et politiques de l'Académie des Sciences de l'Union Soviétique; ses membres étaient *J. A. Tychomirov* et *M. J. Piskotin*, chefs de section, ainsi que *I. A. Asorkine*, *D. A. Gaidoukov*, *G. N. Gabritsidzé* et *B. A. Strasoune*, collaborateurs scientifiques de même Institut. Du côté hongrois ont pris part à la réunion les collaborateurs de la section de droit public et droit administratif de l'Institut des Sciences juridiques et politiques de l'Académie des Sciences de Hongrie, les fonctionnaire dirigeants de la Section des conseils locaux du Secrétariat du Conseil des ministres, un représentant de l'Institut de science sociale de la Commission centrale du Parti Socialiste des ouvriers Hongrois, ainsi que les professeurs et les chargés de cours des chaires de droit administratif des facultés de droit des Universités de Budapest, de Szeged et de Pécs.

I.

Un des problèmes centraux des délibérations était l'ensemble des problèmes ayant trait à la *réglementation constitutionnelle* des conseils locaux ainsi qu'au *développement de la législation* sur ces conseils en général.

B. A. Strasoune a traité dans son rapport les tendances du développement de la réglementation des conseils locaux par les constitutions, eu égard aux dispositions et aux solutions des constitutions socialistes plus récentes. En analysant les questions de la situation en droit constitutionnel des *commissions* des organes représentatifs locaux du pouvoir d'Etat, il a rappelé, entre autres, qu'en ce qui concerne la composition de ces commissions, deux tendances principales peuvent être observées dans les constitutions socialistes. Selon quelques-unes des constitutions socialistes seulement des membres du conseil peuvent être membres des commissions permanentes des organes du pouvoir d'Etat; selon d'autres (République Socialiste Tchécoslovaque, République Démocratique Allemande), à côté des membres de conseil, d'autres citoyens en peuvent être également des membres. Cette dernière tendance de la législation constitutionnelle socialiste a été apprécié par le rapporteur comme un phénomène qui est conforme aux exigences de l'élargissement de la démocratie socialiste.

Les tendances du développement de la législation relative aux conseils locaux et fondées sur des dispositions constitutionnelles ont été traitées par deux rapports. *B. M. Gabritchidzé* a analysé le développement de la législation sur les soviets et

Tibor Kovács (chef adjoint de la section des organes locaux du Secrétariat du Conseil des ministres) a examiné la formation de la législation ayant trait aux conseils hongrois.

Le rapport soviétique, après avoir exposé les différentes étapes du développement de la législation sur les soviets locaux, s'est occupé, avec maints détails, des problèmes actuels du développement des soviets locaux. L'on sait qu'en Union Soviétique les travaux préparatoires des règles juridiques relatives aux soviets locaux sont actuellement en cours. A ce propos — en conséquence de la forme fédérative de l'Etat soviétique aussi — une vive discussion s'est engagée dans la doctrine soviétique concernant les relations réciproques entre législation fédérale et législation républicaine qui devraient exister dans ce domaine. Concernant cette question, qui a sans doute une importance de principe, deux thèses se sont formées: selon l'opinion de certains auteurs la législation sur les soviets locaux relève de la compétence des républiques; ces auteurs contestent donc le bien fondé de ce qu'en la matière des règles de droit soient émises sur le plan fédéral. Selon d'autres c'est précisément sur le plan fédéral qu'on devrait procéder à la réglementation du statut juridique des soviets locaux. Le rapporteur était d'avis que chacune des deux tendances en question approche la question d'une façon unilatérale. Selon lui on a besoin d'une réglementation à la fois fédérale et républicaine. Ce qui est essentiel, c'est la création d'une harmonie, sur la base de critères objectifs, entre ces deux législations et ceci notamment dans le sens que la législation fédérale serve de garantie concernant la réalisation de l'unité des principes fondamentaux et que, en même temps, elle offre d'amples possibilités à la législation des républiques de faire valoir leurs spécificités nationales, les conditions et les divergences locales.

Tibor Kovács, après un exposé des étapes de la législation sur les conseils locaux, a rappelé les considérations principales dont il faut tenir compte lors de l'élaboration de la loi nouvelle sur les conseils. A son avis il est nécessaire que dans la nouvelle loi 1° les compétences soient établies selon des échelons adéquats; 2° les éléments autonomes de l'activité des conseils soient élargis; dans ce domaine le rapporteur a attribué une importance particulière à la réglementation horizontale des compétences, l'élargissement des pouvoirs de coordination des conseils locaux, etc.; 3° sur le terrain du développement des liens des conseils avec les masses, des mesures adéquates d'organisation soient prises et des instances appropriées soient créées; 4° soient réduits les éléments formels dans l'organisation et le fonctionnement des conseils; 5° il faut procéder à la révision des différents échelons des conseils, où il faudra probablement entreprendre des différenciations ultérieures.

II.

Quant au développement ultérieur des conseils locaux, les questions importantes sont celles de *la place revenant aux conseils locaux dans l'organisme d'Etat socialiste et le caractère de ces conseils; puis les questions du système et de la direction des organes administratifs locaux; enfin les questions de l'augmentation de l'efficacité du travail de l'appareil des conseils*. Plusieurs rapports se sont occupés des problèmes y relatifs.

Le caractère particulier des conseils locaux et l'évolution des conceptions relatives à *l'autonomie* locale ont été examinés par le rapport de *József Halász* (chef de groupe à l'Institut des Sciences juridiques et politiques). Le développement qu'on veut donner aux conseils ne saurait être limité aux seuls problèmes de l'administration locale; la question a une importance d'ordre général déterminant plus amplement l'activité de l'organisme d'Etat. Le rapport a souligné que la notion de l'autonomie locale ne possède pas un contenu qui est formé une fois pour toutes. En analysant la substance socio-politique de la notion de l'autonomie locale, le rapporteur est arrivé à la conclusion que dans un sens

politique l'autonomie locale exprime au fond l'exigence complexe et générale de l'indépendance des organes représentatifs locaux, l'exigence du rôle qu'ils remplissent dans la gestion des affaires publiques et du règlement de leurs relations avec les organes centraux du gouvernement. Au sens juridique la notion dont il s'agit signifie un trait caractéristique de l'ordre intérieur de l'Etat socialiste, à savoir que les conseils, organes représentatifs locaux élus par la population, sont en même temps aussi des organes territoriaux du pouvoir socialiste d'Etat, revêtus par la loi d'une indépendance et d'une faculté de prendre des décisions.

I. A. Azovkine d'abord a mis en relief l'importante question de la distinction à faire entre les organes locaux et centraux de l'administration d'Etat. Quant au *cercle* des organes locaux de cette administration il est arrivé à la conclusion que dans l'Union Soviétique appartiennent au système de l'administration locale: *a)* l'appareil exécutif des conseils locaux; *b)* les organes locaux dits «du centre»; *c)* l'administration de certaines entreprises et de certaines institutions sociales et culturelles. Le rapporteur a pris position en faveur de l'élargissement du rôle et des droits de coordination des conseils et ceci surtout au point de vue des organes administratifs locaux qui ne sont pas subordonnés aux conseils.

Ferenc Toldi (chef de groupe à l'Institut des Sciences juridiques et politiques) a analysé le développement de la *double subordination*. En partant de la mise en oeuvre du centralisme démocratique dans l'organisme des conseils, il a souligné que la double subordination se présente dans son essence comme une manière primordiale de la concrétisation du principe du centralisme démocratique, même si dans les différentes étapes de l'évolution de l'Etat socialiste le contenu et la réglementation peuvent manifester — et manifestent effectivement — des divergences. En prenant pour base le développement du système hongrois des conseils il a donné un aperçu de la réglementation du principe de la double subordination par le droit positif, puis, eu égard aux exigences de l'évolution actuelle, il a examiné les questions d'une développement ultérieure à donner à la réglementation en question.

Du point de vue de l'augmentation de l'efficacité de l'organisme des conseils locaux, une exigence de plus en plus marquée se manifeste concernant la *réalisation conséquente des principes scientifiques de l'organisation du travail de l'appareil administratif des conseils*. A ce sujet le rapport de *J. A. Tychomirov* était particulièrement instructif et utile. Du reste, dans l'Union Soviétique la question fait l'objet de recherches scientifiques et pratiques très étendues, dont le rapport a donné des informations très intéressantes. En effet, les comités exécutifs de nombreux soviets territoriaux et urbains ont érigé des laboratoires, des bureaux etc. s'occupant de l'organisation scientifique du travail, lesquels, en appliquant différentes méthodes de l'examen des faits, procèdent à des mesurages dignes d'attention et qui s'efforcent d'appliquer les résultats obtenus dans la pratique, pour rendre le travail des conseils plus simple et plus efficace. En analysant les questions de principe de l'organisation du travail accompli dans l'appareil des conseils, le rapporteur est arrivé à la conclusion, que les conditions d'une réglementation juridique de l'entier processus de l'organisation du travail — au moins dans ses grandes lignes — commencent à arriver à la maturité.

L'on sait que l'importance et le rôle des *recherches sociologiques* concrètes, des examens de faits, de mesurages etc. se présentent avec toujours plus de vigueur dans le domaine des sciences de l'Etat et du droit aussi. Il est donc facile à comprendre l'intérêt qu'on a porté au rapport de *Kálmán Kulcsár* (collaborateur scientifique en chef de l'Institut des Sciences sociologiques de l'Académie des Sciences de Hongrie) sur «l'examen sociologique des décisions des conseils des communes». Après avoir analysé les possibilités et les limites de l'application en la matière des méthodes de la sociologie, le rapport a fait connaître le

résultat d'une enquête entreprise chez les conseils de quelques communes du comitat de Baranya. Même si l'enquête, à cause du petit nombre des unités examinées, n'a pas permis d'en tirer des conséquences d'une validité générale, elle a néanmoins attiré l'attention à plusieurs questions dont la solution serait apte à assurer dans une unité de base de l'organisme des conseils — c'est-à-dire dans la commune — l'augmentation du rôle et du poids des citoyens, des membres du conseil et du conseil même.

III.

L'élargissement des compétences des conseils locaux et le raffermissement de leur qualité d'organes représentatifs du pouvoir d'Etat, fait porter de plus en plus sensiblement au premier plan le développement à donner à la *fonction de contrôle* des conseils et l'intensification du rôle joué dans ce domaine par les commissions, notamment des commissions permanentes de ces derniers.

A. E. Lounier a analysé d'abord, de plusieurs côtés, les tendances qui se manifestent dans l'Union Soviétique en vue d'assurer un développement ultérieur à l'activité de contrôle des conseils locaux; dans la suite il a examiné les principales formes de l'organisation de cette activité. En la matière il a attribué une très grande importance 1° à la discussion en séance de conseil des résultats des inspections de contrôle; 2° aux interpellations des membres des conseils; 3° aux inspections de contrôle entreprises par les commissions permanentes et enfin 4° le contrôle effectué par des groupes de délégués.

Le rapport présenté par *Lajos Török* (collaborateur scientifique de l'Institut des Sciences juridiques et politiques de l'Académie des Sciences de Hongrie) a soumis le contrôle exercé par les organes représentatifs locaux du pouvoir d'Etat à un examen basé sur un matériel comparatif très abondant. Le contrôle exercé par ces organes est au fond de double nature. Les organes en question contrôlent d'une part l'activité des organes du pouvoir d'Etat, des organes administratifs, économiques, culturels etc. qui leur sont subordonnés et d'autre part ils disposent des droits très étendus de contrôle sur tous les organes se trouvant sur le territoire de leur compétence qui ne se trouvent pas dans un rapport de subordination avec le conseil. Ces dernières attributions ne sont pas illimitées; elles sont exercées dans des formes et dans des cadres exactement définies par la loi.

Le rapport de *D. A. Gaidourov* a traité le statut juridique, les compétences, la nature des droits et les questions d'organisation des *commissions permanentes* des soviets locaux. Après avoir exposé le développement de la législation relative à ces commissions il a examiné avec une attention particulière *a)* la mission des commissions permanentes; *b)* le développement de leur composition; *c)* le contenu des pouvoirs et la nature des droits des commissions permanentes.

IV.

A la réunion ont été discutés comme un thème spécial les problèmes de la réglementation juridique des fonds matériels et pécuniaires des conseils locaux, en rapport avec le développement de ces fonds. *M. J. Piskotjine* en s'appuyant sur les enseignements de l'évolution historique et en tenant compte des exigences actuelles formées par l'évolution socio-économique aussi, a analysé dans son rapport d'une façon synthétique le développement des bases matérielles et pécuniaires des soviets locaux de l'Union Soviétique. En examinant les principales régularités qui se font valoir et qui agissent dans le développement socialiste, il a mis en relief l'importance de l'élargissement des pouvoirs que possèdent les soviets locaux en matière économique et budgetaire et ceci également dans les relations des soviets et les organismes économiques fonctionnant sur leur territoire sans qu'il leur soient subordonnés.

Lajos Ficzere (collaborateur scientifique de l'Institut des Sciences juridiques et politiques de l'Académie des Sciences de Hongrie) s'est occupé dans son rapport du développement des bases matérielles et pécuniaires de nos conseils locaux. Après un bref aperçu historique le rapporteur a analysé en détail les changements intervenus dans la planification de la gestion financière des conseils en conséquence de la réforme du système de la direction de l'économie. Dans la suite il s'est occupé des règles régissant l'établissement et l'affectation du fonds de développement des conseils ainsi que des questions posées par la nouvelle réglementation de la gestion budgétaire de ces derniers.

Pendant son séjour en Hongrie la délégation soviétique s'est rendu au comitat Bács-Kiskun, où elle a été reçue par les dirigeants du comité exécutif du conseil du comitat.

Comme nous l'avons dit dans l'introduction de ce compte rendu, il nous a été impossible de donner une image complète ni des rapports discutés à la réunion, qui ont entrepris une analyse très variée du fonctionnement des conseils locaux, ni des discussions très instructives y déroulées. On peut néanmoins constater sans doute que les rapports et les débats ont démontré avec certitude que l'étape actuelle du développement des organes représentatifs locaux du pouvoir et de l'administration d'Etat de type socialiste soulève nombre de problèmes communs. La discussion collective de ces problèmes, l'échange d'idées et d'informations y relatives justifient non seulement l'utilité des consultations de cette nature mais demandent à la fois l'élargissement et le développement des formes ultérieurs de la coopération.

L. FICZERE

Bibliographia

HUNGARIAN LEGAL BIBLIOGRAPHY 1969 Ist PART

This bibliography is the continuation of the former one published in our issue No 1–2 of 1969 (Tomus 11. pp. 247–263.). It contains legal works issued as monographs in Hungary between the 1st of January and the 30th of June 1969, material of periodicals (articles and book reviews) and studies published in collective works.[1]

The bibliography gives the English and Russian translations of the original titles, too. If the work listed has a summary in foreign languages, it is also indicated.

The bibliography is edited by Lajos *Nagy* and Katalin *B. Veredy*.

The periodicals and their abbreviations:

ÁI. = Állam és Igazgatás [State and Administration] 18. year. 1969. No. 1–6.

ÁJ. = Állam- és Jogtudomány [Legal and Administrative Science] Vol. 11. 1968. [1969.] No. 4. Vol. 12. 1969. No. 1.

AJurid. = Acta Juridica Academiae Scientiarum Hungaricae. Tomus 11. 1969. No. 1–2.

AkadKözl. = A Magyar Tudományos Akadémia gazdaság- és jogtudományok osztályának közleményei.

[1] The material for the period of 1945–1965 is resumed in the following publication: *Bibliography of the Hungarian legal literature.* 1945–1965. Budapest, Akadémiai Kiadó, 1966. 315 p.

ВЕНГЕРСКАЯ ЮРИДИЧЕСКАЯ БИБЛИОГРАФИЯ 1969, I-ая ЧАСТЬ

Настоящая библиография присоединяется к библиографии, опубликованной в нашем журнале в 1–2 номерах 1969 г. (Том 11. стр. 247–263.) и содержит в себе самостоятельные юридические издания, материалы, опубликованные в сборниках за время с 1 января до 30 июня 1969 г.[1]

В библиографии наряду с заглавием мы даем английский и русский перевод заглавий. Если имеется резюме на иностранном языке, это отмечается особо.

Библиографию составили Лайош *Надь*–Катал[illegible] *Веред*и.

Разработанные журналы и их сокращения

ÁI. = Állam és Igazgatás [Государство и управление] 18. Том. №№ 1–6. 1969 г.

ÁJ. = Állam- és Jogtudomány [Наука государства и права] 11. Tom. No. 4. 1968. [1969.] 12. Том. № 1. 1969 г.

AJurid. = Acta Juridica Academiae Scientiarum Hungaricae. Tomus 11. 1969. No. 1–2.

AkadKözl. = A Magyar Tudományos Akadémia gazdaság- és jogtudományok osztályának közleményei.

[1] Материал от 1945 до 1965 гг. содержит: Bibliography of the Hungarian legal literature. 1945–1965. [Библиография венгерской юридической литературы 1945–1965.] Budapest, Akadémiai Kiadó, 1966. 315 p.

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HLR.	= Hungarian Law Review 1968. [1969.] No. 1—2.	HLR.	= Hungarian Law Review [Обзор венгерского права] № 1—2. 1968 [1969] г.
JK.	= Jogtudományi Közlöny [Law Journal] 24. year. 1969. No. 1—5.	JK.	= Jogtudományi Közlöny [Вестник юридических наук] 24-ый год изд. №№ 1—5. 1969 г.
MTud.	= Magyar Tudomány [Hungarian Science] 1969. No. 1—6.	MTud.	= Magyar Tudomány [Венгерская наука] №№ 1—6. 1969 г.
OVPr.	= Обзор венгерского права [Hungarian Law Review] 1968. [1969.] No. 1—2.	OVPr.	= Обзор венгерского права № 1—2. 1968 [1969] г.
RDH.	= Revue de Droit Hongrois [Hungarian Law Review 1968. [1969.] No. 1—2.	RDH.	= Revue de Droit Hongrois [Обзор венгерского права] №№ 1—2. 1968 [1969] г.
TSz.	= Társadalmi Szemle [Social Review] 24. year. 1969. No. 1—6.	TSz.	= Társadalmi Szemle [Общественный обзор] 24-ый год изд. №№1—6. 1969 г.

The collective works and their abbreviations:[2] *Разработанные сборники и их сокращения*[2]*:*

Aktuelle Probleme	= Aktuelle Probleme der marxistisch-leninistischen Staats- und Rechtstheorie. [Current problems of the Marxist—Leninist theory of state and law. Актуальные проблемы марксистской-ленинской теории государства и права.] [Közzéteszi a] Magyar Tudományos Akadémia Állam- és Jogtudományi Intézete. Bp. MTA KESZ soksz. 1968. [1969.] 327 p.
Annales Bp. Tomus 9.	= Annales Universitatis Scientiarum Budapestiensis de Rolando Eötvös nominatae. Sectio iuridica. Tomus 9. 1968. Red. Commissio scientiae. Bp. Állami ny. 1968. [1969.] 272 p.
A 600 éves jogi felsőoktatás	= A 600 éves jogi felsőoktatás történetéből. Szerk. *Csizmadia* Andor. [From the 600 years history of higher education for legal profession. Ed. *Csizmadia* Andor. Из истории шестисотлетнего юридического высшего образования. Ред. *Чизмадия* Андор.] Pécs, Pécsi Szikra ny. 1968. [1969.] 164 p. /Studia iuridica auctoritate Universitatis Pécs publicata 60./
Krim. tanulm. 7	= Kriminalisztikai tanulmányok 7. [köt.] [Studies on criminalistics. 7th vol. Очерки по криминалистике. 7. том.] Bp. Közgazdasági és Jogi Kiadó, 1969. 333 p.

[2] Here we deal with only those collective works, which belong to several legal branches. The works pertaining to one single legal branch only are included in their proper branches. The collective works have been analyzed, too, and have been placed in the proper legal branch.

[2] Туда зачисляются только сборники конспектного характера, относящиеся к различным отраслям права. Материалы одной отрасли права находятся там. Сборники мы разработаем тоже аналитически и статьи находятся в соответствующей отрасли права.

Other abbreviations — Другие сокращения

Bp.	= Budapest [Будапешт]
compil.	= compiled by [составил]
Dt. Zusammenfassung	= Deutsche Zusammenfassung [German summary] [Немецкое содержание]
ed.	= edition, edited by [издание, под редакцией]
Eng. summary	= English summary [английское содержание]
изд.	= издание, издательство [edition]
köt.	= kötet [volume] [том]
ktár	= könyvtár [library] [библиотека]
ny.	= nyomda [printing house] [типография]
összeáll.	= összeállította [compiled by] [составил]
перераб.	= переработанный [revised]
publ.	= publication, publicated by [публикует]
публ.	= публикует [publication, publicated by]
Rés. franç.	= Résumé français [French summary] [Французское содержание]
rev.	= revised [переработанный]
Русск. содерж.	= Русское содержание [Russian summary]
szerk.	= szerkesztette [edited by] [издание, под редакцией]
сост.	= составил [compiled by]

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