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CONTENTS

About the Decision of the Constitutional Court on the Criminal Use of Totalitarian Symbols

AMBERG, ERZSÉBET

ABSTRACT *As the pre-requisite for being taken under legal authority, the various phenomena require assessment. Human conducts regarded as harmful for the society appear in various life situations and produce a very colourful image. It is a crucial question, however, how the legislature in a given area evaluates and legally manages the effects of harmful conducts on an imaginary harm scale.*

In our legal system conducts deemed as culpable are managed by the tools of Criminal Law. The scope of punishable behaviour types may be modified in compliance with the continuously changing environment. Accordingly, it is a permanent duty to be aware of the fact that Criminal Law has to function as a sanctioning cornerstone in the legal system.

The study examines the requirement of ultima ratio (last resort) as a criteria derived from constitutional Criminal Law. It focuses on the recent decision of the Constitutional Court in the field of Criminal Law that interprets the last resort role of Criminal Law in connection with the use of totalitarian symbols like the five-pointed red star.

1. Introduction

This study focuses on a rather neglected aspect of Criminal Law: its *ultima ratio* (last resort) nature. The everyday meaning of the Latin term "*ultima ratio*" is "last try" or "last argument". This paper will outline how this principle manifests itself in the legal dogmatic of substantive Criminal Law and what significance it has in the Hungarian legal system, in which Criminal Law is taken into consideration only as a last resort among all legal tools.

The punitive power of the state can be disclosed on the basis of the rigour of sanctions of the Criminal Code. The rules of this branch of law are able to legally constrain one of the most precious values of humankind, i.e. freedom, thus it is highly recommended to give it profound considerations while determining its limits and the extent to which the state may interfere in this value. The issue of "*ultima ratio*" can arise quite frequently, whether it applies to the qualification of a behaviour type as culpable (punishable), or to the scale of penalty for a particular crime becoming more austere, or to the drafting of amendments to statues affecting the scope of punitive actions. An

example for the latter is the Constitutional Court annulling the provision of the Criminal Code prohibiting the use of totalitarian symbols and declaring it as unconstitutional. This decision refers to the fact that Criminal Law can be regarded as a last resort of protection and in connection with this specific crime, as a restructuring and orientating guideline. This paper will attempt to provide an overview of the factors that influenced the decision of the amendment of the Criminal Code on banning totalitarian symbols. These aspects cannot give a general directive regarding all issues and degrees listed in the Criminal Code of Hungary, they can, however, contribute to filling the niche of the abstract content of *ultima ratio*.

2. A brief summary of the last resort nature of Criminal Law

The everyday meaning of the Latin term *ultima ratio* means last try, ultimate decisive argument. Decision no. 30/1992 issued by the Constitutional Court bestowed the *ultima ratio* principle on Criminal Law, and the reasoning for the decision initiated the usage of this term in the legal jargon, *"Criminal law is the ultima ratio in the system of legal responsibility. Its social function is to serve as the sanctioning cornerstone of the overall legal system. The role and function of criminal sanctions, i.e. punishment, is the preservation of legal and moral norms when no other legal sanction can be of assistance…. It is a requirement of content following from constitutional criminal law that the legislature may not act arbitrarily when defining the scope of conducts to be punished. A strict standard is to be applied in assessing the necessity of ordering the punishment of a specific conduct: with the purpose of protecting various life situations as well as moral and legal norms, the tools of criminal law necessarily restricting human rights and liberties may only be used if such use is unavoidable, proportionate and there is no other way to protect the objectives and values of the State, society and the economy that can be traced back to the Constitution."*[1] Based on the cited lines, *ultima ratio* is to be understood from an aspect beyond Criminal Law.[2] It sets the requirement that in the legal treatment of specific behaviour types, criminal sanctioning

[1] Decision no. 30 of 1992 (26.V.), Reasoning Part IV. point 4. http://hunmedialaw.org/dokumentum/154/01_301992_Abh_final.pdf, [06.06.2013.]

[2] According to Ferenc Nagy and Géza Tokaji, from an aspect beyond Criminal Law, *ultima ratio* refers to the comparison of Criminal Law and tools beyond it, whereas from an aspect within Criminal Law, it refers to the comparison of the measures of the Criminal Code and the preference for a more lenient measure. See: Nagy, Ferenc – Tokaji, Géza: A magyar büntetőjog általános része (The General Part of Hungarian Criminal Law). Korona, Budapest, 1998 pp. 59- 60.

should be selected as the appropriate measure, if no other judicial branch is able to provide assistance in reserving law and order. When the Decision was issued (1991), in the years following the change of regime of 1989 in Hungary, there was a great deal of uncertainty regarding the role of criminal justice.

The role of Criminal Law as a sanctioning cornerstone in the overall legal system projects a role well beyond Criminal Law itself. Emphasizing this role of the given branch of law, as pointed out by the Criminal Code, is still necessary in order to raise awareness about the authority of criminal justice. The general Ministerial Reasoning of the new Criminal Code[3] does not explicitly mention the term *ultima ratio*, but it does emphasize its significance, when proposing that the role of Criminal Law as a cornerstone should be restored, as a requirement with regard to the new Code. The European Union also urges the application and more precise development of criminal justice in the sense of *ultima ratio*, as it was pointed out in one of the press releases on criminal justice issued by the European Commission.[4] In the above-mentioned document, the organisation defines the requirements of coherent and consistent criminal policy. The first most crucial guideline to be mentioned was that criminal measures should only be applied as a last resort. The guideline decrees that criminal sanctions are to be preserved for specially severe crimes. It points out that the strict respect of fundamental rights guaranteed by the EU Charter of Fundamental Rights and the European Convention on the Protection of Human Rights are adhered to. Finally, it states that, *"every decision on what type of criminal law measure or sanction to adopt must be accompanied by clear factual evidence and respect the principles of subsidiarity and proportionality."* It is apparent that the application of Criminal Law as a last resort, and its subsidiarity and proportionality play a crucial role in the international and EU context of criminal justice. Above this, the question arising is, what is the clear and factual evidence of the last resort nature of the intervention of Criminal Law in the case of the use of totalitarian symbols.

The actual and precise meaning and content of *ultima ratio* is least developed in Hungarian legal literature. The statements and comments of the textbooks on Criminal Law are contradictory and are not clear on whether *ultima ratio* ought to be treated as a characteristic within the dogmatic system of Criminal Law defining its role or as a basic principle. Several questions arise, a few of wich are: Is it the synonym and/or the explanation

[3] Namely Act C of 2012 on the Criminal Code, came into force on 1th July 2013.

[4] European Commission – Press Release Towards a reasonable use of criminal law to better enforce EU rules and help protect taxpayers' money, Brussels, 20th September, 2011 http://europa.eu/rapid/press-release_IP-11-1049_en.htm, [06.05.2013.], p. 1.

of subsidiarity?[5] Is it a completely independent principle,[6] or does it appear as an umbrella term for necessity and proportionality? Or in a triad with the aforementioned two terms, can it be regarded as a criminal judicial cornerstone and does it play a role in the legitimation of Criminal Law?[7]

In my opinion – considering the above mentioned Decisions of the Constitutional Court and the remarks of the relevant legal literature – *ultima ratio* of Criminal Law is an institution ensuring the constitutional constraints of criminal justice, which carries independent meaning and content. The application of Criminal Law as a last resort, the necessity of punishment and the proportionality of the restriction of fundamental rights are three separate categories which have the significance of basic principality in criminal justice. I regard it as necessary to list *ultima ratio* as an independent basic principle, as within the context of our legal system, it explicitly expresses criminal judicial responsibility. The application of the sanction system of criminal justice may arise only after various, primary and secondary attempts and considered principles.

The significance of *ultima ratio* is that it serves as the theoretical foundation for the management of antisocial and offensive behaviour by the tools of Criminal Law. It is a self-limiting institution of Criminal Law that protects fundamental rights by establishing boundaries of intervention for all branches of the judiciary. It plays a major role in the decision-making process whether to apply criminal judicial tools in handling undesired conducts violating or endangering social order. As far as the application of Criminal Law as a last resort can be justified in the criminalisation process,

[5] This view is represented by the following authors: 1. Balogh, Ágnes – Hornyák, Szabolcs: A büntetőjog alapjai (The Basics of Criminal Law, Educational material). Kódex, Pécs, 2008 pp. 19-20.; 2. Balogh, Ágnes – Tóth, Mihály (eds.): Magyar büntetőjog. Általános rész (Hungarian Criminal Law, Gerenal Part). Osiris, Budapest, 2010 p. 35; 3. Földvári, József: Magyar büntetőjog. Általános rész (Hungarian Criminal Law, General Part). Osiris, Budapest, 1997 pp. 36-37; 4. Görgényi, Ilona – Gula, József – Horváth, Tibor – Jacsó, Judit – Lévay, Miklós – Sántha, Ferenc – Váradi, Erika: Magyar büntetőjog. Általános rész (Hungarian Criminal Law, General Part). Complex, Budapest, 2007 pp. 69- 70; 5. Nagy, Ferenc: A magyar büntetőjog általános része (The General Part of Hungarian Criminal Law). HVG-ORAC, Budapest, 2010 pp. 43-44. and pp. 59-60.

[6] So: 1. Bárd, Károly – Gellér, Balázs – Ligeti Katalin – Margitán, Éva – Wiener A., Imre: Büntetőjog. Általános rész (Criminal Law, General Part). KJK-Kerszöv, Budapest, 2002 p. 9; 2. Sántha, Ferenc: Büntető anyagi jogi ismeretek (Általános rész) (Substantive Criminal Law Skills). Bíbor, Miskolc, 2004 p. 12.

[7] Dr. Belovics, Ervin – Dr. Békés, Imre – Dr. Busch, Béla, – Dr. Domokos, Andrea – Dr. Gellér, Balázs – Dr. Margitán, Éva – Dr. Molnár, Gábor – Dr. Sinku, Pál: Büntetőjog. Általános rész (Criminal Law, Gerenal Part). HVG-ORAC, Budapest, 2009 p. 55.

it intensifies the legitimacy of the fact, and through that, the legitimacy of criminal justice itself.

From a criminal political point-of-view, *ultima ratio* may seem to be a counter-criminalization argument prior to the decision on penalisation as well as a decriminalisation argument with regard to the current law. The latter impact can be observed in the Decision of the Constitution Court on the use of totalitarian symbols.

3. The blameworthiness of using totalitarian symbols

The various phenomena and conducts require continual assessment as the pre-requisite of being taken under legal authority. Human conducts appearing in various life situations produce a very colourful image. In a given social context, specific behaviour types can be deemed as useful or as harmful. It is a crucial question, however, how the legislation in a given era judges and legally manages the effects of harmful conduct on an imaginary harm scale.

Conducts deemed as culpable are managed by the tools of Criminal Law in our legal system, with due consideration of the point, though, that it is no duty of this judicial branch to persecute and criminalize all conducts of negative impact. Criminal justice cannot establish a presence in life's all harmful behaviours in a democratic state; it may only respond with the punitive power of the state at the most severe manifestations of ill-conduct that threaten life and its most essential, particularly precious assets.

The scope of punishable behaviour types may be modified corresponding to the continuously changing environment. Accordingly, it is a permanent duty to be aware that Criminal Law is there to function as a sanctioning cornerstone in the legal system.

The law on the use of totalitarian symbols was not listed in the Criminal Code when taking effect in 1978, even though totalitarian regimes did appear Europe-wide in the first half of the 20th century. The delictum was entered into force in 1993.[8] Among crimes of Incitement against a community, Article 269/B declared the use of the symbols of exhaustively listed totalitarian regimes as a criminal act, formulating it as immaterial- or in certain criminal judicial systems, as so-called abstract danger – and as subsidiary law.

According to the preamble and reasoning of the law criminalising the above-mentioned type of behaviour, the background of the new law is the following, *"Political extremism in the 20th century in Europe as well as in*

[8] The fact was enrolled by the Act XLV. of 1993 on the modification of the Criminal Code, Article 1. It came into force on 21th May 1993, under Article 269/B. in the Criminal Code.

Hungary by means of violent acquisition and exclusive possession of power has produced dictatorial regimes that ignored Human Rights and led to the mass massacre of Hungarian citizens…The use of symbols of states, organisations and movements subscribing to the afore-mentioned extremist views rips up sore wounds and cannot be reconciled to our constitutional values."

Some events shaking the sense of security of the current political power has led to Criminal Law being applied as Prima Ratio by the Legislation to find protection against this type of behaviour. The state did not attempt to find a solution using for e.g. the tools of the Petty Offence Law - even though it also does contain punitive sanctions - but it instantly criminalized the behaviour. During the last 20 years, the law has established itself to such an extent that its culpability and its *ultima ratio* nature did not get to be questioned when the new code was created.[9] It was therefore drafted identically in the new Criminal Code in Article 335 among crimes of Incitement against a community.

4. The use of totalitarian symbols in a normative approach

According to the original Article of 269/B. Section (1) of the Hungarian Criminal Code, *"The person who a) distributes; b) uses before great publicity; c) exhibits in public; a swastika, the SS sign, an arrow-cross, sickle and hammer, a five-pointed red star or a symbol depicting the above, - unless a graver crime is realized - commits a misdemeanour, and shall be punishable with fine."*

The protected legal interest against the crime is the social interest related to the preservation and sacredness of public tranquillity, an undisturbed public atmosphere that can manifest itself in an unthreatened democratic political public life.[10] *Public tranquillity is "the peaceful social atmosphere,*

[9] Decision no. 14 of 2000 (12.V.) of the Constitutional Court dealt with the fact of using totalitarian symbols. The Court ruled that the fact was constitutional. About the contention of freedom of expression and prohibition of using totalitarian symbols see more in the lecture of Tóth J., Zoltán: Az önkényuralmi jelképek használata, mint a véleménynyilvánítási szabadság korlátja? (A 4/2013. AB határozat előzményei, indokai és következményei, valamint az új Btk.-szabályozás pozitívumai és fogyatékosságai) (The use of totalitarian symbols as the limit of freedom of deliverance?) http://jesz.ajk.elte.hu/tothj54.pdf [14.11.2013.]

[10] Blaskó, Béla – Miklós, Irén – Schubauer, László: Büntetőtjog. Különös Rész II. (Criminal Law, Specific Part II.). Rejtjel, Budapest, 2010 p. 80.

in which the observation of legal order, mutual respect and the rightful acknowledgment of the personalities and interest of one another prevail."[11]

The symbols of totalitarian regimes are exhaustively listed as a swastika, the SS sign, an arrow-cross, sickle and hammer, a five-pointed red star or a symbol depicting the above are the objects of crime on whatever medium. The ban applies to the listed symbols exclusively as political symbols, thus the law is not applicable to their appearance and use without political content. Commentaries, also taking into account the statements in the Decision 14/2000. (12.V.) of the Constitutional Court regarding the case in confirmation of its constitutionality, interpret this decree in the following manner: It claims that the purpose of a symbol is that it can be related to the person, event or idea signified by it, thus its appearance is always related to emotions or attitudes. The listed events when the above-mentioned symbols were used also indicate a peculiar relationship with the ideas, which in fact means identification with certain denoted ideologies and the intention to promote them. The personal and subjective relationship with the object of crime is also reflected in the following statement of the Legislation: No criminal offence can be reported, if a symbol merely resembles a totalitarian symbol, but the perpetrator clearly and categorically did not mean to use it as such.

Regarding objects of crime, the law specifies the following acts and considers them unlawful:

a) distribution, in the process of which individuals, not identifiable in advance, on possibly different occasions, and with or without remuneration, come into possession of an object of crime; the criteria of conduct is satisfied, and consequently the case established, if the perpetrators, besides establishing objective conditions for ongoing distribution, transfer one of the objects into the possession of at least one person.

b) use before great publicity, in the event of which the perpetrator uses any one of the objects of crime on vintage clothing or other vintage objects or media with the intention of imitating the original purpose or in an absolutely clear and in a recognizable manner to all, in a stylized way.

In order to meet the criteria of the criminal offence, a restricted location must be used, which is specified by the Legislation, namely large public gatherings. The location of the offence can be defined as public, if there is a large group of people present, whose exact number cannot be determined by sight, or if there is a realistic chance of a larger group of identities not disclosed in advance is aware of the behaviour is question.[12] Pursuant to the relevant passage of the Hungarian Criminal Code[13]: "broad publicity shall mean, among others, when a crime is committed through publication in the

[11] Blaskó, Béla – Miklós, Irén – Schubauer, László op. cit. p. 14.
[12] Blaskó, Béla – Miklós, Irén – Schubauer, László op. cit. p. 76.
[13] Act IV. of 1978 on the Criminal Code, Article 137, point 12.

press, another mass media or by reproduction, or by the publication of electronic information in a telecommunications network."

c) the criterion of public exhibition is satisfied, if any of the objects of crime are enabled by the perpetrator to be seen by or presented to others in a perceptible, recognizable and intentional manner, whether with or without remuneration. It is no pre-requisite of the criminal offence that the totalitarian symbol is perceived by several people simultaneously. According to BÉLA BLASKÓ and his co-authors, based on the above-mentioned restriction, the ban does not apply when only a small number of people in a non-public area can sight the symbol. As a consequence, no criminal offence is committed when our relatives come to our home and on this occasion take a look at a souvenir in a showcase depicting a totalitarian symbol.

The perpetrator of the offence is the individual who satisfies the criteria of becoming a subject of crime. The offence can be committed intentionally, either with a direct or with a conditional intent. The perpetrator must be aware that his act can disturb public tranquillity.[14]

The commentary suggests that the perpetrator's purpose must cover identification of the ideology behind the symbol and there must be a political motive behind the behaviour. Without the drive to distribute the ideology, no criminal offence can be said to be committed. Regarding the perpetrators, Paragraph (2) of this part contains reasons for the exclusion of certain threats against society and conditions applied for punishments imposed. "The acts set out in Paragraph (1) are not punishable if performed for the purpose of disseminating knowledge, education, science, art or information on historical or contemporary events". Restricting the scope of symbols, Paragraph (3) states that "the provisions of Paragraphs 1 and 2 do not apply to current official State symbols."

In the new Criminal Code the only change , concerns the definition of the type of penalty. Whereas originally, the offence, representing the majority solution even in an international context, was punishable by a fine, the new Criminal Code of 2012 deems the offence to be punishable with a custodial arrest.

Ultima ratio of Criminal Law can be interpreted within and beyond the context of criminal justice.[15] Accordingly, a rule can have an effect of *ultima ratio,* if it departs from the gravest penalty within the responsibility system of Criminal Law. As a result, this last resort can be applied and extended to the possibility to give various weights to various offences within a sanctioning system and to the use of alternative solutions. From this

[14] According to the majority position in specialized literature, an action can be committed either with a direct or with a conditional intent. See for example: Belovics, Ervin – Molnár, Gábor – Sinku, Pál: Büntetőjog. Különös rész (Criminal Law, Specific Part). HVG-ORAC, 2007 pp. 378-379.

[15] See: Nagy, Ferenc op. cit. p. 46.

perspective, the new code treats the behaviour of using banned symbols more strictly, as the deemed penalty is now a graver sentence: custodial arrest, which deprives personal freedom, compared to the former form of penalty of paying a fine, which caused merely financial loss as opposed to the loss of liberty. Up to the present time, the Legislation has sanctioned offences that were deemed milder, only with a fine. The new Criminal Code, however, punishes the criminal offence of using totalitarian symbols exclusively with a custodial arrest. This solution reflects that the Legislation still considers the above-mentioned behaviour to be fairly mild, but changing the form of penalty from a fine to a custodial arrest really conceals a more severe punishment, which can be regarded as a stricter sentence.

5. Limits of the freedom of expression in the cross hairs of the Constitutional Court

During the codification process of the new Criminal Code, no special attention was paid to the Decision, thus it took over the disposition of the offence without any change. The regulation of the offence was left unchanged even by Act CXXIII of 2012, which modified the new Code even before its coming into force. This suggests that penalization of this behaviour is required in the Hungarian criminal justice in its original form. But as it was turned into the focal point of the social dispute on the new Criminal Code, the Constitutional Court was forced to deal with the law again. It became an issue of public attention after the Decision of the Constitutional Court on 19th February 2013. There were several newspaper headlines announcing that the Decision had injured the constitutional "shield" of the Criminal Court by claiming the law unconstitutional. *"It was more than 10 years ago when this provision on the ban of symbols evoking dreadful memories became part of the Criminal Code. What effect did this criminal judicial regulation have? Is it at all necessary or does it only cause trouble?"*[16]

The Constitutional Court abolished with the Decision no. 4 of 2013 the statute arguing that the general ban on the use of symbols put an disproportionate constraint on the freedom of expression. An amendment by the Legislation was proposed concerning the intent, manner and effect of the act in order to create an appropriate and adequate drafting of the statute. At the same time, the Constitutional Court also pointed out that a criminal judicial prevention of the use of totalitarian symbols was still justified and

[16] Totalitarian symbols and the rigour of a law-excited community: http://magyarnarancs.hu/belpol/az_onkenyuralmi_jelkepek_es_a_torveny_szigora_izgatott_kozosseg-53400, [08.05.2013.]

valid in order to protect human dignity and a constitutional value system. The Decision focused mainly on the analysis of the statute in respect of the subjects of crime and the behaviour and attitude of the perpetrators. Ruling the provision as unconstitutional was the result of the fact that the drafting itself did not, only the commentaries and the relevant legal literature listed restrictive conditions. As a consequence, these were void, therefore not binding and could lead to various interpretations and could infringe the freedom of expression more than necessary.

Below, this study explores the Decision primarily with regard to the *ultima ratio* nature of Criminal Law, thus it returns to the culpability of using symbols, whereby outlines differing views on the application of the tools of Criminal Law.

According to the constitutional judge, EGON DIENES-OEHM, *"More than two decades after the abolition of dictatorial regimes, in an established constitutional state, it is rather questionable if the mere use of any symbols should be qualified as a criminal offence, unless it is combined with an act, threatening society with a criminal judicial effect or intends to violate the dignity of others. (The latter is also confirmed by the planned fourth amendment of the Fundamental Law, which completes Article IX with a fourth Section (4), "The right to freedom of speech may not be exercised with the aim of violating the human dignity of other people."*[17]

Thus, it is apparent that the Special Part of the Hungarian Criminal Law is not written in stone; the attitude towards the culpability of a behaviour type may change. Criminal justice must always adapt to the current requirements and demands of a given society, and in some cases it must find the transition between culpable and non-culpable behaviours. Based on the opinion of DIENES-OEHM, the Hungarian society has moved past the impasse where this behaviour type could be handled with the sanctioning cornerstone nature of Criminal Law.

Another constitutional judge, LÁSZLÓ KISS gave a parallel reasoning.[18] He approached the constitutionality of the use of totalitarian symbols from quite a different background of principles and accordingly, has reached quite a different conclusion regarding the culpability of the behaviour type.

From the perspective of the applicability of the statute, he considers it a pre-requisite, a kind of constitutional requirement that in addition to the

[17] The collateral opinion of the constitutional judge Dienes-Oehm, Egon to the Decision of Constitutional Court no 4 of 2013 (21.II), paragraph [103], http://public.mkab.hu/dev/dontesek.nsf/0/E1E95AF7B7C1A24EC1257ADA00524F2E?OpenDocument, [04.06.2013.]

[18] The collateral opinion of the constitutional judge Kiss László to the Decision of Constitutional Court no 4 of 2013 (21.II), paragraph [104-109], http://public.mkab.hu/dev/dontesek.nsf/0/E1E95AF7B7C1A24EC1257ADA00524F2E?OpenDocument, [04.06.2013.]

current text of the law, it should also be stated that in order to satisfy the criteria of the offence, the symbol must be used in connection and in identification with the given totalitarian regime. Only in the presence of the above-mentioned criteria does the act require criminal judicial intervention. He, therefore, considers this act an abstract behaviour type dangerous to society, if the symbol is used in connection and in identification with the corresponding totalitarian regime.

In my opinion, this is actually the pre-requisite of the permissibility and necessity of criminal judicial intervention, which re-defines the boundaries of criminal judicial intervention with regards to the statute in question. The insertion of another, subjective provision will set further limits to the behaviour types that can be qualified as a criminal offence.

While analysing in great detail the offences occurring in life contained in the statute, DR. KISS points out that with the exception of extreme cases, it is only the law enforcer who is able to decide whether the behaviour in question is a disturbance of public tranquillity that threatens the already effective constitutional order or violates human dignity within the context of the Fundamental Law itself and the relevant international case-law.

Thus, it must provide a basic starting point in the judgment of this behaviour type, if the specific cases, the disturbance of public tranquillity means or can mean the violation of the effective constitutional order and human dignity. Judges can only balance the competing fundamental rights and constitutional values, if the sanction drafted in the statute remains similar to that of criminal threats. This measure could be realised by the Constitutional Court abolishing the statute pro futuro. Thereby, the Legislation received an opportunity or rather, gained time in the decision-making process on criminal judicial prevention. As a result of this consideration, in order to satisfy the above-mentioned criterion of culpability, the Constitutional Court amended the statute by entering a passage on the modus operandi. The Legislation wishes to ensure the appropriate solution by inserting into the fact of Criminal Use of Totalitarian Symbols “fit to disturb public tranquillity and to violate the human dignity and right to pay homage of the victims of totalitarian regimes.”

6. The internal conflicts of Criminal Law

While balancing various values, we must mention the category of danger to society, which, as expressed in the term itself, is a culpable behaviour type and unlawful in substance. The special concept of illegality appearing in the Criminal Code is theoretically dedicated to provide guidance to the Legislation in criminalizing new behaviour types. According to the effective Criminal Code, *“An 'act causing danger to society' means any activity or*

passive negligence that violates or endangers the governmental, social or economic order of the Republic of Hungary, the person or rights of the citizens."[19] The codifiers of the new Criminal Code retain the normative concept of danger to society by changing the order of values that are to be protected. In other words, behaviour types that violate others, their rights and the existing social and economic order are considered as danger to society.[20]

It is to be taken into account that danger to society is also a concept that occurs in the *Petty Offence Law*, defined as the objective characteristic of an offence. In this branch of law, acts or failures, which *violate or endanger the social or economic order of Hungary, the rights of a natural or legal person or of organisations without a legal personality to a lesser extent than a felony,* are dangerous to society. *Upon its first or repeated commission, it can be punished with the restriction of personal freedom.*[21]

This provision, in agreement with Article 2 Section (4) of the Petty Offence Act, which contrasts the subsidiary character of petty offences with the felonies listed in Criminal Law and conducts that can be sanctioned with administrative fines, is of great help to law enforcers, but it may confuse the Legislation in its judgment over the determination of the criteria of danger to society.

Based on the normative concept of the category, danger to society both in Criminal and in Petty Offence Law, it is obvious that all crimes are dangerous to society, but not all dangerous acts to society are prevented by criminal judicial measures. This type of behaviour is enrolled to petty offences due to its *lower rate of danger to society*. However, this rate *is not always enough to make the right choice between the two punitive branches of law. It is therefore necessary to establish further criteria, especially the criteria of necessity and ultima ratio, so that this type of conduct can be handled with the tools of Criminal Law.*

It is obvious that this decision requires assessment. The judgment of a behaviour type regarded as danger to society as well as its treatment with the *ultima ratio* nature of criminal judicial tools are subject to evaluation. If a type of conduct is dangerous to society, it is not established by the Legislation; it is merely recognized. If the abstract danger for society is given by a behaviour-type, it is the task of the law enforcer to check, whether a specific conduct constitutes danger to a specific society. This responsibility can raise various difficulties, as it can be read in LÁSZLÓ, KISS'S review. According to this piece of writing, one option is, if the culpability of a certain behaviour type is controversial, that the law enforcer

[19] Act IV of 1978 on the Criminal Code, Article 10 Section (2)
[20] Act C of 2012 on the (new) Criminal Code, Article 4 Section (2)
[21] Act II of 2012 on the Petty Offence Law, Procedure and the Register of Petty Offences, Article 1

can choose the more burdensome task of devoting more energy to finding an element of danger to society. After all, in my opinion, legal certainty would be better served by the decriminalization of behaviour types the extent of illegality of which is not obvious. Some thoughts on the criteria of Constitutional Criminal Law below support this idea.

NÓRA CHRONOWSKI[22] enumerates within the requirements of criminal legislation the *ultima ratio* nature of Criminal Law; the clearness, circumscribed and clear-cut character of the criminal fact, the clearness of the legislator's will; and the brightness of conditions of Criminal Law invention.

GÉZA FINSZTER[23] lists the following criteria of constitutional criminal justice: a) restriction of fundamental rights should be tested according to the criteria of necessity and proportionality, b) legal certainty both in a formal and in material terms, and c) the triad of lawfulness, justice and practicality.

He points out that the elements of the above-mentioned constitutional triad may clash with the requirements of legal certainty, even to the extent that amendments to Criminal Law will be carried out. Experts on legal theory mention decriminalization, the popularization of alternative penalties and the fulfilment of warranties, while the representatives of legal practice wish to extend the authority of criminal justice, demand the establishment of new criminal statutes and stricter sanctioning. The criminal policy of repression, however, forgets about some limitations of Criminal Law enforcement, which can be eliminated by no Draconian rule.

Regarding the prevention of the use of totalitarian symbols, it is to be considered how the Hungarian society sees the representatives of political extremism and how this view is reflected in the language of law. Freedoms of speech and thought are established by the Fundamental Law of Hungary under Article 9 in the Section on Freedoms and Responsibilities. Simultaneously, it wishes to protect the essential assets of the Hungarian citizens regardless of their ethnicity, race, religion or any other classification. Should certain types of behaviour violate personal human or other fundamental rights and manifest themselves in violent acts, then, as a last resort, the statute of *Violence against a member of Community*,[24] which

[22] Chronowski, Nóra: Uniós tagság és alkotmányos büntetőjog-alkotás (EU membership and constitutional criminal legislation). Bűnügyi Szemle, 2009/1, pp. 99-108.

[23] dr. Finszter, Géza: A rendészeti rendszer alkotmányos és közjogi alapjai (The constitutional and public base of the law enforcement system). 2. számú előtanulmány az átfogó rendészeti stratégia társadalmi vitájához. Budapest, 2008 www.police.hu/data/cms529192/alkotmanyos_es_kozjogi_elemzes.doc [04.06.2013.] pp. 106-108.

[24] Violence Against a Member of the Community Section 216, „(1) Any person who displays an apparently anti-social behaviour against others for being part, whether in fact or under presumption, of a national, ethnic, racial or religious group, or of a

strictly prohibits distinction between any groups of society, is applied to protect the victims of the felony. The provision on *Illegal organisation of law enforcement activities*[25] also provides protection against extremism, if the activities of organised groups of extreme political ideologies manifest themselves in patrolling and marching, which have an intimidating effect on other groups of the population of an obviously differing ideological background. The lack of the elements of violence and the freedom of speech are the factors which make the necessity of criminalisation less grounded in the case of other, non-violent behaviours that can, however, be categorised as extreme.

The enforcement of the abovementioned statutes, just like criminal justice itself, is greatly influenced by their public moral acceptance. It is naturally not a one-way effect, so the existence of the provision alone may deter some people from committing a crime, but it is usually only typical of law-abiding citizens who observe norms and meet the requirements of community life. However they represent only a minority within the group of political extremists who oppose peaceful social life in accordance with their ideologies. It is therefore understandable that Criminal Law, in order to be effective requires a cooperative social moral support.

KATALIN GÖNCZÖL with regard to criminal policy in general, writes the following: *"In the long run, the governments of post-socialist countries must manage the climate change in criminal policy in compliance with the European model. They must eliminate the illusion in time that basic social problems rooted in social tensions can be solved with the tools of criminal*

certain societal group, in particular on the grounds of disability, gender identity or sexual orientation, of aiming to cause panic or to frighten others, is guilty of a felony punishable by imprisonment not exceeding three years. (2) Any person who assaults another person for being part, whether in fact or under presumption, of a national, ethnic, racial or religious group, or of a certain societal group, in particular on the grounds of disability, gender identity or sexual orientation, or compels him by force or by threat of force to do, not to do, or to endure something, is punishable by imprisonment between one to five years. (3) The penalty shall be imprisonment between two to eight years if violence against a member of the community is committed: *a)* by displaying a deadly weapon; *b)* by carrying a deadly weapon; *c)* by causing a significant injury of interest; *d)* by tormenting the aggrieved party; *e)* in a gang; or *f)* in criminal association with accomplices. (4) Any person who engages in the preparation for the use of force against any member of the community is guilty of a misdemeanor punishable by imprisonment not exceeding two years."

[25] Unlawful Activities Concerning the Pursuit of Public Security Section 352, "Any person: a) who is engaged in organizing activities for maintaining public policy, public security, without any statutory authorization, or b) who is engaged in organizing activities purporting to maintain public policy, public security, is guilty of a misdemeanour punishable by imprisonment not exceeding two years."

justice."[26] Her thoughts are to be taken into consideration also with regard to the statute discussed above. Is the sustention of criminal judicial protection against the promotion of totalitarian regimes still justified in 2013, well after the abolition of these regimes? Can Criminal Law be an adequate tool to re-shape social awareness, the public opinion on totalitarian regimes and to influence certain behaviour types? The Constitutional Court has carried out investigations regarding the criminal judicial treatment of the use of totalitarian symbols in other countries. They have found[27] that while the manifestations of extremism in the form of incitement to hatred based on ethnic, racial or religious grounds are banned in numerous European countries, the use of symbols of totalitarian regimes are punishable only in some states. The criminal judicial prevention of the public use of National Socialist symbols is well-known Europe-wide, and the use of symbols of Communism is mainly banned in ex-Communist countries. The Constitutional Court offered a wide range of international examples to the Legislation in order to propose alternatives to improve the constitutionally problematic statute. In the legal systems of Slovakia, Lithuania, Latvia, Poland, Ukraine, Italy and Germany, Criminal Law is the gear, which prevents the use of symbols of oppressive movements, totalitarian regimes and unconstitutional organisations. Hungary, in this regard can be considered a pioneer, since this statute was registered as early as in 1992, but in most countries the necessity for applying criminal judicial tools in this case was responded to only in the new millennium.

When determining whether *ultima ratio* should or should not be a characteristic of criminal justice with regard to a specific statute, the regulatory practice of other nations can be of crucial importance, but it must not be exclusive. It can be investigated whether the penal code of other states considers the given behaviour type punishable or regards other tools of its legal system as sufficient to handle this issue. As, however, the Constitutional Court pointed it out in its Decision 1/2013. (I. 7.), *"the judgment of the constitutionality of a legal institution can be different in another state depending on the national constitution, on the compatibility of the regulations with the rest of the legal system and on the historical and political context. Having acknowledged that the consideration of international examples may provide assistance in the judgment, the Constitutional Court cannot regard the example of any foreign state as decisive in the question of the statute's harmonisation with the Constitution (Fundamental Law)."* The presentation of the regulations of other states and the introduction of foreign solutions can only contribute to the decision on

[26] Gönczöl, Katalin: Pesszimista jelentés a posztmodern büntetőpolitika klimatikus viszonyairól (Pessimistic report on the climatic relationships of criminal policy) http://mozgovilag.com/?p=1190 [05.06.2013.], p. 1.
[27] Decision no. 4 of 2013 (21.II) of the Constitutional Court, Section [26-37]

the justification of the criminal judicial ban, but it may not provide a foundation for it.

Moreover, it may also happen that in addition to the Legislation and the Constitutional Court, the European Court of Human Rights, as the ultimate forum, also joins the discourse on the judgment of criminal judicial prevention, as it did when the use of totalitarian symbols was discussed. In the case of Vajnai v. Hungary, the EHRC carried out investigations, whether the restriction of the freedom of expression was necessary in a democratic society based on the pressing social needs of the country. From the reasoning of the Decision it becomes clear that the Court had undergone serious considerations concerning restricted and protected values. The judgment on the necessity of criminal judicial protection as well as the restriction of the freedom of expression was supported by the idea that as a consequence of the decades since the establishment of democratic pluralism, Hungary can be considered a stable democracy. The restriction can therefore not be justified by referring to the specific circumstances of transition into democracy. According to the EHRC, *"there is no evidence to suggest that there is a real and present danger of any political movement or party restoring the Communist dictatorship" (Sections 48, 49 of the Judgement of the case of Vajnai v. Hungary), but the uneasiness evoked in past victims and their relatives…"cannot alone set the limits of freedom of expression" (Section 57 of the Judgement of the case of Vajnai v. Hungary.) In countries with a historical past similar to that of Hungary, the protection of the right for relatives to commemorate the victims of totalitarian regimes may require the restriction of speech. It may well be legitimate, if an otherwise protected verbal expression at a specific location and time clearly changes the meaning of a provision. "In the Court's view, the containment of a mere speculative danger, as a preventive measure for the protection of democracy, cannot be seen as a "pressing social need".*

7. Conclusion

On the one hand, this study reflects the objective content of a crime, its *danger to society*, the recognition of which by the Legislation is pivotal in the course of criminalizing a type of behaviour. On the other hand, this paper also ponders the principles of *necessity and proportionality* within the theoretical system of Criminal Law, which also influences the decision made about criminal judicial responsibility. The general or generalizable comments of the Constitutional Court are also to be taken into account in order to prevent unconstitutionality. Moreover, as the result of the processes of globalisation, other states' legislative results and practices cannot be ignored as sources in the management of certain undesired behaviour types.

Last, but not least, from legislative and law enforcement aspects, the procedure of the European Court of Human Rights can also serve as a test for the Hungarian criminal judicial system. It is to be emphasized again that their criteria cannot be decisive with regards to all statutes of the Criminal Code, but they can contribute to meeting the requirements of *ultima ratio*, which is an urgent and crucial task in the process of European law harmonisation and in the establishment of a common European criminal justice.

The European dimension of consumer protection

BENCSIK, ANDRÁS

ABSTRACT *One of the pillars of the legal regulation of consumer protection in Hungary is the fact that Hungary is a Member State of the European Union; therefore, it is natural to examine the European dimension of consumer protection. Consumer protection got relatively late into the focus of political and legal philosophy in Europe for two reasons: this delay is obvious when we consider similar processes in America, while on the other hand it is important to note that the Treaty of Rome, which created the European Economic Community in 1957, did not make any regulations on a common consumer protection policy.*

The emergence of consumer protection and the demand to have it regulated on a community basis are closely connected to the recognition that consumers play a vital role in economic life and in the establishment and operation of the single internal market. Should consumer protection not become a homogeneous practice within the EU and should consumers' interests not be defended at the high level expected by the EU, then consumers' trust, which is very changeable, may block the enforcement of a fundamental principle of the EU, namely the free movement of goods and services.

Since debates of EU law's interpretation and application fall into the scope of the Court of Justice of the European Union, it is important to know that the Court has had several cases over the past decades that have been more or less connected to consumer protection and the EU's consumer protection policy. It is worth mentioning that although a large number of such cases are discussed by the Court on an international level, the Hungarian court practice does not seem to be that intense in terms of consumer protection cases, which may be explained by the relatively minor value of subject matters in consumer lawsuits and the lack of consumers' information about this issue.

1. The evolution of the European Union's consumer protection policy

One of the pillars of the legal regulation of consumer protection in Hungary is the fact that Hungary is a Member State of the European Union; therefore, it is natural to examine the European dimension of consumer

protection. Consumer protection in Hungary cannot be treated separately from the evolution of the policy of consumer protection in the EU.[1] Consumer protection got relatively late into the focus of political and legal philosophy in Europe for two reasons: this delay is obvious when we consider similar processes in America, while on the other hand it is important to note that the Treaty of Rome, which created the European Economic Community in 1957, did not make any regulations on a common consumer protection policy.[2]

The emergence of consumer protection and the demand to have it regulated on a community basis are closely connected with the recognition that consumers play a vital role in economic life and in the establishment and operation of the single internal market. Should consumer protection not become a homogeneous practice within the EU and should consumers' interests not be defended at the high level expected by the EU, then consumers' trust, which is very changeable, may block the enforcement of a fundamental principle of the EU, namely the free movement of goods and services.[3]

Before addressing the topic it is necessary to make a remark on terminology. As the words „European Union" can be found in all treaties discussing the EU's structure and operation since the effectiveness of the Lisbon Treaty, I will always call the former European Community (European Communities) European Union. Further on, I will call previous community legal norms and other EU regulations approved in the second and third stage EU law. Similarly, it should be stated in the beginning of this chapter that no matter how some court institutions used to be called at one point in time, I shall call the court in charge of the quoted affairs Court of Justice of the European Union (further on as: Court).

Since debates of EU law's interpretation and application fall into the scope of the Court of Justice of the European Union,[4] it is important to know that the Court has had several cases over the past decades that have been more or less connected to consumer protection and the EU's consumer protection policy. The majority of cases to be discussed in this thesis have been submitted to the Court to request for a preliminary ruling, but I shall also mention a case discussed in an action for annulment. It is worth

[1] Cf. Tóthné Heim, Lívia – Gál, Tamás: Komplex fogyasztóvédelem a magyar köztudatban. In: Fogyasztóvédelmi Szemle 2010/4. p. 38.

[2] In connection with this see S. Weatherhill: Consumer Policy. In: P. P. Craig – G. de Búrca (eds.): The Evolution of EU law. Oxford University Press, Oxford, 1999 p. 694.

[3] More on this in G. Howells – T. Wilhelmsson: EC and US approaches to consumer protection – should the gap be bridged? Yearbook of European Law. 1997. Clarendon Press, Oxford 1998 p. 6.

[4] Cf. Szalayné Sándor, Erzsébet: A jogorvoslat duális rendszere az Európai Unióban. In: JURA 2004/1. p. 48.

mentioning that although a large number of such cases are discussed by the Court on an international level, the Hungarian court practice does not seem to be that intense in terms of consumer protection cases, which may be explained by the relatively minor value of subject matters in consumer lawsuits and the lack of consumers' information.[5]

It was declared first at the 1972 Paris summit that the elevation of life standard that is included in the Treaty means the same as the liability of environment and consumer protection.[6] The opportunity to introduce new common policies, such as the consumer protection policy, gradually emerged at this point.[7] When the necessity of consumer protection as an activity became obvious also on an EU level, action plans were accepted including the regulations for e.g. cosmetic articles, food labelling, and misleading advertising. After this the EU extended its consumer protection activity by five- and eventually three-year programs, therefore I shall explain the progress of the European Union's consumer protection policy focusing on these periods also mentioning court judgements in this topic that were announced in the given period.

2. The EEC's first consumer protection program (1975)

The European Union approved the 'Magna Charta' of Common Market Consumer Rights on 14 April 1975, which was significant in three aspects. First: the document defined the fundamental rights of consumers, second: it determined the areas to be regulated, third: it contained an action plan to bring consumer rights in harmony.

As a result of the afore mentioned several directives were passed, e.g. price labelling on food products or standards. Still, the program motivating people for action moved forward only slowly. One of the problems was the competence division between the Member States and the EU.[8] The program's execution was made more difficult by the ambiguity of EU

[5] Cf. Fazekas, Judit – Sós, Gabriella: Fogyasztóvédelem az Európai Bíróság gyakorlatában. In: Fogyasztóvédelmi Szemle, 2005/1. electronic version: http://www.fvszemle.hu/archivum/2005_marciusi_szam/paragrafus/fogyasztovedelem_az_europai_birosag_gyakorlataban/ [04.08.2012]

[6] For the EU's environment protection policy see Horváth, Zsuzsanna– Bándi, Gyula – Erdey, György – Pomázi, István: Az EU környezetvédelmi szabályozása. Közgazdasági és Jogi Könyvkiadó, Budapest, 2004 p. 17.

[7] Fazekas, Judit: Fogyasztóvédelmi jog. Lícium-Art Kiadó, Miskolc, 2000 p. 15.

[8] Some Member States considered consumer protection their exclusive competence area and were ready to recognise national rules only, while others accepted the regulatory role of the Community too. But these differences made the process of harmonisation much more difficult.

regulations' legal source and the creation of harmonising rules was blocked in the long run by lengthy and fierce debates in connection with the program. The difficulties were actually enhanced by the complicated mechanism of decision making and preparatory works in the EU, thus the prepared directive drafts[9] could not become EU norms.

The court judgement of the case Cassis de Dijon[10] is relevant in many ways in connection with EU law. I will only highlight those parts that can be related to consumer protection.[11] Consumer's right to choice is fulfilled by the principle of mutual recognition of the theses issued by the Court, while the Treaty on the Functioning of the European Union, Article 42 (Treaty establishing the EEC, Article 36) makes a deviation possible from Treaty on the Functioning of the European Union, Article 36 (Treaty establishing the EEC, Article 30) that allows the free movement of goods in cases, when the health protection of people, animals or plants requires that. Thus, it is clear that the above mentioned case is connected to consumer protection in many ways. [12]

According to the state of affairs the base process' plaintiff wanted to export French blackcurrant liquor to Germany, but the German authorities refused to grant the export permit reasoning that the product's alcohol content did not meet German regulations, by which fruit liquors may only be sold in Germany if they reach a volume percentage of 25%, but this kind of liquor contained only 15-20% alcohol. The Court of Justice of the European Union discussed the issue, because the regulation attacked by the export company was a member state's measure equal to a quantity restriction, which is forbidden by EU law.

The government of Germany referred to two reasons in their defence. One was that the regulation served the protection of consumers by forbidding access to low alcohol content beverages, thus discouraging citizens from spirit consumption. The other reason was that alcohol was the most expensive part of the products and those traders who sold a lower alcohol content drink within the same product category would get a price (competition) advantage.

The court explained that as there was no EU regulation for alcohol products, the formulation of the regulation was a national competence, but

[9] These drafts dealt with deceiving advertising and dishonest conditions of agreement among others.

[10] Judgement of the Court of Justice of the European Union under No. C-120/78 on February 20, 1979 in the case Rewe-Zentral AG vs. Bundesmonopolverwaltung für Branntwein.

[11] About the full scale and detailed analysis of the case see Kecskés, László: EU-jog és jogharmonizáció. HVG-ORAC, Budapest, 2011. p. 617. ff.

[12] See about this N. Reich – H-W. Micklitz (eds.): Wirtschaftsrecht, Verbraucherinteressen und EU-Integration. In: Europäisches Verbraucherrecht. Nomos, Baden-Baden, 2003 p. 4.

when such is created, EU regulations had to be obeyed, (e.g. the prohibition of free move's hindering), unless some forcing factors (e.g. public health or consumer protection reasons) gave basis to deviation from the rule. Reacting on the point of view of the government of Germany the court said that German citizens consumed spirits in a diluted way and the consumer would not only consider price,[13] when he/she took a decision. In this respect the court decided that all national regulations that limited the alcohol content of liquors were incompatible with EU law and those had to be abolished. By this decision the court also implicated that no EU regulation was necessary to help further legal harmonisation to promote the free move of goods, but it is the Member States' duty to demolish the negative factors.[14]

3. The EEC's second consumer protection program (1981)

The above mentioned consumer protection program prepared a good basis for the issue of the second one in 1981 that set the goal to give new impetus and strength to consumer protection on an EU level.[15] The program determined consumers' basic rights and listed the priorities of legal harmonisation already in an EU document, in which the EU commissioned the Member States with the acknowledgement and development of „consumer rights".[16]

The EU's second consumer protection base document called the attention to the problems of consumer base right enforcement and urged the necessity

[13] The price contains several elements, for instance VAT and, in case of certain alcohol products, excise duties. Such fees are hidden for the consumers, since it is not well-known who pays what exactly. See Ercsey, Zsombor: Az általános forgalmi adóról. In: JURA 2012/2. p. 73.

[14] This phenomenon is called negative integration by Judit Fazekas and Gabriella Sós. See. Fazekas, Judit – Sós, Gabriella op. cit. It is to be noted, however, that the obstructing factors have been removed by exact legal harmonisation, which can be considered as positive integration. The court verdict presented fairly expressed the 'principle of mutual recognition', which is basically the legal harmonisation without creating an EU regulation for it.

[15] Cf. H-W. Micklitz: Zur Notwendigkeit eines neuen Konzepts für die Fortentwicklung des Verbraucherrechts in EU. VuR, 2003/1. pp. 4-5.

[16] The background of this may have been that the Community thought of the confirmation of the „European consumer" as a key to the success of economic integration. Beyond others see Akšamović, Dubravka – Márton, Mária: Consumer protection in EU law, de lege lata, de lege ferenda. In: Drinóczi, Tímea – Takács, Tamara (eds.): Cross-border and EU legal issues: Hungary – Croatia. Faculty of Law, University of Pécs – Faculty of Law, J. J. Strossmayer University of Osijek, Pécs-Osijek, 2011 p. 11.

of a specific regulation for special consumer groups.[17] It was the result of this program that EU level legislation started in this area, of which „products" the norms on misleading advertising[18] and product liability[19] can be set as an example.

4. The EEC's third consumer protection program (1985)

The third consumer protection program commenced on 23 July 1985,[20] when the Commission prepared a report on its activities on the tenth anniversary of the first program and presented the successes and failures of EU level consumer protection in it.

The Commission set the three fundamental goals to be reached by the EU. The compatibility with health and safety requirements of products sold on EU markets was stressed as the primary goal of consumer protection policies, then the establishment of the legal and economic environment to improve life standard came up second.[21] The third requirement the Commission emphasised was to have consumer interests prevail in EU decision making. The inclusion of such a wish into an EU document it has become a „quasi" fundamental principle that EU institutions must respect consumers' interests, when they take decisions.[22] EU consumer protection gained new momentum, when the Single European Act was approved in 1986, which looked at consumer protection as one of the elements to make the single internal market more perfect.[23]

The case Centro Sud[24] that reached the Court in 1985 can be deemed as a special court case from the judgement practice point of view, because the Court decided against the chief counsellor in this process. According to the state of affairs Italian law allowed only the sale of pasta that was made of durum flour. Through this national regulation the state of Italy wanted to

[17] Such „specific" consumer groups are especially the elderly, children and the poor.

[18] Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising.

[19] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

[20] This is when the Commission submitted its report „New impulses in consumer protection policy"

[21] The latter one determined a basic task for community level legislation.

[22] Cf. Fazekas, Judit op. cit. p. 19.

[23] Cf. H-W. Micklitz op. cit. p. 5.

[24] Judgement of the Court of Justice of the European Union under No. C-407/85 on October 31 1983 in the case 3 Glocken GmbH and Gertraud Kritzinger vs. USL Centro-Sud and Provincia autonoma di Bolzano.

protect the Italian market in this process in order to keep national traditions.[25]

The chief counsellor's basic statement was that this restrictive measure, which was also discriminative in its character, was undoubtedly superfluous, if the level of labelling and component indication is appropriate, thus providing the consumer with enough information. The pasta sorts tested in the process all had the necessary information, but those were displayed at hardly visible spots on several products. This led the chief counsellor to the conclusion that Italian consumers might not be well informed enough and that was why the restrictive measures had to be maintained in order to protect the market.

The court approved a point of view contrary to this opinion, when it stated that the Italian rule was not compatible with EU law and basically meant a trade restriction, which was not to be sustained in the future. This way the point of view got accepted that an Italian consumer wass able to choose between various sorts of pastas, because, as the court pointed out with a theoretical angle, a well-informed consumer was able to take proper decisions.

5. The first threeyear program (1990-1992)

The EU's first 'threeyear' program meant a new strategy from two aspects. First, it was meant to be a shorter period instead of the former five-year periods in order to make legislation more effective, but it was also aimed at coordinating new measures that were to be introduced in the transition period to a single internal market and harmonising them with consumer protection requirements.

The definition of the legislation topics, in which Member States had to carry out legal harmonisation, was an unquestionable result of this document. These topics were general product safety, food labelling, consumer loans and dishonest contract conditions. In order to help national legislation as well the directives governing these topics were also created.[26]

[25] Tradition is an important factor for the legal regulation of the countries, including the Member States. This is the case regarding the tax regime as well. Cf. Ercsey, Zsombor: Some Major Issues of Value Added Tax. In: Ádám, Antal (ed.): PhD tanulmányok 9. PTE ÁJK Doktori Iskola, Pécs, 2010 p. 210.

[26] This is when the following Council Directives were approved: 92/59/EEC of 29 June 1992 on general product safety, 92/11/EEC of 3 March 1992 amending Directive 89/396/EEC on indications or marks identifying the lot to which a foodstuff belongs, 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning

A further merit of the program was that the Commission set up the Consumer Policy Service (Service Politique des Consommateur), which had the basic function to coordinate market and consumer interests in the realisation of the single internal market.[27]

6. The second three-year program (1993-1995)

The issue of the 'second' threeyear program, which took place after the approval of the Maastricht Treaty, led to thorough changes in former EU consumer protection activities. The novelty was that consumer protection got into the foundation treaty as an independent EU policy for the first time, when the Treaty made the EU responsible for cooperation in the development of consumer protection in order to achieve EU goals.[28]

According to the Maastricht Treaty the EU approved measures in connection with the realisation of the single internal market and also took special action to support and extend the consumer protection policy of Member States.[29] The second change must be highlighted, because „special action" extends and supports the consumer protection policy of Member States to make consumer basic rights valid.[30]

Beyond the above mentioned the Treaty also defined two measures in connection with consumer protection policy: the power of legislation was given to the Council with a mandatory consultation process with the Economic and Social Committee and also settled that these measures may not hold back any Member State to introduce stricter consumer protection rules than those of the EU.[31]

It happened in this period that the Mars-case[32] was discussed, which can be considered as a milestone in European consumer protection, because it was in this very case, when the court first defined the concept of „sensible

consumer credit and 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

[27] Cf. Fazekas, Judit op. cit. p. 20.

[28] Cf. Treaty on the Functioning of the European Union, Article 169 (Treaty establishing the EEC Article 153.)

[29] Cf. Treaty on the Functioning of the European Union, Article 169, paragraph (2) (Treaty establishing the EEC Article 153, paragraph 3.)

[30] The Treaty lists the protection of consumers' health, safety and economic interest as well as their proper information as Community measure goals.

[31] With the remark that such stricter regulations should be in harmony with the Treaty and the Member States affected must inform the Commission.

[32] Judgement of the Court of Justice of the European Union under no. C-470/93 of 6 July 1993 in the case Verein gegen Unwesen in Handel und Gewerbe Köln e. V. vs. Mars GmbH.

and rational" consumer, which has become a cornerstone of EU level consumer protection policy.

The state of affairs is that the producer of Mars chocolate intended to increase its sales by increasing the bar's packaging by 25% and still selling the product for the same price. As a result, not only the chocolate, but also the packaging was extended. Consumer protection specialists, however, considered it a problem that consumers could have expected a larger size increase based on packaging. This proved to be suitable for deceiving consumers, because from the packaging the consumer could have made the conclusion that he/she could buy a product that was 25% bigger, but cost the same price.

It is to be noted that two types of „consumer approaches" got popular in this period within the European Union. The Anglo-Saxon countries focused on the sensible, well-informed consumer who could take rational decisions based on his/her knowledge, while the German-speaking countries rather believed that the consumer had to be defended in all ways, even from himself/herself. Finally the Court of Justice of the European Union took the standpoint that the European master would be the rational consumer who is aware that he/she could get only a 25% larger chocolate bar under certain conditions, thus no consumer deceiving took place.

The Court of Justice of the European Union discussed the Clinique-affair[33] in 1992, where the state of affairs was the regulation of German law that banned the sale of cosmetics with the name Clinique in Germany. The legislator's opinion was that the word „Klinik" meant hospital in German, and such a product name might falsely make the consumer believe that such a cosmetic product was medicinal, i.e. in connection with medicine. To obey this rule the company affected (Estée Lauder) sold its product with the name Clinique all over the world, but it had to be called Linique in Germany. However, this put an extra cost on the company; therefore it gave up its tradition and started to sell the article with the name Clinique also in Germany. This was challenged by an organisation fighting for clean competition in front of a court in Berlin and when the court of the Member State realised there might be a contradiction between national and EU law (Treaty on the Functioning of the European Union, article 36, which used to be article 30 of the former Treaty establishing the EEC), it turned to the Court of Justice of the European Union to request for a preliminary ruling.

The Court ruled that the regulation of the Member State violated the free movement of goods and services and since the deception of consumers could be stated in this affair for several reasons, it stated that such a regulation was not compatible with EU law. The decision included the EU principle without

[33] Judgement of the Court of Justice of the European Union under no. C-315/92 of 2 February 1994 in case Verband Sozialer Wettbewerb e.V. vs. Clinique Laboratories SNC and Estée Lauder Cosmetics GmbH.

saying that consumers were aware that they did not buy medicinal products, but cosmetics under the name Clinique and if they are aware of it in the moment of buying, then later no reference could be made for deception neither by the consumer, nor by anyone else.[34]

During the second three-year program the Commission issued a Green Book[35] in 1993, which determined the basic priorities of consumer protection policy, analysed the situation of consumer law enforcement and the settling of legal disputes and proposed solutions to enforce demands more effectively in a wider circle.[36] Besides Department no. 24 (eventual Health and Consumers Department) was established on its proposal in 1995 in order to direct consumer protection and to manage programs and elaborate directives in relation with it.

7. Consumer protection program 1996-1998

The department established in 1995 created the EU's consumer protection program for the third three-years, which was necessary partly due to the diverse consumer protection systems of Member States, but also due to demands motivated by the experiences of the yet-to-be-expected legal harmonisation.

The program determined the primary goals of the European Union's consumer protection policy, among others the development of the system of demand enforcement and the harmonisation of Member States' rules for guarantee and warranty. It was the result of this program that the directives on guarantees of consumer goods[37] and on the protection of consumers in respect of distance contracts were approved.[38]

The court ruling in case Dietzinger[39] did not deal with consumer protection relation, or the connection of goods' move and consumer protection, but the collision of EU consumer protection policy and the activity of Member States.

[34] This meaning becomes clear in the work of Judit Fazekas and Gabriella Sós. See Fazekas, Judit – Sós, Gabriella op. cit.
[35] COM (93) 576 final.
[36] Cf. Fazekas, Judit op. cit. p. 22.
[37] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.
[38] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.
[39] Judgement of the Court of Justice of the European Union under No. C-45/96 of 17 March 1996 in the case Bayerische Hypotheken- und Wechselbank AG vs. Edgard Dietzinger.

The state of affairs was connected to directive 85/577/EEC on contracts negotiated away from business premises. A financial institution provided Mr. Dietzinger with a loan, but the condition of the loan payment was the liability of a guarantor. This person was the son of Mr. Dietzinger who wanted to give a guarantee for his father's loan. The loan agreement was signed in the house of Dietzinger's parents and it is also essential that the father of the suing party was a construction entrepreneur who took out the loan in connection with his work.

The Court of Justice of the European Union ruled that it was the directive's goal to offer extra protection to consumers taking the special environment of agreement signature into account. As the formulation of the agreement does not exclude an agreement for the advantage of a third person, the contract under discussion may be interpreted in a way that the guarantor's guarantee is just a counter-service for the loan provision. However, since Mr. Dietzinger was a construction entrepreneur, he did not qualify as a consumer and the directive cannot be held valid for this very case. Thus, in this case the Court highlighted the relation of consumer protection and the legislator's intention behind the directive, but examining the power of the directive it was not held possible to actually apply it.

8. The effect of the Amsterdam Treaty on consumer protection

The Amsterdam Treaty, which took effect on 1 May 1999, confirmed and developed the EU's ever changing consumer protection policy. The modification affected the consumer protection regulation in several areas.

The previous goal that had been fixed in agreements to ensure the high level of consumer protection has been preserved.[40] On the other hand as a development of common policy the Treaty also prescribed the active contribution of the EU, when it said that "in order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests."[41] Thus, the

[40] Thus the Treaty of Amsterdam confirmed the established consumer protection policy. In connection with this see J. Stuyck: European consumer law after the Treaty of Amsterdam: consumer policy in or beyond the internal market? CMLR, 2000/2. p. 384.

[41] Cf. Treaty on the Functioning of the European Union, Article 169, paragraph 1 (Treaty establishing the EEC Article 153, paragraph 1.)

Treaty enumerated consumer basic rights in a wider range than before and commissioned common consumer protection policy to make it valid actively.

It is also important to note that the Treaty puts the relation of consumer protection policy and other common policies on a brand new basis, when it says that „consumer protection requirements shall be taken into account in defining and implementing other policies and activities".[42] By this regulation the consumer protection policy has been transformed into a horizontal policy, just like the common environment protection policy, the targets of which have to be considered, when all other policies get elaborated and enforced.

The Tobacco case[43] is at least as much related to the operational mechanisms of EU legislative power as to the topic of consumer protection, but it is worth referring to this case briefly. The basis of the case was directive 98/43/EC of the European Parliament and the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products. The directive basically forbids all tobacco advertisements.

According to the state of affairs the government of Germany initiated a procedure against the Council of the European Union and the European Parliament, in which it requested the annulations of the directive claiming that the legal basis of its issuance was not appropriate. Germany said that legislation based on the Treaty on the Functioning of the European Union, Article 114, paragraph 1 (Treaty establishing the EEC Article 95, paragraph 1.) could only be approved if it served the promotion of the internal market, but since this affair had public health protection connotations, this relationship could not be stated.

The Court reasoned that although the relationship between the protection of public health and the promotion of the internal market was possible to imagine, the EU's legislator could only refer to it if the original goal of the measure was the establishment or development of the internal market. Considering these aspects, the court annulled the directive.[44]

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[42] Cf. Treaty on the Functioning of the European Union, Article 169, paragraph 2 (Treaty establishing the EEC Article 153, paragraph 3.)

[43] Judgement of the Court of Justice of the European Union under no. C-376/98 of 5 October 2000 in case Federal Republic of Germany vs. European Parliament and Council of the European Union.

[44] It is worth noting in connection with the follow-up story of the case that Directive 2003/33/EC of the European Parliament and the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products regulated this topic actually with no change in content and now set the proper legal base as a reason for legislation. Germany, however, also attacked the 2003 directive in front of the Court of Justice of the European Union. The judgement of the Court of Justice

Other major regulations were also approved in Amsterdam concerning consumer protection policy. The modification upgraded the divided legislation power that had been established in the previous program, according to which the EU could basically pass directive-type of measures in connection with the single internal market[45] and on the other hand it would implement extending measures to control the policies of Member States (outside the framework of the single internal market).

The previously established Department went through a serious facelift too. The change was only seemingly formal (as the name of this institution changed into Health and Consumers Department), because it also included new elements like the extension of the powers of the department's public health care and consumer protection units. The Amsterdam Treaty entrusted the Department with the management of market supervision, the operation of specialists' committees, the issues of consumer protection and health care as well as the task of integrating consumer protection policy into other EU policies.

9. Consumer protection program 1999-2001

The next consumer protection period of the EU focused on interest representation, the high level of health protection and safety and the protection of economic interests.[46] In order to strengthen the strength of interest representation, the EU set the goal to support consumer protection associations more intensely, to execute the closer cooperation of associations and the increase of consumer representation in EU decision making. The importance of consultation is to be stressed among the latter ones, under the scope of which the EU investigated the possibility of the establishment of a permanent, consumer-entrepreneur type consultation forum.

It was food scandals[47] at the end of the 1990s that urged the need for a guarantee of the high level of health care and safety, as essential goals of the European Union. In connection with this, the EU took the standpoint that it was necessary to approve international standards as soon as possible and it

of the European Union under No. C-380/03 of 12 December 2006 in the case Federal Republic of Germany vs. European Parliament and Council of the European Union declared Germany's lawsuit unfounded in all points and therefore refused it.

[45] The decision making is carried out in a co-decision procedure with a qualified majority. The regulation for the former process is meant to ensure the horizontal character of consumer protection, while the latter one to increase its efficiency.

[46] Cf. Fazekas, Judit: op. cit. p. 25.

[47] Beyond others bovine spongiform encephalopathy (BSE) and counter-measures (cattle export ban, order of emergency slaughter) are to be considered.

was the duty of the European Food Safety Authority to participate in the coordination of food-related EU activities.[48]

10. Consumer protection policy strategy 2002-2006

The EU's consumer protection policy again took a turn in 2002, when the programs for three-year periods were replaced by a strategic program for five years. The Commission approved the „Consumer protection policy strategy" on 7 May 2002, which set three medium-range goals: the establishment and the assurance of single, high level consumer protection, the effective execution of consumer protection rules and the inclusion of consumer protection organisations into EU policy.

The Court of Justice of the European Union dealt with consumer protection in the Cofinoga case[49] a little differently than earlier. According to the state of affairs, Cofinoga Merignac SA, a company registered under French law provided a loan for Mr. Sachithanathan. The contract was made for a definite period of time, one year, after which it could have been lengthened. However, the debtor did not fulfil his obligation to return the loan and the company sued Mr. Sachithanathan in front of a French court. But the court called up Cofinoga to resolve discrepancies demanding them to submit the agreement for the renewal of the contract after the first year.

The Court requested an answer for the question in this process, whether the formula of signing contracts according to Council directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit and the Council's directive 90/88/EEC of 22 February 1990 on the amendment of directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit was to be applied for the renewal of the same contract too.

The Court's standpoint was that the company providing the loan had to inform the consumer according to the content and formal criteria of the relevant directives. The chief counsellor, nevertheless, took the standpoint that the providing of information lost importance if it should happen in case of the renewal and extension of an already signed agreement, because the consumer would already know them, unless they had been modified. Based

[48] This is why Regulation No. 178/2002/EC of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety was approved.

[49] Judgement of the Court of Justice of the European Union under No. C-264/02 of 4 March 2004 in case Cofinoga Mérignac SA vs. Sylvain Sachithanathan.

on the above mentioned standpoints the Court ruled that it was not mandatory for the provider of the loan to keep his information liability as far as the state of affairs of the current case went.

In relation to this medium-range consumer protection goal it is necessary to refer to the importance of enforcing consumer interests in decision making and standardisation. This is based on an agreement with WTO, which affects consumer rights at several points and the Commission is to endeavour the protection and enforcement of these interests and rights during its negotiations.[50]

The European Union determined the criterion in connection with effective execution that EU measures should be created to settle debates more easily, especially with the preference of alternative debate settlement methods.[51]

The results of the strategy were evaluated by the Commission from the aspect of goals' achievement in a document issued on 13 March 2007 and the consumer protection measures of the above period were basically considered successful.[52] The indisputable results of the program were apparent in the following areas: Many legal regulations were approved through the accelerated consumer protection legislation that can be regarded as successful both in the approximation of laws and legal protection.[53] Furthermore, the preparatory works of many other legislation products were started and the supervision of consumer protection legal works commenced to serve unification and modernisation goals. It is the indisputable merit of the program that several new institutions have beenestablished among the EU's consumer protection institutions that have the main role to protect European consumers and have their rights enforced as effectively as possible.[54]

[50] Fazekas, Judit op. cit. 31.

[51] In connection with this it must be referred to the establishment of EEJ-NET and FIN-NET networks and the European Consumer Centres. About their operation see in detail: http://europa.eu/legislation_summaries/other/l32043_en.htm [04.08.2012] and http://ec.europa.eu/internal_market/finservices-retail/finnet/index_en.htm [04.08.2012]

[52] This statement was called „2002-2006 Consumer protection program screening".

[53] Just referring to Directive 2005/29/EC of the European Parliament and the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market as well as Council directive 84/450/EEC, the European Parliament and Council directives 97/7/EC, 98/27/EC and 2002/65/EC as well as directive 2005/29/EC amending the European Parliament and Council directive 2006/2004/EC.

[54] The Consumer Safety Network, the Network of European Consumer Centres and the European Consumer Consultative Group were created among others in this framework.

11. The EU's consumer protection strategy 2007-2013

The European Union's consumer protection strategy for the seven year period 2007-2013 was approved by the Commission in April 2005. The special feature of the document is that besides setting three major goals it also describes the priorities that lead to these goals.

The primary goal to be reached by the EU in the given period is to confirm the market position of consumers and decrease their disadvantageous position against the service providers. The Commission believes it is viable if consumers have enough information and a real choice that requires the transparency of the market (conditions).

The second goal is only indirectly related to the topic, because as the program contains the consumer protection and health care policy strategy, it aims the improvement of consumers' welfare in the EU. This undoubtedly has some components[55] that (may) affect consumer protection policy, but their relation to consumers' law enforcement is only indirect.

The third goal is to guarantee consumers' defence effectively – that is what requires state (EU) defence- when individuals are not able to enforce their rights.[56]

One can say as a summary that the goals of the document are not new, they used to be included in previous consumer protection programs, but the priorities to be considered in their realisation put them in new light.

The first requirement that the EU's latest consumer protection policy determines is the consideration of national (Member State level) consumer protection policies and markets. This has a double importance. On one hand consumers' decision and their motivating factors can be better understood by monitoring, while on the other the mistakes of national consumer protection policies and the differences in regulations have become also more apparent.

The EU's intention to give more effective legal remedy guarantees through the common availability of the pace, inexpensiveness and easy access of consumers' law enforcement methods is of special importance. To help these, the Commission will publish a concise study with its previously issued recommendations and statements on alternative debate settlement methods.[57]

Partly connected to the previous priority, the program prescribes the necessity to raise an „educated" European average consumer.[58] The aim of

[55] Referring to the requirement of security among others.

[56] The program defines a wider circle than the priorities that are eventually presented, however, this thesis quotes only those ones that are to be highlighted from the aspect of consumer law enforcement.

[57] COM(2007) 99 final, p. 12-13. Cf. Fazekas, Judit op. cit. p. 34.

[58] This approach would be useful regarding taxation as well. Cf. Ercsey, Zsombor: Az Szja- és az Áfa-szabályozás igazságossága a magyar adórendszerben (Pécs, PhD

the new concept of the Commission is to supply consumers with knowledge that gives them a stabile position in the market and this can be realised through three channels: first, by using the consumers' basic right to information, consumers must receive a wide range of information on their rights, second, by introducing consumer protection focused education already in primary school and third, by paying attention to the education of such skills in adult education.[59]

It is an outstanding result of the EU's political strategy that the Commission issued its Green Book on the due diligence of consumer protection legal materials on 8 February 2007. This was considered important by the Commission because consumer protection legal materials are diverse in two ways. It is enough to refer to the already discussed result of "minimum harmonisation and the fact that the mutual relation of directives is not clear.[60]

Following the issue of the Green Book a public consultation started, in which the Member States, the EU's main institutions, consumer protection organisations as well as representatives of the business world reacted on the document and it was mostly welcomed.[61]

12. The European Union's consumer protection policy 2014-2020

The proposal on the consumer protection program of the next seven year period was submitted by the Commission in November 2011 with the primary goal to put citizens into the focus of the single internal market and give them an opportunity for successful and active market participation. This rather general goal is yet progressive in two aspects. One is that the position of consumers is qualified as central from the perspective of the operation of the internal market, which also means the recognition of the duality of consumers' legal status that consumers are creators of market activity and at the same time they are participants who require protection against the activities of other economic players. But the new consumer protection strategy may seem modern also in the sense that the new EU legislation is less paternalistic, but rather believes that the fundamental aim of the

Thesis 2013), p. 124. Available at http://doktori-iskola.ajk.pte.hu/files/tiny_mce/File/Vedes/Ercsey/ercsey_nyilv_ertekezes.pdf [30.10.2013]

[59] COM (2007) 99 final page 13.

[60] This may lead in law enforcement, or often in legislation to the point that uncertainty prevails, when a topic is ruled by several directives.

[61] In connection with this see Kenderes, Andrea: A fogyasztóvédelmi jog európai egységesítésének aktuális helyzete. In: Európai jog 2008/3, p. 23.

common EU policy is to create a consumer image that is active and able to act independently.

In order to achieve the above mentioned goals, the proposal lists the topics, in case of which it may be advisable to implement EU measures. These topics are the following: the increase of product safety with effective market supervision activity, the improvement of consumers' knowledge, the consolidation of consumer rights, the strengthening of effective legal remedy methods (especially by alternative debate settlement) as well as international law enforcement.

13. Consumer protection in the Charter of Fundamental Rights of the European Union

A document of key importance from the perspective of the European Union's development and the enhancement of its economic and political integration was accepted in Nice[62] on 7 December 2000, when the Council, the Commission and the Parliament all proclaimed the Charter of Fundamental Rights of the European Union. Instead of discussing many questions in detail in connection with the Charter of Fundamental Rights and its miserable fate, here I want to focus the attention on two issues that are very important concerning consumer protection. The first one is that the declaration of some fundamental rights on an EU level expresses the recognition that EU citizens are not only regarded as economic factors, but the EU's decision makers also consider them as valuable humans and want to express this human nature more dominantly.[63] Furthermore, article 38 of the Charter of Fundamental Rights is to be highlighted, which says that the high level of consumer protection is to be taken care of in EU policies.

The text of the Charter was finalised by spring 2004 and according to the agreement the topic was regulated in the European Union's order of competence as a "divided" competence, in which both national and EU legislations have a word also obeying the principle of subsidiarity.

The approved text says that "consumer protection requirements are to be considered, when other EU policies and activities are defined and executed". This is extended by Article 6 of title III, which makes the relevant regulation perfect when is says that "in order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves

[62] Cf. J.-F. Renucci: Droit européen des droits de l'homme. L.G.D.J. Reuter P., Paris, 2002 p. 450.

[63] Cf. M. Hesselink: Are we Human Being or Mere Consumers? In: European Voice 2006/12. p. 38.

in order to safeguard their interests." On the basis of all these, it can be stated that the Charter imports human, citizen, economic and social rights into the legal system of the European Union without content change and will thus provide a listing of the classical human rights catalogue with a combination of the social dimension of sustainable growth and the social dimension of those rights.[64]

Since the Charter of Fundamental Rights makes health care, consumer protection, access to law enforcement and free access to public services its regulation topic, it can be deducted from the norm text that the EU's legislator thinks of consumer protection as a basic legal principle and not as the "mother right"[65] of all independent consumer fundamental rights. This means that the consideration of consumer protection aspects as an EU task has a limited legal character and reflects the constitutional traditions of Member States.[66] This approach suggests that consumer protection can be regarded rather as a general requirement that determines national and EU level decision makers scope for action, but it doesn't have a fundamental right creation character that would make it possible to refer to a concrete consumer's right in front of national courts.

14. The regulation of consumer protection in the Lisbon Treaty

The chapter introducing the European Union's consumer protection policy would be incomplete without the presentation of currently valid conditions; therefore it is well-founded to have a closer look at the effective regulation. Before going into details let me put two general remarks.

First, it has to be noted that only some of the regulations in this area can be found under title XV of the Treaty on the Functioning of the European Union and there are other regulations in the Treaty that may be in connection with consumer protection policy. At this point two basic regulations are to be

[64] In connection with this see in detail J. Weiler: Does the European Union Truly Need a Charter of Rights? In: European Law Journal, 2000. p. 95. G. Alpa: New Perspectives in the Protection of Consumers. In: European Business Law Review, 2005. p. 725. and S. Weatherill: EU Consumer Law and Policy. Edward Edgar, Cheltenham-Northampton, 2005 p. 31.

[65] O. De Schutter: Les droits et principles sociaux dans la Charte des droits fondamentaux de l'Union européenne In: J.-Y. Carlier – O. De Schutter (eds.): La Charte des droits fondamentaux de l'Union européenne. Bruylant, Brussels, 2002 p. 150.

[66] O. De Schutter op. cit. p. 3., E. Riedel: Kapitel IV. Solidarität. In: Jürgen Meyer (ed.): Charta der Grundrechte der Europäischen Union. Kommentar. Nomos, Baden-Baden, 2005 pp. 9-10.

mentioned. Point f) of paragraph (2) of Article 4 of the Treaty on the Functioning of the European Union declares that a shared competence between the EU and the Member States implies among others for consumer protection. The regulation makes it clear that the exclusive competence of the EU does not relate to consumer protection, but the right of regulation is divided between the EU and the Member States respecting the principles of proportionality and subsidiarity. Article 12 of the Treaty also belongs to the same circle when it declares the horizontal clause that I have already quoted, saying that consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.

It is also to be stressed that Article 169 of the Treaty on the Functioning of the European Union takes over the regulation[67] of Article 153 of the former Treaty establishing the EEC without real change; therefore I will present at this stage the effective regulation of the EU's consumer protection role on the basis of Article 169.

Paragraph (1) of Article 169 of the Treaty on the Functioning of the European Union says that "in order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests." It is obvious from the quotation it is obvious that two goals can be separated in EU consumer protection policy, which is the promotion of consumer's interest promotion and the assurance of the high level of consumer protection.

In connection with this it is worth noting that both concepts are rather vague and indefinable, therefore the EU has a wide decision field, when it pursues its consumer protection policy. The EU's legislation is thus entitled to decide in what ways it wants to promote the enforcement of consumers' interests in a given case. It has to be emphasized though that this consideration is placed within definite limits by the rule that consumer protection may not be weakened and an already achieved level may not be given up or reduced. Similarly it is not easy to make sure if the "high level of consumer protection" works because it is not the theoretically highest or the highest level in any Member State that is to be achieved as a goal by the EU but only a high level.[68]

The presented regulation also defines the action areas that require EU action. This means that it is consumers' health, safety and the protection of their economic interests as well as their rights to information, education and

[67] Cf. Hajnal, Zsolt: Fogyasztóvédelem. In: Osztovits, András (ed.): Az Európai Unióról és az Európai Unió működéséről szóló szerződések magyarázata. CompLex, Budapest, 2011 p. 2427.

[68] In connection with this see Gál, Attila: Fogyasztóvédelem. In: Osztovits, András op. cit. pp. 1070-1071.

self-organisation for interest protection are the values, where defence requires EU action. In this respect it may be settled that the Treaty fundamentally sets paths for the EU that rely on the previously mentioned Magna Charta of Consumer Rights because the fundamental rights of consumers included in it define the content of the EU's consumer protection policy. It has to be stressed also that the presented regulation does neither entitle nor oblige any state, and such generally formulated values get concrete only by secondary right.[69]

Based on the Treaty on the Functioning of the European Union the EU will contribute with the following to achieve the above mentioned goals: according to Article 114 with measures approved in connection with the establishment of the internal market as well as measures to support, extend and control Member State policies.[70]

Article 114 of the Treaty on the Functioning of the European Union (former Article 95) says that The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. It is clear from the regulation that it is enough in this respect if the topic of the measures to be approximated can be related to the internal market, but it is not a requirement that Member States' different regulation should directly block the establishment and operation of the internal market. As a result, this article has become the most important authorisation referring to consumer protection policy. It has to be stressed, however, that without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as they directly affect the establishment or functioning of the internal market.[71]

The regulation of paragraph (3) in Article 169 can be understood as a special authorisation for EU consumer protection legislation, when it says that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures supporting, extending and attention paying Member States policies. It is to be emphasized, though, that the EU is only entitled to minimum harmonisation with this legislation authorisation because measures adopted this way will not hinder Member States to

[69] Cf. Hajnal, Zsolt op. cit. p. 2427.
[70] Cf. Treaty on the Functioning of the European Union, Article 169, paragraph 2.
[71] Treaty on the Functioning of the European Union, Article 115

maintain or introduce stricter defensive measures. But such measures must be in accordance with Treaties and the Commission has to be informed of the measures.[72]

15. Conclusions

Examining the development the European Union's consumer protection policy has gone through it can be stated that the topic in focus got into the centre of Member States' thinking at a theoretical level only in the 1970s, as it was not until the 1972 summit that Heads of State and Prime Ministers realised that the desired "generally high life standard" was nothing else but an environment and consumer protection activity.

The next development stage took place when consumer protection activity became a horizontal policy. The special importance of it is marked by the fact that consumers' interest must be considered not only when consumer protection legal acts are taken but also at any EU action, any issued legal act or taken measure.

It has to be noted that in the beginning consumer protection in the EU had no base in Treaties; common consumer protection policy became part of the primary rights only through the Maastricht Treaty. It is obvious that EU decision makers approached consumer protection in connection with the economic fundamental rights recognising the fact that the consumer protection regulations of the Member States, which are different from each other, would have an effect on the free move of goods and services. It became necessary to approximate the laws, orders and administrative regulations of Member States in this issue in order to let the single internal market operate.

Based on the goals and priorities of the examined consumer protection programs is can be seen that the EU gradually acknowledged the problem of consumer protection and its effect on the operation of the internal market. The Common Market Magna Charta of Consumer Rights defined consumers' fundamental rights and described the content of a common consumer protection policy declaring interests at the same time, where EU action was necessary. The consumer protection legislation based on consumer protection programs had three positive steps in the Member States. First, in some states it prepared a regulation for large areas of consumer interest protection that had not been regulated before, second, it gradually balanced the differences of states with weak and strong consumer protection systems, and third, it called up Member States' attention to the dynamic development of consumer protection, and the regulation by directives can be deemed as a catalyst of this trend.

[72] Treaty on the Functioning of the European Union, Article 169, paragraph 4.

The institutional system of consumer protection was, however, affected by EU legislation in two aspects: EU law's execution is the competence of the administration of Member States, the EU did not decide about concrete organisational and operational rules for the administrations of these states, but it prescribed the requirement that the effective legal protection of consumers must take place in a unified way in every Member State. This endeavour is well illustrated by the efforts of the European Commission in alternative consumers' debate settlement.

Having a close look at the case law of the Court of Justice of the European Union it can be stated that court procedures have affected consumer protection in three ways. There have been some cases, where the EU dimension of consumer protection emerged in connection with economic fundamental freedom rights; in other procedures the Court discussed what the legal relation of being a consumer means, while the most recent cases have produced questions about the harmony and mutual relation of the EU and the consumer protection policies of the Member States.

The Need for the Harmonization of Laws within the EU on Cross-Border Debt Recovery

KIRÁLY, LILLA

ABSTRACT *In order to guarantee the efficient functioning of the single internal (Union) market, firstly, the possibility had to be created – in the field of procedural rules – for judgments passed in one Member State to be recognized and enforced in another Member State – within the frames of simplified and accelerated proceedings; secondly, in order to ensure effective legal protection for citizens – and to avoid conflicting judgments – the possibility of parallel proceedings had to be minimized, in other words, there was a need for the unification of rules of jurisdiction as well."*[1]

The legal rules governing enforcement, the organizational system, real estate registration, etc. differ from Member State to Member State. Based on the position held by the EU, this is the main reason why – up to now – the effectuation of enforcement has been carried out everywhere in accordance with domestic law. However, it is of essential importance for the functioning of the EU and the realization of its objectives that all Member States have similar legal rules operating with similar effectiveness in the field of judicial enforcement. Thus – due to the differences existing between the Member States – there was a need for the precise and detailed definition of minimum rules in this field.

In recent years Union legislation in the field of enforcement has clearly reflected a tendency toward a unification of laws exceeding harmonisation[2]*: EU legislative organs do not wish to assign to the competence of the legislative organs of the Member States to define the frames of regulation themselves (as in the case of directives), on the contrary, they strive toward uniform regulation not merely concerning the ordering of enforcement but also concerning the effectuation of enforcement.*[3]

In the EU - especially in recent decades - it has become an important objective to ensure the free movement of judicial decisions. This requires

[1] Wallacher, Lajos: Európai polgári eljárásjog – álom vagy valóság? [European Civil Procedural Law – Dream or Reality?] In: Wopera, Zsuzsa – Wallacher, Lajos (eds.): Polgári Eljárásjogi szabályok az Európai Unió jogában [Rules of Civil Procedure in the Law of the European Union]. Complex, Budapest, 2006 p. 25.

[2] The two important principles to be followed when the Union is entitled to legislate are that of proportionality and necessity. In Tattay, Levente: Bevezetés az európai magánjogba [Introduction to European Private Law]. Szent István Társulat, Pázmány Péter Catholic University Publisher, Budapest, 2011 p. 17.

[3] Wallacher, Lajos op. cit. p. 25.

Community action and the adoption of Community legal norms in civil procedure in the field of judicial enforcement. The specific priorities for Community action for the period of 2010-2015 are laid down in the Stockholm Programme adopted by the European Council in December 2009, which is a comprehensive five-year plan for justice and security policies, the main objective of which is the adoption of proposals that make the positive achievements in justice and home affairs cooperation more effective and tangible to the citizens.[4]

It was in its Communication of 1998 entitled "towards greater efficiency in obtaining and enforcing judgments in the European Union"[5] *that the European Commission pointed out the difficulties relating to the cross-border recovery of debts, emphasizing the need for the enforcement of judgments and for establishing a Union level system of protective measures relating to debtors' assets.*

1. From the Brussels Convention of 1968 to the present

The foundations of the recognition and enforcement of judgments were created by the Brussels Convention of 1968[6] and the Brussels I Regulation[7] replacing the former. Their essence lies in the exequatur procedure, which is a preliminary procedure conducted for the declaration of the enforceability of a judgment passed in another Member State and which is aimed at obtaining an enforceable title, in other words, at creating the possibility for

[4] "At its meeting in Brussels on 10 and 11 December 2009, the European Council adopted a new multiannual programme entitled 'The Stockholm Programme – an open and secure Europe serving and protecting citizens. In the Stockholm Programme the European Council considered that the process of abolishing all intermediate measures (the exequatur) should be continued during the period covered by that Programme. At the same time the abolition of the exequatur should also be accompanied by a series of safeguards." (The Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Preamble (2), See also Gombos, Katalin: Az Európai Unió jogának alapjai [Foundations of European Union Law]. Complex, Budapest, 2012 p. 237.

[5] Commission Communication to the Council and the European Parliament towards greater efficiency in obtaining and enforcing judgments in the European Union [1998] OJ C 33. 31.1.1998. p. 3.

[6] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (27 September 1968) OJ C 27, 26.1.1998.

[7] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12, 16.1.2001.

enforcement in the Member State where the order of enforcement has been sought. Thus, a judgment passed in one Member State may be enforced in another only if it has been declared enforceable in the Member State of enforcement within the frames of the exequatur procedure.

For the acceleration of proceedings and in order to promote the enforcement of cross-border claims, in April 2002, the Commission submitted a new proposal for a regulation to the Council and the European Parliament on the introduction of a European Enforcement Order for uncontested claims, which was adopted in April 2004 as Regulation No 805/2004 [hereinafter referred to as Regulation].[8] The main objective of this Regulation was to eliminate the (exequatur) procedure for the declaration of enforceability with regard to uncontested claims. The Regulation meant a step beyond the regulation contained in the Brussels I Regulation and Council Regulation (EC) 2201/2003 (hereinafter referred to as Brussels II Regulation)[9] – which is concerned solely with judgments relating to parental responsibility[10] - by eliminating the exequatur procedure in relations between the Member States,[11] thereby accelerating the assertion of the lawful interests of creditors. At the same time, the Regulation does not override the Brussels I Regulation with regard to uncontested claims, since the issue of a European Enforcement Order is only a possibility offered to the creditor: the person applying for enforcement may also decide to have recourse to the Brussels I Regulation (and the exequatur procedure contained in it) instead of the special rules relating to uncontested claims.[12] This

[8] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims OJ L 143, 30.4.2004.

[9] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 OJ L 338/1 23.12.2003.

[10] In the case of judgments relating to the dissolution or annulment of marriage, Member States only have an obligation of recognition, which takes place ipso iure. Wopera, Zsuzsa: Európai családjog [European Family Law]. HVG-ORAC, Budapest, 2009 p. 123.

[11] Based on Council Regulation (EC) 44/2001, a judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there, or - in accordance with the rules applicable in the United Kingdom – when the court has registered it for enforcement (Article 38). The same applies to authentic instruments or court settlements serving as the basis for the ordering of enforcement (Articles 57–58). Practically this means the application of a separate (non-litigious) procedure, with the possibility of challenging recognition.

[12] Kapa, Mátyás: Európai jogharmonizáció a bírósági végrehajtás területén [Approximation of European laws in the field of the enforcement of court decisions]. In: Papp, Zsuzsanna (ed.): A magyar polgári eljárásjog a kilencvenes

provides an effective alternative, which significantly reduces the delays and costs associated with cross-border proceedings.[13] The exequatur procedure plays the role of a bridge between the foreign judgment and the enforcement procedure of the Member State, in return for the elimination of which the Union legislator expects the courts of the Member States to observe some minimum procedural standards with regard to judgments, court settlements and authentic instruments that may be certified as a European enforcement order.[14]

Concerning uncontested monetary claims,[15] the Regulation created the institution of the European Enforcement Order,[16] as a result of which a judgment passed in one Member State of the EU must be taken into account under the same conditions as a (domestic) judgment passed in any other Member State. This means that the domestic enforcement rules of the given Member State must also be applied to these documents in the same way, in other words, the ordering of enforcement must precede the effectuation of enforcement. This Regulation means a huge step forward concerning the free movement within the European Union of court judgments, court settlements and authentic instruments relating to pecuniary claims.[17] At the same time, its significance goes far beyond its content: concerning uncontested monetary claims it has created the institution of the European enforceable title, thereby also establishing the prototype of the European enforceable document, the application of which may later be extended to other claims as well.[18]

években és az EU jogharmonizáció [Hungarian Civil Procedural Law and the Approximation of European Laws in the 90s]. In: Tanulmányok Németh János egyetemi tanár tiszteletére [Scientific studies in honour of Professor János Németh]. ELTE Eötvös Publisher, Budapest, 2003 p. 21.

[13] Molnár, Judit: Az Európai Parlament és Tanács 805/2004/EK rendelete a nem vitatott követelésekre vonatkozó európai végrehajtható okirat létrehozásáról [Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims]. In: Gyekiczky, Tamás– Kormos, Erzsébet – Köblös, Adél – Molnár, Judit – Nagy, Adrienn – Wallacher, Lajos – Wopera, Zsuzsa: Az Európai Unió polgári eljárásjoga [Civil Procedural Law of the European Union]. Complex, Budapest, 2007 p.184.

[14] Nagy, Csongor István: Az Európai Unió nemzetközi magánjoga, Határon átnyúló polgári jogviták az EU-ban [International Private Law of the European Union, Cross-Border Civil Law Disputes in the EU]. HVG-ORAC, Budapest, 2006 p. 256.

[15] The debtor does not contest either the amount of the claim or the title to it.

[16] Based on the English text of the Regulation: European Enforcement Order, and based on the German text: europäischer Vollstreckungstitel [European Enforceable Title].

[17] Kapa, Mátyás op. cit. pp. 15, 21.

[18] Ibid. p. 22.

The elimination of the (exequatur) procedure for the declaration of enforceability forms the basis of enforcement procedures regulated by Council Regulations (EC) 4/2009,[19] 1896/2006[20] and 861/2007[21] as well.

The "Maintenance Regulation"[22] created the possibility of automatic implementation and enforcement in the European Union of decisions, court settlements and public documents relating to maintenance, without interim proceedings (exequatur procedure) [23] This automatic procedure also applies to the "European order for payment procedure". The "European Small Claims Procedure" may be considered as a particular type of the European enforceable title, given the fact that the court of the Member State which has made the decision in the legal dispute shall issue a certificate which renders the judgment enforceable in the other Member State without the exequatur procedure. [24]

[19] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ L 007 10.01.2009), applying a double standard, lays down two different procedures depending on which EU Member State's judgment is to be enforced. In the case of Member States falling under the scope of the Hague Protocol of 2007, there is no exequatur procedure (Article 17), on the other hand, the exequatur procedure is applicable to judgments passed in Member States that do not fall under the scope of the Hague Protocol of 2007 (United Kingdom, Denmark) Articles 16-17. This procedure is based on the procedure and the grounds for refusal of recognition laid down by Regulation (EC) 44/2001. (Articles 23-24.) Recognition may also be refused in the absence of an exequatur procedure if the right to enforce the decision of the court of origin is extinguished by the effect of prescription or the limitation of action and there is an earlier enforceable decision (Article 21).

[20] During the application of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ L 399. 2006.12.30.) there is no need for the court/notary having issued the decision to issue the European order for payment with a European enforceable title. Article 19.

[21] Based on the rules of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199. 31.7.2007.), at the request of one of the parties, the court of the Member State of origin shall issue a certificate concerning a judgment in the European Small Claims Procedure at no extra cost which certifies its enforceability in another Member State without a procedure for the declaration of enforceability [Article 20 (2)].

[22] Council Regulation (EC) No 4/2009, Article 2, Paragraph 1, points 1-3

[23] The automatic implementation of decisions relating to maintenance, court settlements and public documents without interim proceedings for their recognition and enforcement (exequatur procedure) is only possible if the judgments have been passed applying uniform conflict of laws provisions (The Hague Protocol of 2007).

[24] Parliament and Council Regulation (EC) No 861/2007, Article 20 (2)

The elimination of all interlocutory measures (the exequatur procedure) for the recognition and enforcement of foreign judgments[25] was also aimed at by the Green Paper - published in 2009 - and the final review of Council Regulation (EC) 44/2001.[26] The reviewed Regulation (EU) No 1215/2012[27] states that "mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure. In addition, the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed. As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed."[28] The procedure for refusal of enforcement shall, in so far as it is not covered by this Regulation, be governed by the law of the Member State addressed.[29] Thus the total abolition of "exequatur", concerning civil and commercial matters, seems feasible but the differences in the remedy systems of the different Member States can make the

[25] Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters COM (2009) 175. final, Brussels, 21.4.2009.

[26] Council Regulation 44/2001/EC functions as a matrix of judicial cooperation but empirical studies have revealed four major deficiencies: (1) The "exequatur" procedure (proceedings for the recognition and enforcement of judgments in another Member State) constitutes an obstacle to the free movement of judgments. (2) In the EU access to justice is generally not satisfactory in the case of proceedings involving non-EU defendants. (3) The effectiveness of agreements conferring jurisdiction must be improved. (4) Contact between arbitration and court proceedings must be developed.

[27] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (OJ L 351. 20.12.2012.)
The main elements of the reform introduced by the Regulation: With the exception of decisions in defamation cases and collective proceedings for damages, the intermediate procedure for the recognition and enforcement of judgments (exequatur) was abolished; Extension of jurisdiction rules of the Regulation to disputes involving third country defendants; Strengthening the effectiveness of agreements conferring jurisdiction; Creation of two other forums for disputes involving defendants domiciled or established outside the EU (place of the assets and forum necessitatis); The Regulation introduces a discretionary lis pendens rule with regard to disputes between the same parties concerning the same subject matter pending before the court of a Member State of the EU and the court of a third country; Special rules relating to connections between court and arbitration proceedings; The judge must inform the defendant of the consequences of acceptance of the jurisdiction of the court.

[28] Regulation (EU) No 1215/2012, Recital (26)

[29] Regulation (EU) No 1215/2012,Article 47 (2)

application of this provision difficult because the regulation gives only a general rule to take into consideration: "A party challenging the enforcement of a judgment given in another Member State should, to the extent possible and in accordance with the legal system of the Member State addressed, be able to invoke, in the same procedure, in addition to the grounds for refusal provided for in this Regulation, the grounds for refusal available under national law and within the time-limits laid down in that law."[30] The grounds for refusal available under Regulation (EU) No 1215/2012 are identical with the previous provisions of Council Regulation 44/2001/EC.[31] According to the revised Regulation there are many questions the Regulation does not answer at all, e.g. which courts have jurisdiction for the procedure for refusal; - as against the previous two-stage remedy system - how many possibilities will be available for the parties to appeal? The revised

[30] Regulation (EU) No 1215/2012, Recital(30), "The direct enforcement in the Member State addressed of a judgment given in another Member State without a declaration of enforceability should not jeopardise respect for the rights of the defence. Therefore, the person against whom enforcement is sought should be able to apply for refusal of the recognition or enforcement of a judgment if he considers one of the grounds for refusal of recognition to be present. This should include the ground that he had not had the opportunity to arrange for his defence where the judgment was given in default of appearance in a civil action linked to criminal proceedings. It should also include the grounds which could be invoked on the basis of an agreement between the Member State addressed and a third State concluded pursuant to Article 59 of the 1968 Brussels Convention." [Regulation (EU) No 1215/2012, Preamble (29)] The decision on the application for refusal of enforcement may be appealed against by either party. The appeal is to be lodged with the court which the Member State concerned has communicated to the Commission pursuant to point (b) of Article 75 as the court with which such an appeal is to be lodged. [Regulation (EU) No 1215/2012, Article 49 1, 2.]

[31] On the application of any interested party, the recognition of a judgment shall be refused: (a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed; (b) where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; (c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed; (d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; e) if the judgment conflicts with the Jurisdiction in matters relating to insurance, Jurisdiction over consumer contracts, Jurisdiction over individual contracts of employment when the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or in the case of exclusive jurisdiction. [Regulation (EU) No 1215/2012 ,Article 45]

Regulation – by the abolition of "exequatur"- unifies the procedure of refusal and the national enforcement of court decisions, which may make the procedure easier for the creditor and the debtor but it makes the procedure even more complicated due to the lack of a remedy system.

2. The latest sources of law relating to cross-border judicial enforcement

In the European Union there has been a remarkably active legislative activity in the field of civil procedure since the turn of the millennium: the EU's supranational bodies have been broadening the scope of EU law to cover an increasingly wide area, thus in the enforcement process new measures and legal sources may be introduced in the future. An example of this is the Green Paper on the *Transparency of Debtors' Assets* published on 6 March 2008,[32] which seeks to find solutions to improve the enforceability of judgments and to access reliable information on debtors' assets. In terms of transparency, it formulates possibilities in four directions:[33]

- the need for drawing up a manual of national enforcement laws and practices;
- increasing the range of information available and improving access to a wider range of registers;
- establishing the frames of exchange of information between enforcement authorities;
- measures relating to the debtor's assets declaration.

Outstanding importance may be attributed to the Green Paper on *the Attachment of Bank Accounts* published on 24 October 2006,[34] which urges the creation of a Community instrument for the attachment of bank accounts. This would enable creditors to secure the amount of money covering the claim against withdrawal or transfer by debtors. This instrument would serve the creditors' interests, by attaching the funds in the bank account, but it would not render their transfer to the creditor possible. Moreover, a strict condition for issuing the instrument would be to satisfy the court that there is a need for the protection of the creditor's interests, which would serve as a guarantee for the debtor. These rules were submitted to the Council of the

[32] Green Paper – Effective Enforcement of Judgments in the European Union: the Transparency of Debtors' Assets COM (2008) 128 final, Brussels 6.3.2008

[33] Baracsi, Katalin: A külföldi határozatok európai uniós végrehajtásának történeti áttekintése és a jövő kihívásai [Historical Overview of the Enforcement of Foreign Judgments in the European Union and Future Challenges]. In: Glossa Iuridica, 2011/1. p. 160.

[34] Green Paper on Improving the Efficiency of the Enforcement of Judgments in the European Union: the Attachment of Bank Accounts COM (2006) 618 final

European Union on 25 July 2011 in the form of a *Proposal for a Regulation creating a European Account Preservation Order to facilitate cross-border debt recovery.*

3. The European Account Preservation Order

3.1 Preliminary (provisional, protective) measures ensuring immediate rights protection in European civil procedural law

It is an approach characterizing the civil procedural laws of the European Member States that measures ensuring the immediate protection of rights in urgent cases are treated uniformly, and although a distinction is often made between provisional or protective measures, they are regulated within the frames of a coherent system, regardless of the stage of the process in which the need for the protection of the rights of the applicant arises.[35]

At present, the creditor intending to enforce his claim in another Member State comes up against difficulties. The procedure is especially long and costly if he wishes to apply for preliminary measures to preserve the debtor's assets located in another Member State in order to cover his claim. Nonetheless, such "preliminary" measures are of key significance in order to preserve the debtor's assets until the court passes an enforceable judgment.[36]

In accordance with the Brussels Convention of 1968, it was possible to apply for "protective measures" concerning the debtor's assets if, in the given State, enforcement of the judgment passed by another Contracting State had been authorized, but this judgment had been appealed by the debtor. This means that the creditor had been granted the enforceable judgment, but with regard to the fact that it had to be enforced in another State, which would take more time – also because of allowing for the possibility of appeal –, the Convention rendered it possible to guarantee the success of enforcement by provisional measures ordered for this period.[37]

[35] Wopera, Zsuzsa: Az ideiglenes intézkedés elmélete és gyakorlata a polgári eljárásjogban [The Scientific and Practical Approaches of the Provisional Measure]. PhD értekezés [PhD Thesis], Miskolc, manuscript, 2001 p. 161.

[36] Proposal for a Regulation of the European Parliament and the Council Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters. COM(2011) 445 final, Brussels, 25.7.2011.1.

[37] Wopera, Zsuzsa: Az ideiglenes intézkedés elmélete és gyakorlata a polgári eljárásjogban, p. 163.

Article 47 of the Brussels I Regulation[38] replacing the Brussels Convention of 1968 provides for provisional measures that may be applied prior and subsequent to the declaration of enforceability. The creditor cannot effectuate final measures of enforcement before the conclusion of the procedure for the declaration of enforceability but he is provided with such means by which – either based on the standard of the national law of the State requested or directly on the Regulation – he may prevent the debtor from hindering later enforcement by disposing of his assets in the meantime.[39] Paragraph (1) of Article 47 provides for provisional measures that may be ordered following the resolution of the legal dispute but before the judgment having been declared enforceable,[40] on the other hand, Paragraph (2) of Article 47 states that the right to order protective measures following the declaration of enforceability of the foreign judgment does not derive from national law but directly from Community law.[41] This means that the applicant is no longer required to meet the conditions laid down by national law, the protective measure may also be ordered without this, directly based on the Brussels I Regulation.[42] The Brussels I Regulation does not contain provisions relating to the actual methods of enforcement because this question had been governed exclusively by national law until the Proposal for the Regulation creating the European Account Preservation Order[43] was made. The Proposal for a Regulation[44] renders it possible to submit an application for a provisional measure prior to the filing of the statement of claim, thereby conferring on it the "role of preventing legal

[38] Council Regulation 44/2001/EC

[39] The term of provisional measures is not defined either in the text of Council Regulation (EC) 44/2001 or the explanatory reports. The European Court of Justice has dealt with the legal nature of provisional measures and their relation to the basic claim but it has not found it necessary to give the term an autonomous meaning in Community law. Conditions for ordering provisional and protective measures are regulated by the national laws of the Member States. In: Kengyel, Miklós – Harsági, Viktória: Európai Polgári Eljárásjog [The European Civil Procedural Law]. Osiris, Budapest, 2009 p. 142.

[40] Ibid.

[41] Ibid. p. 143.

[42] Protective measures may be used until the application for legal remedy submitted concerning the issue of the certificate of enforceability has been adjudicated, following this there is a possibility for enforcement for satisfaction.

[43] Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters COM (2011) 445 final Brussels 25.7.2011.

[44] Proposal – COM (2011) 445 Article 5, Paragraph 1, point a)

action", which also provides opportunity for extending the scope of application of the legal institution.[45]

Recital (33) of the revised Regulation (EU) No 1215/2012 states that: "where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured under this Regulation. However, provisional, including protective, measures which were ordered by such a court without the defendant being summoned to appear should not be recognised and enforced under this Regulation unless the judgment containing the measure is served on the defendant prior to enforcement.[46] This should not preclude the recognition and enforcement of such measures under national law. Where provisional, including protective, measures are ordered by a court of a Member State not having jurisdiction as to the substance of the matter, the effect of such measures should be confined, under this Regulation, to the territory of that Member State."[47] The revised Regulation – which is to enter into force on 10 January 2015 - will make the judicature more simple compared to the previous Council Regulation 44/2001/EC.

Article 20 of Council Regulation (EC) 2201/2003 enables the courts of a Member State to take provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if the court of another Member State has jurisdiction as to the substance of the matter. In practice this rule has less significance regarding matrimonial matters, but rather great significance regarding matters of parental responsibility.[48]

Article 14 of Council Regulation (EC) 4/2009 provides – in the same way as the Brussels I Regulation – that application may be made to the courts of a Member State for such provisional, including protective measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.[49] In the States falling within the scope of the Hague Protocol of 2007, an enforceable decision shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of

[45] Wopera, Zsuzsa: Az ideiglenes intézkedés elmélete és gyakorlata a polgári eljárásjogban, p. 165.

[46] In order to inform the person against whom enforcement is sought of the enforcement of a judgment given in another Member State, the certificate established under this Regulation, if necessary accompanied by the judgment, should be served on that person in reasonable time before the first enforcement measure. In this context, the first enforcement measure should mean the first enforcement measure after such service. [Regulation (EU) No 1215/2012, Recital (32)]

[47] Regulation (EU) No 1215/2012, Article 35

[48] Kengyel, Miklós – Harsági, Viktória op.cit. p. 227.

[49] Ibid. p. 257.

the Member State of enforcement.[50] In the case of judgments passed in Member States not falling under the scope of the 2007 Hague Protocol, provisional and protective measures are available even without a declaration of enforceability.[51]

If – under Council Regulation (EC) 805/2004 – the judgment has already been certified as a European Enforcement Order, he may file an application for a protective measure with the court having certified the enforceable title, or with the enforcement authority of the Member State in which the bank administering the debtor's bank account is located, but he may also do so based on national law.[52]

Protective measures ensuring immediate rights protection are of key importance with regard to the success of enforcement, however, so far these legal institutions have not been regulated by an independent Regulation - corresponding to their significance. In this field an essential step forward was the creation of an independent, European level protective measure: the European Account Preservation Order.

3.2 The European Account Preservation Order

In its report published in May 2011, the European Parliament urged the improvement of cross-border enforcement and called upon the Commission to put forward a proposal for solving the problem of the attachment of the debtor's bank account.[53] By this, it endeavoured to contribute, firstly, to the development of the Union internal market as outlined in the Europe 2020 Strategy for Growth[54] and secondly, to the creation of a genuine European area of civil justice in the area of enforcement. The general objectives of the proposal are[55]:

- to facilitate the recovery of cross-border debts;
- to reduce the risks involved in cross-border trade, thereby encouraging more cross-border business activity.

The means for achieving these aims are:[56]

[50] Council Regulation (EC) 4/2009 Article 18.
[51] Council Regulation (EC) 4/2009 Article 36.
[52] Council Regulation (EC) 805/2004 Article 6, Article 14.
[53] Plenary session of the EP of 10 May 2011. Document 2009/2169(INI) of 6 February 2011 of the Committee on Legal Affairs
[54] At the meeting of the European Council of 26 March 2010, the leaders of the EU defined the "Europe 2020" as a strategy which serves the purposes of increasing the competitiveness of the EU as well as growth and the creation of more job opportunities. Source: http://ec.europa.eu/europe2020/index_hu.htm [20.07.2012.]
[55] Proposal COM (2011) 445. 25.7.2011. 1.2.
[56] Ibid.

- account preservation orders issued on the basis of the same conditions;
- access to information on the financial institutions administering debtors' bank accounts;
- reducing costs for applicants;
- quick procedure; and
- orders with provisional effect, issued without the preliminary hearing of the debtor.

The Proposal for a Regulation establishes a new, *independent Union procedure* in civil and commercial matters, with regard to cross-border[57] monetary claims[58] - besides the already existing regulations[59] - through which the creditor may apply for the attachment of the debtor's bank accounts in any Member State of the Union[60]:

a) prior to the initiation of judicial proceedings on the substance of the matter against the defendant or at any stage during such proceedings;
b) after the claimant has obtained a judgment, court settlement or authentic instrument against the defendant which is enforceable in the Member State of origin but which *has not yet been declared enforceable* in the Member State of enforcement where such a declaration is required;
c) after the claimant has obtained a judgment, court settlement or authentic instrument against the defendant which is by operation of law enforceable in the Member State of enforcement or has been *declared enforceable* there.

Consequently, the European procedure will be available in two – clearly distinguished – situations: prior and subsequent to obtaining an enforceable title in the Member State in which the bank account is held. Based on this, the Regulation distinguishes a "Section 1" and a "Section 2" for issuing the European Account Preservation Order (EAPO). Section 1[61] is applicable to

[57] For the purposes of this Regulation, a matter is considered to have cross-border implications unless the court seized with the application for an EAPO, all bank accounts to be preserved by the order and the parties are located or domiciled in the same Member State. Ibid. Article 3

[58] Similarly to the Brussels I Regulation, this Regulation does not apply to bankruptcy, social security, arbitration, accounts exempt from seizure under the national law, etc. As opposed to the Brussels I Regulation, it shall apply to matters of matrimonial property, the property consequences of registered partnerships or successions where Union legislation proposed by the Commission relating to these matters is adopted and applied. Ibid. Articles 2-3.

[59] The account preservation order is available to the creditor as an alternative to the protective measures in the Member States. Ibid. Article 1.

[60] Ibid. Article 5.

[61] Ibid. Articles 6-13.

points a)-b), and Section 2[62] is applicable to point c) "Section 3"[63] contains the common provisions applicable to both preceding sections.

In accordance with "Section 1", jurisdiction for issuing the EAPO shall lie with the courts of the Member State where proceedings on the substance of the matter have to be brought in accordance with the applicable rules on jurisdiction. Where more than one court has jurisdiction for the substance of the matter, the court of the Member State where the claimant has brought proceedings on the substance or intends to bring proceedings on the substance shall have jurisdiction. The courts of the Member State where the bank account is located may also have jurisdiction to issue an EAPO, but in this case the effect of the order is limited to that Member State and it cannot be recognized and enforced in other Member States.[64] In accordance with the rules of "Section 2", where the claimant has obtained a judgment or court settlement, jurisdiction to issue an EAPO shall lie with the court which issued the judgment or court settlement; where the claimant has obtained an authentic instrument, jurisdiction to issue an EAPO shall lie with the competent authority in the Member State where the authentic instrument has been drawn up and which is designated for this purpose by each Member State; or jurisdiction shall lie with the authority which that Member State has designated as competent for issuing the order.[65]

The main question concerning the ordering of protective or provisional measures is when it is possible to establish that the claim or satisfaction of the claim is endangered.[66] The Proposal requires the creditor to satisfy the court that he has a good chance of winning the case on the merits, in other words, his claim is well-founded and at the same time, that there is a real risk that the enforcement of the court judgment to be passed later could possibly be hindered by the debtor's conduct. Apart from this, the court may also require the creditor to provide a security deposit to ensure compensation for any damage suffered by the defendant if the order is later set aside with reference to it being unfounded. (Section 1).[67] As a matter of course, "Section 2" does not lay down conditions concerning the well-foundedness of the claim, however, the applicant must make a declaration to the effect

[62] Ibid. Articles 14-15.
[63] Ibid. Articles 16-51.
[64] Ibid. Article 6.
[65] Ibid. Article 14.
[66] One must reckon with the possibility that at the time of the resolution of the legal dispute the asset constituting the subject-matter of the claim or the assets covering the claim may not be not subject to enforcement any more. Kommentár a Bírósági Végrehajtásról szóló törvényhez [Commentary to the Act on Judicial Enforcement]. § 185, Complex Law Database
[67] For example, because the creditor had no valid claim on the substance. COM(2011) 445. Article 7 , Article 12.

that the court judgment has not been performed yet,[68] and whether he has seized any other court with an application for an EAPO or an equivalent protective measure under national law against the same defendant and aimed at securing the same claim, and whether such an order has been issued or such a protective measure has been ordered already (applicable to both Sections 1 and 2).[69]

The EAPO will be issued in *ex parte* proceedings, in other words, without hearing the other party. This guarantees "the surprise effect" of the measure.[70] However, in those situations where there is no need for this, the applicant may request that the proceedings take place (*inter partes*) hearing the other party. There is a possibility for taking written evidence (in the form of a written witness statement or expert opinion). Oral testimony is admitted only in exceptional cases (with the help of a video conference or other communication technology), which ensures the quickness of proceedings[71] (Section 1).

Where an application for an EAPO is made prior to the initiation of proceedings on the substance, the claimant shall initiate such proceedings within 30 days of the date of issue of the order or within any shorter time period set by the issuing court, failing which the order shall be revocable.[72] The court shall issue the EAPO within 7 calendar days of the lodging of the application. Where an oral hearing is deemed necessary, the court shall convene the hearing within a further 7 calendar days at the latest and shall issue the order within 7 calendar days after the hearing has taken place at the latest (Section 1) or within 3 calendar days of the lodging of the application at the latest (Section 2).[73]

The provisions below are applicable to both "Sections 1 and 2":

An EAPO issued in one Member State shall be recognised and enforced in other Member States. There will be no need for a further procedure for the declaration of its enforceability or its recognition.[74]

It may be difficult for the creditor to obtain information about the debtor's bank account. The Proposal requires Member States to alleviate this by ensuring the right of choice between the two mechanisms below:[75]

- The applicant may submit a request for access to information on the debtor's bank account in the Member State of enforcement. In this

[68] Ibid. Article 15.
[69] Ibid. Article 19.
[70] The defendant shall not be notified of the application or be heard during the proceedings prior to the issue of the EAPO.
[71] COM(2011) 445. Articles 10-11.
[72] Ibid. Article 13.
[73] Ibid. Article 21.
[74] Ibid. Article 23.
[75] Ibid. Article 17.

case, the court (or other authority) having jurisdiction shall obtain the necessary data.

- Member States may oblige all finacial institutions in their territory to disclose whether the debtor holds a bank account with them.

With regard to the serving of the EAPO on the bank, the Proposal distinguishes between two situations:

- Where the court and the bank are located in the same Member State, service is governed by national law.
- If the EAPO is served in another Member State, service is governed by Regulation (EC) 1393/2007, but with an important modification: the documents to be served are transmitted by the court of origin or directly by the applicant to the competent authority of the Member State of enforcement, which will serve them on the bank holding the bank account. Not only does it guarantee that banks receive the orders through channels known to them, but it also enables the competent authority - ex officio - to have regard to the funds exempt from enforcement.[76]

Compared with a variety of other delivery modes and the free choice between methods of service, this method has the significant advantage that it involves competent authorities of the Member State of enforcement. [77] By this not only does it ensure that the financial institution receives the orders through the known channels, but it also makes it possible for the competent authority to have regard, ex officio, to the amounts exempt from execution, if such exemption is applicable under national law. If the order provides for the attachment of several bank accounts, the creditor is required to release the blocked amounts in excess of the claim without delay. Because of the significant differences between the national laws relating to joint and nominee accounts, this issue continues to be regulated by national law. [78]

The bank is to implement the order immediately by attaching the amount of money indicated in the order. Any funds exceeding the amount specified in the EAPO remain at the disposal of the debtor. Within 3 working days following receipt of the EAPO, the bank shall inform the competent authority and the claimant about the amount of funds in the defendant's account that have been preserved. Where the account balance is sufficient to cover the amount specified in the EAPO, the bank shall not disclose the balance of the defendant's account.

Where the EAPO covers several accounts held by the defendant with one and the same bank, the bank shall implement it only up to the amount specified therein.[79] Where EAPOs have been issued covering several

[76] Ibid. Articles 24-25.
[77] Ibid Articles 24-25.
[78] Ibid Articles 28-29.
[79] Ibid. Articles 26-27.

accounts in different Member States, the claimant shall have a duty to effect the immediate release of any amount which exceeds the amount stipulated in the EAPO. Having regard to the great differences between the national rules relating to the attachment of joint or nominee accounts, the Proposal reserves the regulation of this area to national laws.[80]

Requests for the implementation of account preservation that cannot be fulfilled in part or as a whole are "ranked" by the financial service provider until the funds required for implementation are ensured. The Proposal provides that the rank of the EAPO corresponds to the rank of an equivalent measure in national law.

At the time of the entry into force of the measure – the preservation – the debtor must be immediately notified through service of the order and the attached documents.[81] Legal remedies differ in the case of "Section 1"[82] and "Section2"[83].

Appeal against the order authorizing the protective measure does not have a suspensory effect. The Proposal allows the debtor to challenge the EAPO on grounds relating either to substantive or procedural law.

With regard to the question of determining the court having jurisdiction to adjudicate the application for review, the approach formulated by the Brussels I Regulation is to be followed:[84]

- The debtor must address his application for legal remedy to the court of origin issuing the order – and having proceeded originally -, therefore, the same court decides about the review of the order;
- Exceptionally, the objections raised concerning the enforcement procedure must be addressed – on a standard form – to the courts of the Member State of enforcement, since the procedure is conducted by that State.
- A different rule of jurisdiction is applicable to some categories of debtors who are generally considered in the legal dispute as "the weaker party", in other words, to consumers, employees and insured persons. Such debtors may also address their applications for legal remedy to the courts of the Member State where they are domiciled.

Banks may charge a fee for the execution of the EAPO only if they are entitled to do so in the case of equivalent measures under national law. For the sake of increasing transparency, the Member States concerned must define a single fixed price applicable in their territory. Single fixed prices are to be defined concerning the costs of recourse to the competent authorities –

[80] Ibid. Articles 28-29.
[81] Ibid. Articles 24-25.
[82] E.g. review of the EAPO (Ibid. Article 34.), limitation or termination of enforcement (Ibid. Article 35.)
[83] E.g. setting aside the order, suspension of enforcement (Ibid. Article 35.)
[84] Ibid. Articles 34- 36.

e.g. the bailiff. In spite of the fact that Member States retain their discretion to decide about the court fees for obtaining the EAPO, such fees shall not be higher than the fees for obtaining an equivalent measure under national law, disproportionate to the amount of the claim, and shall not discourage claimant from making use of the procedure.[85] Article 43 of the Proposal obliges the losing party to bear the costs of the European procedure.

There are national procedures for the issue of protective measures – including orders for attachment – in the laws of each Member State, but there are great differences in the conditions for ordering the measures and in their efficiency. In cross-border cases, applying for national protective measures is complicated, time-consuming and costly, especially if the creditor endeavours to achieve the attachment of several accounts held in several Member States. The European procedure ensuring the simple, quick and inexpensive attachment of the debtor's bank accounts would remedy the deficiencies of the present situation. Its immense advantage lies in the fact that where the currency of the funds held in the account is not the same as that in which the EAPO was issued, the bank shall convert the amount by reference to the official exchange rate of the day of implementation.[86]

The new European Account Preservation Order would have an impact on the economy as well, having regard to the fact that more than half of the European economic operators would expand their cross-border commercial activities if a unified European regulation relating to the attachment of bank accounts was adopted.[87] However, the first practical step would be to set up a uniform central register of banks and bank accounts.

3.3 The transparency of the debtor's assets

Problems relating to the recovery of cross-border debts derive partly from the fact that both delayed and unperformed payments endanger the interests of undertakings and consumers, and partly from the fact that the creditor and the enforcement authorities do not have information about the place of residence or assets of the debtor at their disposal.

What means are available for the precise identification of the debtor's assets in the territory of the Member States? The most obvious solution would consist of: the use of registers,[88] the debtor's obligation to make an

[85] Ibid. Articles 30, 31, 43.
[86] Ibid. Article 26.
[87] Ibid. 1.2.
[88] a) Commercial registers (company law) (68/151/EGK) (89/666/EGK) b) Population registers: central registers are often not accessible for creditors wishing to find out the address of private individual debtors c) Social security and tax

assets declaration, the elaboration of a manual relating to national laws on enforcement and practices, and the exchange of information between enforcement authorities.

In the European Union several sources of law of the Member States authorize enforcement organs to request information directly from the debtor about his financial situation. Two groups of assets declaration may be distinguished: one obliges the debtor to disclose all of his assets; as opposed to this, the other requires him to identify only assets that would be of sufficient value to satisfy the creditor's claim.[89] Debtors' assets declarations are initiated by creditors in the majority of the Member States. Coercive measures may be imposed upon the debtor who refuses to disclose his financial situation, and making a false declaration is considered a criminal offence.[90]

The Green Paper[91] recommends the introduction of a uniform "*European Assets Declaration*", which would oblige the debtor to disclose all of his assets in the European Judicial Area. It would lay down sanctions for refusal to make a declaration or for false declarations.[92] The debtor should have the opportunity to avoid making a declaration by offering payment, or by identifying assets that are sufficient for the enforcement.[93] The *European Assets Declaration* would be provided on a uniform standard form, on the same conditions, and in accordance with the same content and formal requirements.

The Commission Proposal clearly points out that the act of taking the declaration would fall within the competence of the Member States, which task would include the appointment of the competent authority. In my opinion, the most suitable institution in Hungary would be the National Tax and Customs Administration of Hungary (NTCA) – because of its administrative capacity and already existing European liaison system.[94] It is an important argument in favour of the NTCA that there is an established system of remedies connected with its procedural acts (objection, appeal, judicial review, modification and revocation of decisions/orders, measures of supervision, instruction to conduct a new procedure). Moreover, appointing the NTCA would provide a solution to our questions relating to jurisdiction and competence and also to the protection of the obligor's data.

registers: for the creditor, they may be a better means of gathering information than debtor's declarations, since there is no need to involve the debtor.

[89] Green Paper – Effective Enforcement of Judgments in the European Union: The Transparency of the Debtors' Assets, Brussels 6.3.2008. COM (2008) 128. 12.

[90] Ibid.

[91] Ibid.

[92] Imposing a fine or arresting the debtor

[93] Green Paper - COM (2008) 128. [14.]

[94] Dombi, Gergely: Végrehajtás külföldön [Enforcement Abroad]. In: Adóvilág, 2009/9. pp. 2-4.

In my view, introducing the uniform European Assets Declaration in the near future is not an unattainable objective. Within the European Judicial Area, the foundations for cooperation between the Member States have already been laid, ensuring an adequate background for the introduction of such an institution. Based on the research conducted among independent Hungarian court bailiffs[95], such a legally compulsory assets declaration would alleviate bailiffs' work, but only if bailiffs were empowered to impose fines in the case of the debtor's refusal to make a declaration or his supplying false data, and following this, to apply criminal sanctions – in the case of his impeding the procedure.[96]

During the integration of the European Assets Declaration into the national legal order, the other most important question is what means of legal remedy are available during the procedure to the persons concerned.

With regard to the exchange of information between enforcement organs, it may be stated that independent court bailiffs have neither direct nor indirect access to the registers of the other Member States. The Nordic Countries are planning to adopt an "Agreement on the Exchange of Information in Recovery Matters".[97] This agreement would be the first legal instrument to lay down direct cooperation between enforcement organs.

The regulation applicable in matters relating to maintenance may also be of precedent-setting importance concerning the expansion of the system of cooperation: national central authorities ensure access to information that facilitates the enforcement of maintenance claims, especially with regard to establishing the obligor's place of residence and assets.[98]

[95] Király, Lilla: Az adós vagyonának feltérképezhetősége tárgyában, a végrehajtók körében végzett felmérés [Survey Conducted among Bailiffs on the Transparency of Debtors' Assets (Manuscript)], 2009

[96] Ibid.

[97] Green Paper – The Transparency of the Debtors' Assets, COM (2008) 128. [28]

[98] Council Regulation (EC) 4/2009 (Articles 49-63.) See: "Act LXVII of 2011 on the Performance of Central Authority Tasks in Cross-Border Matters of Maintenance" in Hungary

Local participative democracy in Hungary

KISS, MÓNIKA DOROTA

ABSTRACT *The institutions of the local participative democracy in Hungary have been relatively unified for years. This means that the* constitutional *process did not really deal with the direct local governance in the period of 2010-2011. The legislator seems to be indifferent to the local democracy, although the local institutions to be mentioned do not require basic modification. Most of them are regulated in detail by local law; accordingly there is no central notion to stipulate them uniformly. In my opinion, this is a correct reasoning. Nevertheless the central and the local regulations are always changing. In the future it is possible that the local and the territorial public power will be modified, but it should take place with the consequent dialogue between the central Government and the local governments.*

The study is mostly based on the Act on Local Government of 1990 which is already not in force. Nearly two years passed from the writing until the publication of the study, therefore the study has "only" legal historical relevance, except the sections concerning the Fundamental Law.

1. Legal basis

Legal institutions of the local participative democracy have a triple-level regulation in Hungary. As for the constitutional provisions, the Fundamental Law declares that local governments in Hungary are to be established to administer public affairs and exercise public power at a local level.[1] Hungary is organised into counties, towns and villages. Towns can be organised into districts.[2] As it can be observed that there is a two-level local self-government system consisting of the municipal (local) and the territorial (county) communities in Hungary. Municipal local self-governments function in the villages, towns, towns with township status (they are the seats of the newly constituted townships), towns with county status and the capital districts. The capital has a two-tier local self-government system, which consists of itself and the districts. The county is a territorial self-government.

The citizens of the municipalities and counties eligible to vote are entitled to local self-governance. The voters exercise their communal rights to local

[1] Article 31, Section (1)
[2] Article F, Section (1) – (2)

self-government by the elected representatives indirectly or by local referendums directly.

The Fundamental Law provides only the local referendum[3] among the direct legal institutions, while the other participative formations, such as the people's initiative, public hearing, village meeting, sub-municipal self-government, consulting hours, committee membership and the publicity of councils are not mentioned in the Fundamental Law, only in sectoral acts.

In 2010 a very significant legislative process began. Due to the Government's concepts, a great number of new laws were adopted. At present two Acts on Local Government are in legal force: the previous Act on Local Government adopted in 1990[4] and the new Act on Local Government adopted in 2011.[5] The new Act came into force on 1 January 2012, but there are some provisions, especially the material rules of the local referendum and the peoples' initiative laid down in the previous Act, which are to be enforced until the following general election (October 2014).

In 2013 the Parliament also adopted the new Act on Election[6] and at the same time overruled the previous Act on Election of 1997,[7] with the exception of the proceeding rules of the local referendum and the local people's initiative.

Last but not least, the representative bodies are also entitled to adopt their own implementation ordinances on the local referendum, the people's initiative and the other participative formations. Through the local law-making, the representative bodies can vindicate their special communal traditions, but it is a constitutional principle that the local law may never conflict with any other legislation. This principle has been violated occasionally.

Besides the legal regulation, the Constitutional Court also has dealt with more related areas of the connected central and local laws in the past years. Decisions of the Constitutional Court have taken an effect on the new normative framework, but several questions have been left out of consideration.

[3] The National Assembly (Parliament) adopted the new Constitution (officially „Fundamental Law of Hungary") on 18 April 2011. It was published in the Hungarian Journal on 25 April 2011 (Hungarian Journal 2011. No. 43, p. 10656-10681.), and it came into force on 1 January 2012.

[4] Act on Local Government of 1990. No. LXV.

[5] Act on Local Government of 2011. No. CLXXXIX. The new Act was adopted on 19 December 2011 and it was published in the Hungarian Journal on 28 December 2011 (Hungarian Journal 2011. No. 161. pp. 39268-39293). The new Act overrules periodically the previous Act, its final expiry will be in October 2014.

[6] Act on Election of 2013. No. XXXVI.

[7] Act on Election of 1997. No. C.

2. Local referendum

The local referendum has fundamental, statutory and local regulations. According to the Fundamental Law, a local referendum may be held on any matter within the responsibilities and competences of local governments as defined by law.[8]

At statutory level the local referendum is disposed by two Acts, the previous Act regulating the material rules[9] and the Act on Election regulating the proceeding rules.[10]

A very colorful practice of direct participation prevails because of the regulatory authorization of the representative bodies, and the same can be said about the local people's initiative too. Different local autonomies, different practices. Of course, this phenomenon is undoubtedly problematic. There is an important rule: the local law may regulate only those procedural rules and further conditions of local referendums whereon the representative bodies have authorization, but the local case law shows that the local law makers often exceed their regulatory power.

The Constitutional Court has already declared several times this anomaly, which arises from the presented debatable dogmatical solution. However, sometimes even the Constitutional Court is inconsequential, too. The number of the related decisions of the Constitutional Court is conspicuous. Those local ordinances on local referendum, which have been proposed before the Constitution Court in order to control them posteriorly, have proved almost without exception to be false. At the same time, the Constitutional Court has declared such domains of local government for local regulation which originally may not be regulated at this level.[11] Accordingly, the legislator should reconsider and basically modify the normative provisions. It is advisable to regulate all segments of local referendum uniformly in the future Act, without any regulatory authorization of localities.

According to the Fundamental Law, every adult citizen of any other Member State of the European Union who is a resident of Hungary shall have the right to be a voter as well as a candidate in the elections of local representatives, mayors and the members of the European Parliament.[12] The previous Act on Local Government declares that these persons are also entitled to take part in the local referendums (and local people's initiatives).

The local referendum is valid if more than half of all the citizens eligible to vote take part in it, and it is effectual if more than half of all the participants give the same answer for the worded question. If the referendum

[8] Article 31, Section 2.
[9] Chapter IV.
[10] Chapter XV.
[11] Constitutional Court Decision No. 816/B/2002.
[12] Article XXIII, Section 2.

is ineffectual, the representative body may not call for another one on the same question within a year.

There are three types of issues of local referendums: facultative, obligatory and forbidden. As a general rule, the representative bodies may call for facultative local referendums on every type of cases within the local autonomies.

The representative bodies are liable for call for obligatory referendums on the following issues defined by the Act: a) territorial joining another county; b) establishment and abolition of communal territorial unions; c) establishment of new villages; d) transmission, receiving and change of territorial divisions between neighbouring municipalities; e) establishment and abolition of joint representative bodies. Beyond the statutory cases, the representative bodies are also obliged to call for local referendums on those issues that they pre-determined in their ordinances.

The forbidden issues are narrowly detailed in the Act and they cannot be expanded at local level. The Constitutional Court declared that the expansion of forbidden issues by local law would limit the voters' right of direct local self-governance.[13]

The forbidden issues are the followings: a) type and rates of local taxes; b) local budget; c) organizational, functional and personal cases belonging to the competence of the representative body; d) dissolution of the representative body.

Some of the forbidden issues are modifiable. During the preparation of the new Act on Local Government[14] the experts suggested that local taxes should possibly be facultative. In some countries such as in Poland[15] or Switzerland the local voters have the right to model the local taxes, their types or rates. A similar right should be granted for Hungarian voters as well.[16] However, the opposing arguments say that the right to model the local taxes by local referendums would prejudicially act upon the financial position of a given local government. Both opinions are questionable. The concepts of the right to model the local taxes directly by the voters is only a theory, the letter opinion, in turn, is a simple assumption.

As for the new Act, the representative bodies can undertake every local public affair by their own decisions or by local referendums. Therefore, the

[13] Constitutional Court Decision 34/1993. (V. 28.)

[14] Working Paper of the new Act on Local Government of 2011.

[15] Kowalczyk, Andrzej: Local Government in Poland. In: M. Horváth, Tamás (ed.): Decentralization: Experiments and Reforms. Local Government and Public Service Reform Initiative, Open Society Institute, Budapest, 2000 p. 231.

[16] Kiss, Mónika Dorota: New aspects of Local Government in Europe – What we can learn from each other. In: Balogh, Zsolt György (ed.): Studia Iuridica Auctoritate Universitatis Pécs Publicata: Essays of Faculty of Law University of Pécs Yearbook of 2011. University of Pécs Faculty of Law, Pécs, 2011 p. 152.

local budget as a complete question may not be submitted for local referendums, but some of its items connected with the undertaken voluntary tasks are to be decided directly by the voters.

Local referendums may be initiated by four groups: a number of citizens eligible to vote determined between 10-25 percent by local law (in this case the representative body has liability for calling for the initiated referendum); at least one-quarter of the representatives; the committees of the representative body; the management of the local social organizations.

The initiators have the exclusive right to word the question in advance. This means constitutionally that the representative body or other organs, such as the preparatory committee, the mayor etc. may not vindicate the right to change the presented question, neither before calling for the referendum, nor afterwards.[17] If the voters initiate the local referendum, the question is firstly presented on the sign-up sheet and the municipal clerk authenticates it after a professional overview. In other cases the representative body controls the question, but exclusively on legal grounds, with the municipal clerk's technical help.

The number of the local referendums is relatively low. The data of the real local referendums have been registered only since 1998, before that there were no such type central registries conducted by the Ministry of Home Affairs. Statistics show that the local autonomies hold usually only the obligatory local referendums on the territorial organizational cases. But at the same time the research reports show a very interesting tendency: overfrequented local referendums influence the voters' behaviour unfavorably and make them passive. The reason of this tendency may perhaps be a typal inurement and exclusion derived from the voters' sensation. Voters are not used to direct decision making and they keep rather away from collective local activities, especially in difficult cases.[18]

The outcome of a local referendum is binding on the representative body. In spite of this legal thesis, an inappropriate interpretation of law has evolved at municipalities, which originates in the Constitutional Court decisions.[19] In accordance with the regulatory power of local autonomies, the representative bodies create their ordinances, but often incorrectly. A large number of local autonomies neglect the provisions of higher law. Authorization of the local autonomies, as mentioned before, concerns only those procedural sections which are not detailed in the Acts, otherwise the local law becomes unlawful.

There are further legal problems about the outcome of local referendums, since the Act does not provide its moratorium: how long does the outcome

[17] Constitutional Court Decision No. 59/2002. (XI. 28.)
[18] The counties may also call for referendums on their territory, but similarly to the localities, they never take advantage of this opportunity.
[19] Constitutional Court Decision No. 76/2007. (X. 19.)

bind the representative body? When and by whom can the former collective decision be modified made by local referendum? May these questions, failing a normative regulation be regulated in the local law? A lot of legal difficulties arise from the central loopholes, but it does not necessarily follow that the representative bodies can make law on all these unregulated questions, in special view of the Constitutional Court decisions. It would be a good solution if the moratorium term, on the model of the Slovenian solution, bound the representative body until the end of its cycle.

The initiation of a local referendum by the voters begins with the authentication of the sign-up sheet by the head of the local electoral office (he or she is the municipal clerk). The municipal clerk authenticates the sign-up sheet within 15 days if it is suitable for the legal requirements. The municipal clerk refuses the authentication if the question does not belong to the local authority, there is no legal possibility to call for a local referendum on the initiated question if the same question has already been submitted for a local referendum within a year, or the sign-up sheet is not suitable for the legal requirements.

It is a remarkable fact that the Constitutional Court has often declared the clarity of the questions presented for the national referendums as a basic condition, last time in 2011,[20] but there are no similar requirements at local level, neither in the Acts, nor in the Constitutional Court decisions that would permit the refusal of the sign-up sheet by the same token.

The initiators have one month to collect the adequate number of signatures determined by local law to generate legal effect. The mayor puts forward the initiation on the following session day and the representative body has to decide about the initiation within 30 days. In the case of the voters-initiated local referendum, the representative body is liable for call for the local referendum and simultaneously determine its date within a four month term.

The election organs are composed of the electoral committees and the electoral offices. If it comes to a local referendum, the following electoral committees function: vote counter committee, local electoral committee, county electoral committee, National Electoral Committee (it functions only in cases of the capital and the county).

The electoral offices are the followings: local electoral office headed by the municipal clerk, electoral office of parliamentary individual electoral district, county electoral office headed by the county's chief municipal clerk, National Electoral Office headed by the capital's chief municipal clerk (it functions only in the capital and the county cases).

The electoral committees are organised into a hierarchical system, and they have different competences. The vote counter committee controls the

[20] Constitutional Court Decision No. 9/2011. (III. 1.)

polling-place, conducts the voting, provides for the lawful voting, decides the moot questions during the voting, counts the votes, settles and registers the voting result in the polling-district, initiates the annulment of the voting result of the polling-district in case of violation of law.

The local electoral committee controls the signatures, decides the objection related to the local referendum, decides the appeals connected with the decisions of the vote counter committee, repeals the voting result in case of violation of law, settles and publishes the result of the local referendum, initiates any proceeding at the competent organ in case of violation of law.

The county electoral committee decides the appeals connected with the decisions of the local electoral committee and initiates any proceeding at the competent organ in case of violation of law.

The National Electoral Committee publishes its resolutions in order to interpret uniformly the higher-level electoral laws. The resolutions are normative, there is no appeal against them. They are published in the Hungarian Journal.

The Act also provides the legal remedy system. The jurisdiction of remedy may be exercised before the district courts as well as the court of justice, in Budapest before the Pest Central District Court. The jurisdiction of remedy is available for everyone against the authentication of the sign-up sheet within 15 days counted from its publishing, and the calling or refusal for the initiated local referendum within 8 days counted also from the publishing.

3. Local people's initiative

Citizens eligible to vote of a given municipality have the right to initiate a disputation of any questions which belong to the competence of the local authority. The representative body has liability to discuss the question that was initiated by the number of voters determined between 5-10 percent by the local ordinance. With the use of the people's initiative, compared to the local referendum, voters cannot directly achieve local decisions. Most initiators submit a draft resolution as well, which they wish to accomplish. However, representative bodies have the discretional right to satisfice the required resolution, to take their own resolutions on the necessary actions and to decide the way in which they can efficiently manage the arising problems.

All proceeding rules of the local referendum have to be enforced at people's initiatives as well, with two special exceptions. The head of the local electoral office has liability to refuse the authentication of the sign-up sheet only in two cases: if the initiated question does not belong to the local authority or the sign-up sheet is not suitable for the legal requirements.

According to the last legislative draft[21] the local people's initiative is recommended to be abolished. It is a fact that the number index of the local initiatives is questionless unfavorable, the voters' participative notion is rather low. However, this legislative intent can induce a serious problem, since there is no provision in the Bill that would replace the potential future abolishment of the people's initiative. If the local people's initiative were abolished, the public hearings could take over its function at best.

4. Special forms of the local public will

There are various legal institutions defined by the Act on Local Government to express and configure the local public will and general opinions at municipalities.[22] The undermentioned formations can activate a large number of the local population:

- public hearing functioned obligatorily at all localities;
- village meeting functioned voluntarily or obligatorily only in localities with village status;
- sub-municipal self-governments which can function at any localities, but implicitly they are attributes of the towns;
- committee membership;
- consulting hours held by local politicians;
- publicity of the councils;
- various forms of local media.

The mutual characteristic of the listed institutions, as the names suggest, is the consultative function, excluding the sub-municipal self-government, the committee membership and the special form of the village meeting, wherewith local decisions can be exceptionally made.

As the detailed material and procedural rules are disposed by local laws, a very wide range of the participative rights have evolved in practice, starting from the simple participation to the active social work.

[21] The Bill on Initiation of Referendums has not been passed in the submitted form by the Parliament yet.

[22] On the local democratic forms see also: Temesi, István: Local Government in Hungary. In: M. Horváth, Tamás (ed.): Decentralization: Experiments and Reforms. Local Government and Public Service Reform Initiative, Open Society Institute, Budapest, 2000 pp. 357-358.

4.1 Public hearing

Public hearing as a non-decision forum was established in 1990 by the previous Act on Local Government. Earlier this legal institution was unknown in the Hungarian Public Law. Besides the local referendum and the people's initiative, the public hearing is the third most important democratic form at municipalities.

According to the recent regulation, all municipal representative bodies (villages, towns, counties, capital and its districts) have to hold a public hearing at least once a year. When there is a public hearing, the inhabitants and the management of the local social organizations can directly take any questions of common interest and public proposals before the representatives. The representative bodies have to answer the initiated questions preferably on the forum or not later than 15 days in writing. Several localities hold public hearings more than once a year.

The following sectoral issues laid down in the by-laws are submitted to the public hearings:

- improvement of local public services;
- developmental plan of the settlement;
- types and rates of local taxes;
- comprehensive modification of own local by-laws;
- public consultation on the dissolution of the representative body;
- implementation of a given period programme and its budget;
- statement of the future financial conceptions;
- different local sectoral and developmental cases;
- other public interest petitions.

4.2 Village meeting

As the name of the village meeting shows this legal institution functions only in municipalities with village status. Previously, during the socialist period and especially in 1971, this legal institution was regulated only in local by-laws made by local councils. In 1971 the Parliament recognized the significance of the village meeting in the communal public life and defined it directly in the third Council Act.[23] The village meeting was originally a facultative and a non-decision forum, with exception of the villages with joint councils where the village meeting functioned compulsorily.

[23] Council Act of 1971. No. I. (There were three Council Acts in force in the socialist period in Hungay: the first Council Act of 1950. No. I; the second Council Act of 1954. No. X; the third Council Act of 1971. No. I.)

Due to the strong historical background derived from the socialist tradition, even now there is a permanent interrelationship between the village meeting and the public hearing at communes. They are usually organized together with the same agendas once, twice or even more often a year. My research shows that 50 percent of the villages have institutionalized the village meeting and 50 percent of them have regulated it as obligatory forums.[24]

Local ordinances comprise the forwarding modus of the majorities' standpoints expressed on the village meeting or other civil forum. After the village meeting chaired usually by the mayor, the representative bodies debate the public interest issues in their own separate session and order the necessary measures.

The agendas and the yearly number of the village meetings are decided discretionarily.

Village meetings, similarly to the public hearings, usually deal with the most important general matters in which the localities are acutely interested:

- coverage on the seasonable tasks and the future plans;
- report on the part-time execution of the budget;
- discussion of the minority matters;
- decision on any loan;
- preparation of the current law-making procedure;
- establishing of the preparatory committee before the territorial organizational proceeding.

The latter one is the single obligatory statutory case of village meetings. The main object of the village meeting before the territorial organizational proceeding is the establishment of the preparatory committee from the representatives and other voters living in the territory connected with the territorial organization[25] and the mayor gives information about the current progress and procedural situation to the citizens on this forum too.

The village meeting in municipalities with less than 500 inhabitants can become a special and an exceptional form of the local referendum. The representative bodies can delegate the local referendum into the village meeting with a specific criterion in these villages: the village meeting can achive a local decision only if more than half of the citizens eligible to vote are present on the forum. In every other case the village meeting functions only as a non-decision forum. In practice, the entitled small villages take

[24] See also Kiss, Mónika Dorota: A közmeghallgatás helyi önkormányzati jogintézménye – doktori értekezés (The public hearing as a local governmental institution – doctoral dissertation). Pécsi Tudományegyetem Állam- és Jogtudományi Karának Doktori Iskolája, Pécs, 2012 pp. 130-132.

[25] Constitutional Court Decision No. 1124/E/2004 and Curia Decision No. 5.018/2012/8.

almost never advantage of this granted legal possibility that would make their decision making easier.

4.3 Sub-municipal self-government

Representative bodies have the right to establish one or more sub-municipal self-governments on their administrative territories. The main purpose of the sub-municipal self-governments is to represent the special features of the separated quarters and their residents within the municipality (e. g. industrial areas, protected nature reservations, recreation areas, agricultural zones, holiday resorts, joint stations, etc.)

There is a hierarchical relationship between the sub-municipal self-government and the representative body. The sub-municipal self-government is an organ of the representative body; it functions by its provisions and by derived legitimacy. The representative body can take any directions for solving the delegated tasks and duties, can recall anytime the delegated authorities and can supervise the decisions of the sub-municipal self-government.

The members of a sub-municipal self-government can be appointed from the representatives and the other voters living in the separate territorial unit, but the head of the plenum and more than half of all the members may be chosen from the representatives.

As the sub-municipal self-government has certain power delegated from the representative body such as decision-making and financial self-determination, the voters who possess a mandate of the plenum can exercise influence over the basic cases of their separated territories.

4.4 Committee membership

As the Fundamental Law provides, local representative bodies may elect committees.[26] This rule means that the committees can be elected mainly voluntarily, but an act may order also compulsory establishment. Committees are established in order to help such local sectoral duties of representative bodies which claim special proficiencies and prudentialities. Accordingly, committees have three main functions:

- preparation of decisions before councils;
- control of implementation of decisions;
- decision-making by delegated authorization.

[26] Article 33, Section 3.

Committees in towns consist of mostly articulated structures with complex duties, while in provinces, by virtue of the simpler organization systems, they are less established, instead of them, there are preferably one or more aldermen appointed.

A committee may be divided into external and internal membership, with the same rights and liabilities.[27] The chairman and more than half of all the members of a committee have to be chosen only from the representatives, but the mayor cannot be elected for the chairman's position. Acquiring the external membership is available in principle for anyone, but the representative bodies stipulate in their own by-laws, what type of self-organized collectivities may be called into the local political work.

As the committees can exercise influence on the different sectoral cases wherein they were constituted, for that very reason, it is recommendable to elect such managers of the local social organizations into the committees who work in favour of the inhabitants and can review the problems of the whole local society.

4.5 Publicity of councils

Local authorities may function in open and closed sessions. As a general rule, the councils are public for all citizens. Publicity means only the participation without any additional rights of participants such as contribution, compliance, questioning, interpellation, reaction, etc. The concrete participative rights, their substance and exercise methods are defined in detail always by the local by-laws.

The items presented on the closed agenda are assigned exclusively by an itemized list. They are specifically the followings: official social affairs; unworthiness and confliction cases; investigation of property declaration, giving of decoration; disciplinary proceeding. If a person concerned requests it, a closed session in connection with his or her personal case is ordered, (for example choosing, appointment, recall, grant or acquittal of the executive charge). Besides, the local authorities have the discretionary right to order a closed session on the negotiation of their properties, inviting for tender and specifying its conditions if the public session would violate either participant's business interest.

Aside from the issues of closed sessions, the work of the local authorities is absolutely public. The concrete functioning methods of the open forums and the participative rights are allocated by the local by-laws. In this respect the representative bodies may not regulate the publicity superficially,

[27] Special rules of the external membership will come into force on the following general election in October 2014.

interpret the higher law strictly, and make the voters' participation more difficult. The mayor may order the sessions only in the official seat of the representative body and it cannot be required from the citizens that they travel to the other location where the current session is just being holding.[28]

All sessions are registered, separately the open and the closed ones. Since the working papers of open sessions are qualified public interest data,[29] all voters have the right to inspect into the minutes and proposals, review and photocopy the documents.

It is a remarkable tendency in bigger towns that the local media broadcast the open sessions; therefore, the inhabitants can orientate themselves about the disputes and follow the decision-making live.

4.6 Local politicians' consulting hours

The local officers, namely the mayor, the deputy mayor and the representatives are obliged to hold consulting hours weekly or monthly regulated by local law. When consulting hours are being held, the inhabitants may visit privately the local politicians and put forward a kind of petition which requires a perfect discretion, for example an individual social problem.

Beyond the consulting hours, the representatives have also liability to report on their public work at least once a year and keep basically adequate relationship with their voters. They can accomplish this liability in the consulting hours or other at meetings of their election district. The councillors can also write a blog on Internet and, of course, use e-mail by their own right, where there is an excellent possibility to hold conversation with anyone who inquires after the local happenings.

The mayors, compared to the representatives, are in a specific legal status, as they can possess even official capacities as well as financial power of disposition delegated by the representative bodies. Indigent citizens who visit the mayors' consulting hours can be received in direct and immediate help assistance.

4.7 Local media

The local media consists of various press products, periodical journals, magazines, television, radio, Internet and official web sites, notice boards, free phone connection, toll free numbers, etc.

[28] Supreme Court (Curia) Decision No. 5036/2012.

[29] Act on Informational Self-determination Right and Freedom of 2011, No. CXII. Section 3.

Nowadays more and more citizens take advantage of the former mentioned forms to express their opinions, standpoints and views on the local public life and the work of the community. The use of the local media permits an easy and a quick communication among the interested persons and organs. The main aim of the local media is to inform the residents about events and actualities of prime importance. The well-developed system of the media also improves the population's attitude and identity sense, can articulate the inhabitants' expectations and mobilize them in the public work as well.

Forms, appearance and the number of the local media depend on the communal claims, financial conditions and the legal status of a given local self-government. In villages and especially in smaller ones there are only one or two forms of media functioning, but the bigger towns have built up typically expansive informational networks used in everyday life.

5. Some remarks on the enforcement of rights and the due process

Some experts recommend reforms in this field. Some of the rights to exercise the individual petitions have changed. For example, the individual constitutional complaints concerning the conflicted local ordinances have become a very complicated mechanism.[30] Recently there has not been any legal possibility to turn directly and personally to the Constitutional Court, since the former actio popularis as a general legal institution has been abrogated. The newly regulated constitutional complaint, as compared to the former one, needs adequate legal ground, judgement-at-law by the Supreme Court (Curia), as well as legal representation. It may be hypothesized that these conditions are completely new, but specifically uncertain, expensive and circumstantial from the citizens' point of view.

Most submitted constitutional complaints have been in connection with the local referendums, but occasionally the Constitutional Court has dealt with other formations too, because the participative rights have been restricted by local laws on several occasions. These problems have been handled posteriorly and the practice shows that the representative bodies have not committed the earlier legal failures again.

The professional opinions are divided. Several conflicted local ordinances have been in force for several years. The legal supervision over the local self-governments is based originally upon the pre-overview, however this mechanism solves the problems even after the local law making sometimes ineffectively.

[30] Act on Constitutional Court of 2011. No. CLI. Section 26.

6. Afterword

The Parliament, during the legislative process of the new Act on Local Government, had left invariable most participative forms; the local referendum and the local people's initiative were not regulated either. Among others the slowness, expensiveness and circumstantiality are mostly said to be the main disadvantages of the local participative democracy, however, these disadvantages could be eliminated. The presented problems and pragmatic expectations should be taken into account and the persistent law making is recommended to in order to put it on a strong professional basis, without political interest.

Practical issues in the protection of secrets in the Hungarian criminal procedure

LÁSZLÓ, BALÁZS

ABSTRACT *The aim of the essay is to present the practical problems and questions raised by the protection of secrets in the criminal procedure. Even theoretical issues come up in the analysis where it is deemed necessary for better understanding.*

The author is trying to analyze the main legal institutions of the criminal procedure concerning the protection of secrets one by one, starting with the participants of the procedure, through gathering evidence, secret investigation and coercive measures, finishing with witness protection. The analysis is not a simple collection of the ambiguous articles of the Criminal Procedure Act but a presentation of problematic practical examples and of possible solutions to the questions. Besides the Criminal Procedure Act, further statutes, decrees, decisions of the Constitutional Court and sources of jurisprudence have been examined and are presented and interpreted to the reader.

Hopefully, the issues mentioned in the essay can clearly illustrate the practical significance of this topic and the de lege ferenda proposals can lead closer to the solution of these problems.

The author is trying to emphasize that even in an essay concerning practical issues, the balance of jurisprudence and legal practice cannot be broken. The frame and motto of the analysis is a quotation from Ervin Cséka: 'professional work of a high standard requires thorough grounding in practical issues which must lean on deep theoretical bases'.

1. Significance of secrets in criminal procedure law and in society

Nowadays, one of the most important questions of jurisprudence and legal education is the balance between theoretical and practical issues. The two, however, should not be separated too rigidly. Talking about law enforcement, ERVIN CSÉKA says: 'professional work of a high standard requires thorough grounding in practical issues which must lean on deep

theoretical bases'.[1] This statement can also be applied to other legal activities, including jurisprudence. The tight connection between theoretical and practical issues allows us to start this essay concerning practical problems of the protection of secrets with some important findings of philosophy and the philosophy of law.

The legal regulation of conflicting social interests is always an important and difficult question. Two such conflicting interests are constituted by finding out the exact state of affairs ('truth' without qualification)[2] and the protection of secrets in criminal procedure. Finding out the truth is a most typical characteristic of criminal procedures.[3] As LAJOS NAGY says, finding the facts of the case is basically recognition, intellectual reconstruction of the offender's activities.[4] This reconstruction means an action (authorities must be active), while the protection of secrets can be guaranteed by passivity, by silence. According to TAMÁS FÖLDESI, disclosure of secrets of crimes is a basic requirement in the criminal procedure, while the investigation usually includes secret elements.[5]

A further finding can be mentioned concerning the relationship of law and secrets: 'law may have a positive influence on social relations and on human behavior, but it cannot substitute other social, political or moral standards, or take the place of political or moral instruments'.[6] This means, in terms of our analysis, that law (and interests connected with it) do not always take precedence over secrets. However, the relationship of law and secrets is characterized by a conflict not only between interests but also between values, since both of them can be considered as a store of values.

In modern legal systems the social significance of law is beyond doubt, but secrets also play an important role in the social subsystems. In the age of information society, the social significance of secrets is continuously growing.[7] FÖLDESI emphasizes that the problems relating to secrets are not only important and of current relevance, but they also raise unanswered questions. And this is related to the characteristic of secrets, namely, that secrets often include contradictions and induce dilemmas.[8]

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[1] Cséka, Ervin: A büntető ténymegállapítás elméleti alapjai. Közgazdasági és Jogi Könyvkiadó, Budapest, 1968 p. 11.
[2] Tremmel, Flórián: Magyar büntetőeljárás. Dialóg Campus, Budapest-Pécs, 2001 p. 36.
[3] Király, Tibor: Büntetőeljárási jog. Osiris, Budapest, 2003 pp. 21-25.
[4] Nagy, Lajos: Tanúbizonyítás a büntetőperben. Közgazdasági és Jogi Könyvkiadó, Budapest, 1966 p. 19.
[5] Földesi, Tamás: A „Janus arcú titok". A titok titka. Gondolat, Budapest, 2005 blurb.
[6] Szabóné Nagy, Teréz: A büntető igazságszolgáltatás hatékonysága. Közgazdasági és Jogi Könyvkiadó, Budapest, 1985 p. 12.
[7] Földesi, Tamás op. cit. pp. 9-11.
[8] Ibid. p. 12.

In terms of criminal law and criminal procedure law, PÁL ANGYAL gives the following definition for secrets: 'all the realities (incidents, phenomena, concepts, emotions, ideas, etc.) which anyone can become acquainted with, but which, in fact, are kept from unauthorized people, and exist in the mind of only one person or the minds of a few particular individuals, and which, for equitable reasons, are undesirable to be known by others'.[9] A similar definition is given by MIHÁLY TÓTH: 'secrets are all the data, facts, conditions and ideas which anyone can become acquainted with theoretically but are known by only a few particular individuals and which, in the equitable interests of the confider, are undesirable to be known by others'.[10] Finally, the substance of the protection of secrets lies in the fact that: 'the benefit of secrets is part of the benefits of privacy, thus it must be guaranteed and protected in the same way and equally cautiously as other benefits of privacy'.[11]

2. A theoretical issue – conflicting interests and values

According to the axiology, criminal jurisdiction (as an organization and a procedure) is not a value. Accusatory criminal procedure, however, is built on criteria considered as values (fairness, publicity, equity).[12]

The simple existence of criminal jurisdiction is a social interest beyond doubt. This is also declared in the Fundamental Law of Hungary (the new Hungarian constitution of 2012): 'the common goal of citizens and the State is to achieve the highest possible measure of well-being, safety, justice, order and liberty'.[13] Jurisdiction is one of the most important instruments to achieve these goals. The so-called 'outer functions' of criminal procedure (which indicate the designation of the procedure) can also be considered as interests.[14]

Finally, a number of personal interests (those of the defendant, the victim, the authorities, etc.) may meet and clash in the process of operation of criminal procedure. We can also mention the so-called 'inner functions' of

[9] Angyal, Pál: A titok védelme anyagi és alaki büntetőjogunkban. Atheneum, Budapest, 1908 p. 13.
[10] Tóth, Mihály: Titkokkal átszőtt büntetőjog. In: Iustum Aequum Salutare I. 2005/1. p. 57.
[11] Angyal, Pál op. cit. p. 25.
[12] The rule of equity can be found in Articles 22 and 36 of Act CLXII of 2011 on the Legal Status and Salary of Judges.
[13] The Fundamental Law of Hungary, National Avowal.
[14] Tremmel, Flórián op. cit. pp. 35-38.

criminal procedure which indicate the most essential interests (the main roles) in the procedure: the prosecution, the defense and the verdict.[15]

Because of its relation with the protection of secrets, it is important to examine the legal notion 'taking evidence', which is the main part of the criminal procedure. According to FLÓRIÁN TREMMEL, 'taking evidence is the process of recognition of legally relevant and mainly past facts, striving after the faithful finding of the facts of the case by authorities (after all by judges), which is realized in collecting, examining and assessing evidence'.[16] So the most fundamental goal, interest and duty of the authorities is recognition. The conflict between recognition and protecting (or keeping) secrets seems obvious.

In terms of criminal procedure law (rules giving the basis of jurisdiction), we have to mention first of all a fundamental proposition of legal axiology: 'law creates a concept of value, law itself is value'.[17] This seems clear if we think of subjective rights (especially pecuniary rights) but from the aspect of public order and legal security objective law (and so procedural laws, e.g. criminal procedure law) can also be considered as a social value. It is obvious that the rules of criminal law would not be able to overcome lynch law and the 'Talio' principle without the procedural rules and organization of criminal procedure law. This is properly described in the 'knife-handle-blade' parallel of THEODOR MOMMSEN.[18]

Another fundamental proposition of legal axiology is that law is a store of values. According to CSABA VARGA, 'the *corpus* of law incorporates such values and their hierarchic system developed in our evolution of civilization the presence and value of which are beyond doubt'.[19] And the values carried by the *corpus* of law are law and order, legality, legal security, fairness and equity.[20] These values can be divided into further elements, e.g. legality can be divided into the separation and balance of powers, *nullum crimen*, *nulla poena* and so on.[21] These are all guarantees of accusatory criminal procedure

[15] Ibid. pp. 92-95.

[16] Tremmel, Flórián: Bizonyítékok a büntetőeljárásban. Dialóg Campus, Budapest-Pécs, 2006 p. 59.

[17] Moór, Gyula: Bevezetés a jogfilozófiába. Pfeifer Ferdinánd Nemzeti Könyvkereskedése, Budapest, 1923 pp. 19-25., 282-302. Horváth, Barna: A jogelmélet vázlata. Attraktor, Máriabesnyő-Gödöllő, 2004 pp. 91-105.

[18] Mommsen, Theodor: Römisches Strafrecht. Duncker & Humblot, Leipzig, 1899 preface

[19] Varga, Csaba: A jog társadalomelmélete felé. Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Kar Jogbölcseleti Intézete, Budapest, 1999 p. 251.

[20] Takács, Péter: Jog és igazságosság. In: Szabó, Miklós (ed.): Jogbölcseleti előadások. Prudentia Iuris 11. Bíbor, Miskolc, 1998 pp. 184-190. Visegrády, Antal: Jog- és állambölcselet. Dialóg Campus, Budapest-Pécs, 2003 pp. 90-93.

[21] Gallant, Kenneth S.: The Principle of Legality in International and Comparative Criminal Law. Cambridge University Press, New York, 2009 pp. 11-19.

and also have significance in terms of the protection of secrets. As a matter of fact, secrets were hardly protected in the inquisitory procedure (especially when torture was applied), while the protection of several types of secrets can be traced back to the criteria of legality, fairness and equity.

The existence of criminal procedure law is also a social interest, since the codification of the rules of operation of jurisdiction is of vital importance in guaranteeing the aforementioned values and interests. These rules are laid down in Act XIX of 1998 on the Criminal Procedure (Criminal Procedure Act). Guarantees, relations and balances of the interests held up in the criminal procedure are also secured in the Criminal Procedure Act.

We can also find interests in the criminal procedure which are linked not with one of the aforementioned interests but with one of those values. For example, the right to defense, which can be considered as an interest of the accused, is also the guarantee of legality, which is a value beyond doubt.[22]

The requirement manifested in the protection of secrets is not simply the opposite of the interests and values enumerated above. It cannot strive after the hindrance of rapid, efficient, successful and fair criminal procedure. Moreover, the interest of the protection of secrets is an integral part of the body of criminal jurisdiction and criminal procedure law, and it is also linked with other interests.

According to ISTVÁN KIRÁLY V., 'our age is characterized by an unprecedented expansion of secrets, and the most important human activities are all surrounded by secrecy'.[23] Talking about the 'Janus Face' of secrets, TAMÁS FÖLDESI adds that secrets cannot deny themselves even in the law, which means that the law can raise contrasting requirements concerning secrets depending on its subject-matter'.[24] It means that sometimes the keeping and sometimes the revealing of secrets can be considered as a breach of law.

Interests concerning the protection of secrets can be best analyzed through the types of secrets. Theories of the systematization of secrets in the *corpus* of law, however, do not constitute the subject of this essay. Only two facts must be mentioned. On the one hand, the protection of privacy is not only an interest of private individuals but also a public (general) interest. On the other hand, the roots of the protection of secrets (especially of privacy) can be found in the Fundamental Law of Hungary and these roots point towards the right to human dignity.[25]

[22] Takácsné Takács, Dóra: A fogvatartott védelemhez való joga – középpontban a kapcsolattartás gyakorlata. In: Jungi, Eszter (ed.): Büntetőjogi Tanulmányok X. Magyar Közlöny Lap- és Könyvkiadó, Budapest, 2009 pp. 169-184.

[23] Király V., István: Határ – Hallgatás – Titok. A zártság útjai a filozófiában és a létben. Komp-Press Korunk Baráti Társaság, Kolozsvár, 1996 p. 151.

[24] Földesi, Tamás op. cit. p. 115.

[25] The Fundamental Law of Hungary, Freedom and Responsibility. Art. VI, Par. (1)

3. Presence of the protection of secrets in the criminal procedure

Before talking about practical issues, namely, problems of the protection of secrets, it is worth taking into consideration at which points of the criminal procedure this institution (or phenomenon) occurs.

The Hungarian Criminal Procedure Act does not enumerate the basic principles of criminal procedure; instead, this is done by representatives of jurisprudence on the basis of the Act.[26] In terms of the protection of secrets, principles of legality, publicity, right to defense and right to legal remedy must be taken into consideration.

A further fundamental article of the Act to mention is Article 60, which provides that 'privacy rights must be respected in every single action of the authorities' and authorities are obliged to 'prevent the unnecessary revelation of data concerning privacy (private life)'. The declaration of this principle is important beyond doubt, but it is not enough to have real efficiency in practice. On the one hand, it could be raised as a theoretical objection that some notions of the principle (e.g. 'unnecessary') are not exact enough. On the other hand and as the first practical objection in my essay, I would like to point out that in certain actions of the authorities (apprehension, perquisition) it is impossible to totally rule out inspection by unauthorized people (e.g. the neighbors). Authorities clearly cannot build up folding screens around the scenes of action. So this principle needs a more exact reformulation.

In terms of the several roles in the criminal procedure, the protection of secrets raises questions concerning the accused, witnesses, experts and official witnesses, especially with regard to interrogations and hearings. Issues of diplomatic immunity and consular secrets are also interesting.

Another important field of the protection of secrets is secret investigation (secret gathering of information before the criminal proceedings are ordered, and secret gathering of data during the criminal procedure). These activities, deeply analyzed by LÁSZLÓ KIS, require special guarantees.[27] So does the so-called 'further gathering of data' carried out during the criminal procedure,[28] which was earlier incorrectly referred to as 'enquiry' in the

[26] Bánáti, János – Belovics, Ervin – Csák, Zsolt – Sinku, Pál – Tóth, Mihály – Varga, Zoltán: Büntető eljárásjog. (ed.: Tóth, Mihály) HVG-Orac, Budapest, 2009 pp. 40-49. Fenyvesi, Csaba – Herke, Csongor – Tremmel, Flórián: Új magyar büntetőeljárás. Dialóg Campus, Budapest-Pécs, 2008 pp. 59-68. Király, Tibor op. cit. pp. 104-134.

[27] Kis, László: A titkos adatgyűjtés szerepe a büntetőeljárásban, különös tekintettel az Európai Unió keretében folytatott együttműködésre. PhD értekezés. Miskolc, 2010 pp. 15-25.

[28] Criminal Procedure Act, Art. 178

Act.[29] The phenomenon of undercover agents analyzed by BENCE MÉSZÁROS[30] can also be problematic in terms of the subject of this essay.

Further articles concerning the protection of secrets are articles regulating judicial and prosecutorial powers, rules of access to qualified data (former state secrets and service secrets). A significant deficiency of the Criminal Procedure Act is that it does not have any rules defining the obligation of secrecy of civil suitors[31] (in fact private prosecutors) and so-called 'substitute civil suitors'[32] concerning data learnt during the criminal procedure. In terms of civil suitors it is usually not a very significant problem since civil suitors are allowed to prosecute only in cases of lower importance.[33] Substitute civil suitors, however, should be put under a special (*sui generis*) obligation of secrecy, similarly to the authorities.

The lower importance of privacy is reflected in the articles declaring that in the case of the crimes 'violation of secrecy'[34] and 'violation of the secrecy of correspondence'[35] the prosecution is represented by civil suitors if the criminal procedure was started on a private motion.

The protection of attorney-client privileged information (legal professional privilege) and notarial secrets is also guaranteed by articles regulating the actions of authorities carried out in offices of attorneys and public notaries.[36] Meanwhile, secrets of the defense (which the counsel for the defense must keep) are also protected in the Criminal Procedure Act when it says that 'a counsel for the defense can act for two or more defendants only if there is no conflict of interests between the defendants'.[37] In practice, this is a very important guarantee for defendants that their secrets cannot be revealed by their own counsels in favour of another accused.

Among the statutory provisions concerning the protection of secrets, the rules of witness protection cannot be ignored. With regard to this phenomenon, the following must be noted. On the one hand, witness protection is a way to protect not only witnesses but also other participants of the criminal procedure.[38] On the other hand, in terms of the protection of secrets, witness protection is significantly different from the phenomena

[29] Bócz, Endre: Büntetőeljárási jogunk kalandjai. Sikerek, zátonyok és vargabetűk. Magyar Hivatalos Közlönykiadó, Budapest, 2006 pp. 202-203.
[30] Mészáros, Bence: Fedett nyomozás a bűnüldözésben. Doktori értekezés. Pécs, 2011 pp. 1-174.
[31] Criminal Procedure Act, Art. 52
[32] Criminal Procedure Act, Art. 53
[33] Criminal Procedure Act, Art. 52, Par. (1)
[34] Act C of 2012 on the Criminal Code (Criminal Code), Art. 223
[35] Criminal Code, Art. 224
[36] Criminal Procedure Act, Art. 149, Par. (6) and Art. 151, Par. (3)
[37] Criminal Procedure Act, Art. 44, Par. (4)
[38] Fenyvesi, Csaba – Herke, Csongor – Tremmel, Flórián op. cit. pp. 240-242.

mentioned above. The essence, the main question of witness protection is not 'What is a witness allowed or obliged to keep back from the authorities?' but 'How can the identity of the witness (or someone else) be kept secret from others with the aid of the authorities?'. Witness protection can also considerably help the authorities gather information[39] since if (for fear of any possible insults or injuries) the witness is afraid to make a confession or to give evidence, he may not be able or willing to do so.[40] In a wider sense, this kind of protection does not confine itself to Articles 95-98/A of the Criminal Procedure Act, but also includes the legal instruments of the so-called 'considerate treatment of witnesses' (e.g. omission of the confrontation of witnesses,[41] use of a detective mirror,[42] interrogation through a closed-circuit communication system).[43,44] The assertion of interests relating to witness protection is clearly manifested in the practice of the European Court of Human Rights.[45]

4. Several practical problems and possible solutions

In the following paragraphs, several practical problems of the protection of secrets in the criminal procedure will be analyzed. I will also try to present some possible solutions. The system of the upcoming paragraphs is based on the logic of point 3. Questions concerning the basic principles of criminal procedure are to be mentioned during the discussion of several legal instruments.

4.1 The interrogation of the accused

The first issue to mention is the interrogation of the accused. Here we can see the conflict of two fundamental interests of the same person. One of the basic principles of the criminal procedure is the right to defense, which means that the accused is allowed to make use of any legitimate means to defend himself. One of these means can be the 'right to silence', an unstated[46] fundamental right of defendants.[47] The right to silence obviously

[39] Criminal Procedure Act, Art. 95
[40] Varga, Zoltán: A tanú a büntetőeljárásban. CompLex, Budapest, 2009 p. 106.
[41] Criminal Procedure Act, Art. 124, Par. (2)
[42] Criminal Procedure Act, Art. 122, Par. (5)
[43] Criminal Procedure Act, Art. 244/A-244/D
[44] Varga, Zoltán op. cit. pp. 153-154.
[45] Ibid. pp. 166-172.
[46] The 'right to silence' is considered unstated only as a fundamental right of defendants, otherwise it is declared in the rule of the Miranda warning.

includes the right to keep all kinds of legally relevant secrets, but its relation to the obligation of secrecy can raise questions.

Strictly clinging to the letters of the Criminal Procedure Act, the accused is allowed to make use of legitimate means to defend himself, so if he is obliged to keep a secret, he must find another way than revealing the secret. If the secret to keep is of lower importance and the acquittal depends on the secret information, this solution may seem unfair, especially since the accused cannot even commit perjury. The considerable reason for this unfairness is, however, that the law always gives protection to those who act lawfully. So if the accused reveals a secret despite of the possible punishment, the necessity to defend himself cannot be more than a mitigating circumstance if he is accused of violation of secrecy. One (but not an excellent) solution to this problem could be the exclusion of publicity.

In terms of the refusal of the accused to make a statement, we must emphasize the duty of the authorities to always read out the Miranda warning and other warnings concerning the protection of secrets the most precisely possible.[48] The statement of the accused may be important evidence in the criminal procedure but the authorities must respect the right to silence. Otherwise, the evidence will be excluded as a result of unlawful influence. The instrument of this unlawful influence can be violence, threat, or some other infringement of rights and also deception, promises and physical or mental compulsion.[49]

The silence of the accused (and others obliged to keep a secret) may also result in deficiency of evidence which can lead to the application of the principle of '*in dubio pro reo*', an element of the presumption of innocence.[50] Finally, the rules concerning the interrogation of the accused are also applicable to confrontations.

Another interesting practical issue to mention is contacting defendants under custody. An important guarantee of secrets of the defense is that the accused has the right to contact his counsel (and the consular representative of his country if he is a foreigner) without control or supervision of the authorities.[51] This contact is also a duty of the counsel for the defense,[52] and

[47] Bárd, Károly: Emberi jogok és büntető igazságszolgáltatás Európában. A tisztességes eljárás büntetőügyekben – emberijog-dogmatikai értekezés. Magyar Hivatalos Közlönykiadó, Budapest, 2007 pp. 243-294.

[48] Elek, Balázs: A vallomás befolyásolása a büntetőeljárásban. Tóth Könyvkereskedés és Kiadó Kft., Debrecen, 2007 pp. 99-100.

[49] Katona, Géza: Valós vagy valótlan? Értékelés a büntetőperbeli bizonyításban. Közgazdasági és Jogi Könyvkiadó, Budapest, 1990 pp. 224-225.

[50] Tremmel, Flórián: Magyar büntetőeljárás. pp. 86-88.

[51] Criminal Procedure Act, Art. 43, Par. (3), Subpar. a)

[52] Fenyvesi, Csaba: A védőügyvéd. A védő büntetőeljárási szerepéről és jogállásáról. Dialóg Campus, Budapest-Pécs, 2002 pp. 186-193.

authorities, especially penitentiaries are obliged to help this right and duty to contact be realized. On the other hand, the accused can only contact his family or others (e.g. his representative acting in a civil case or a priest) under supervision.[53] At first sight this may seem as a deficiency in the protection of privacy, trade secrets, attorney-client privileged information and church secrets, but the supervising officer is obliged to keep secret everything he may hear. The less we disengage the officer from the obligation of secrecy, the better we protect these types of secrets. The omission of supervision would not be justified because it could interfere with the effectiveness of the criminal procedure.

GÉZA KATONA emphasizes that casual (not formal) meetings of the accused and the authorities must be avoided because these meetings are not documented (no minutes are taken) so the statements of the accused cannot become evidence (in legal and fair ways).[54]

4.2 The interrogation of the witness

In terms of the protection of secrets in the criminal procedure, the interrogation of the witness raises the most various practical questions. In this chapter, I will try to present only the most important and interesting issues.

According to the Criminal Procedure Act, the counsel for the defense must not be heard as a witness on issues which have come to his notice or which he has communicated to the defendant in his capacity as a counsel. Being a counsel for the defense, however, means a role in the criminal procedure and not a profession. So, strictly clinging to the letters of the Act, any information given to an attorney in order to engage him as a counsel is protected as attorney-client privileged information and not as a secret of the defense. In practice, however, we must apply the teleological interpretation instead of the grammatical interpretation and extend the protection of the secrets of the defense to the mentioned issue.[55]

On the other hand, this protection cannot generally and overwhelmingly surpass the demands of an effective criminal procedure. That is why the secrets of the defense do not extend to information revealed to the counsel about other crimes committed by the accused if this information cannot be linked with the case in which the counsel is acting for the defendant.

Against a detainee, a potential way to evade the protection of secrets of the defense is the interrogation of his cellmates. These confessions should be assessed carefully because of the possible background interests (e.g.

[53] Criminal Procedure Act, Art. 43, Par. (3), Subpar. b)
[54] Katona, Géza op. cit. pp. 228-229.
[55] Fenyvesi, Csaba op. cit. p. 274.

bargaining with the cellmates in their own cases).[56] As CSONGOR HERKE adds, if the bargaining with an accused violates the principle of fair trial in the (same or another) criminal procedure, this may lead to unlawful evidence.[57]

According to the analysis of CSABA FENYVESI, four more practical characteristics of secrets of the defense can be mentioned here.[58] First of all, the prohibition of defensive charge (which means that in the case of conflict of interests between two or more clients the counsel for the defense must cancel each assignment) must be respected. Contrary to attorney-client privileged information, secrets of the defense cannot be revealed in disciplinary or criminal procedures started by clients against their counsels. Secrets of the defense cannot even be revealed if the acquittal of another person depends on the information. That is why counsels cannot commit the crime of suppressing extenuating circumstances when protecting secrets of the defense. Finally, contrary to the Ethical Code, with permission of the accused, counsels are allowed to cautiously reveal the secrets of the defense not only to other defendants but also to the relatives of the accused.

In terms of church secrets, the most important practical issue is the subject of this kind of secrets. ZOLTÁN VARGA sets up a system which differentiates between church secrets, and declares that the prohibition of interrogation[59] only concerns the so-called confessional box.[60] This system seems to be reasonable in terms of the wide-spread religion of Roman Catholics, but the Criminal Procedure Act must be applicable to every single religion. That is why the statements of ZOLTÁN VARGA cannot be agreed with.

Concerning qualified data, the following problems can occur. If the authority which has qualified the data allows exemption for particular questions (so not generally), that may lead to the exclusion of spontaneous questioning and to the undesirable prolongation of criminal procedures. ENDRE BÓCZ emphasizes that courts are theoretically allowed to revise qualification of any data after hearing an expert in data protection, as

[56] Hesz, Tibor – Kőhalmi, László: A tanúvédelem a terhelt védőjének aspektusából. In: Mészáros, Bence (ed.): A tanú védelmének elméleti és gyakorlati kérdései. Pécsi Tudományegyetem Állam- és Jogtudományi Kar Gazdasági Büntetőjogi Kutatóintézet, Pécs, 2009 p. 103.
[57] Herke, Csongor: Megállapodások a büntetőperben. PTE ÁJK, Pécs, 2008 pp. 21-24.
[58] Fenyvesi, Csaba op. cit. pp. 277-279.
[59] Criminal Procedure Act, Art. 81, Par. (1), Subpar. a)
[60] Varga, Zoltán op. cit. pp. 77-78.

qualification is an administrative procedure.[61] That kind of judicial revision should be legally banned for the court affected in the criminal case.

In terms of the crime 'misuse of qualified data', data are also under the protection of the Criminal Code during the first thirty days of qualification if the offender is aware of the existing qualification.[62] As misuse of qualified data can be a crime even if the offender is negligent,[63] those who are not (but should be) aware of the existing qualification, commit the crime.

Another extension of protection can be found in article 37 of the Witness Protection Act.[64] It says that the rules of protection of qualified data are applicable to several not qualified data connected with witness protection. Practical problems may occur if someone who is not aware of the protection initiates the interrogation of a protected witness.[65] In this case, the reasoning of the dismissal would reveal the witness.

Even in the case of the prohibition of interrogation (or witness statements) mentioned above, the witness must be summonsed so that the existence of the prohibition can be considered.[66] Furthermore, there is no statutory answer to the following question: What happens if a person prohibited from making a witness statement anonymously denounces someone else and that leads to a criminal procedure?[67]

In terms of the exemptions from interrogation,[68] an interesting practical issue is the subject of public assignment. As no statute or judicial decision defines this subject, lawyers must interpret the notion 'public assignment' from case to case, which can lead to inconsistencies in practice. An important element of the notion may be that a public assignment is not a profession, since statutes always mention professional secrets and secrets relating to public assignment side by side. This also means that the differentiation of these types of secrets may be unreasonable.

It is important to emphasize, that an attorney committing a violation of attorney-client privilege commits the crime 'legal malpractice'[69] if his aim is to cause unlawful wrong to his client. According to CSABA FENYVESI, employees of a lawyer's office must also keep attorney-client privileged information secret[70] even if they cannot commit legal malpractice (only a violation of privacy).

[61] Bócz, Endre: Az államtitok fogalmáról és az államtitoksértésről. In: Magyar Jog 2000/5. pp. 260-261.
[62] Criminal Code, Art. 266, Par. (1)
[63] Criminal Code, Art. 265, Par. (6)
[64] Act LXXXV of 2001
[65] Hesz, Tibor – Kőhalmi, László op. cit. p. 103.
[66] Varga, Zoltán op. cit. p. 76.
[67] Ibid.
[68] Criminal Procedure Act, Art. 82
[69] Criminal Code, Art. 285, Par (1)
[70] Fenyvesi, Csaba op. cit. p. 274.

The effectiveness of the exemptions from interrogation may be reduced by the following facts: the proceeding authority decides about the lawfulness of the refusal to make a statement, witnesses can be fined for unlawfully refusing to testify and this way they may also commit a crime according to the new Criminal Code.[71] Anyway, the unlawful refusal to give evidence is a problematic practical issue especially if the witness had testified earlier in the procedure. If the conditions are granted, former statements of the witness can be read out by the court unless the witness takes advantage of his exemption. In this case, statements can still be read out with the permission of the witness.[72] According to ZOLTÁN VARGA, the former statement of the defendant can also be read out as a witness statement even if it was made by the former accused.[73] However, authorities must act the most cautiously since defendants do not have to tell the truth.

As mentioned above, former statements cannot be read out if the witness takes advantage of his exemption. This rule cannot solve the most significant problem of violation of the protection of secrets: once a secret is revealed, it cannot be deleted from the knowledge of the authorities. This information can influence the criminal procedure later. Quite a good but difficult and lengthy solution could be to replace the judge (prosecutor, detective) in the case.

Since the criminal code clearly defines when the witness is allowed to refuse to give evidence, theoretically everyone else can be heard as a witness even if he may have got his information unlawfully and not during his official proceedings.[74] This fact may also undermine the protection of secrets.

Another practical issue may be the protection of trade secrets. Although the new Criminal Code contains the crime 'violation of trade secrets', most jurists say that this kind of secret does not need to constitute an exemption from interrogation.[75] According to less radical opinions, the protection of trade secrets could be extended to criminal procedures, but the regulation concerning trade secrets must be specified first (e.g. no one shall refer to the protection of trade secrets to conceal a breach of law).[76] Interesting rules can be read in the essay of LÁSZLÓ MAJTÉNYI, who says that the conditions and results of privatization and concession (which procedures are of important

[71] Criminal Code, Art. 277
[72] Varga, Zoltán op. cit. p. 69.
[73] Ibid. p. 95.
[74] Ibid. p. 85.
[75] Tóth, Mihály op. cit. pp. 68-69.
[76] Szilágyi, György – Szilágyi, Pál: Jogalkalmazás és az üzleti titok. In: Magyar Jog 2004/11. p. 668.

concern to criminal law) are always open, while offers are confidential and may include trade secrets.[77]

Authorities are also obliged to respect the protection of secrets, and violation of this obligation can lead to unlawful evidence, of which FLÓRIÁN TREMMEL defines five classes. Moreover, violation of state secrets and service secrets through unlawful fact-finding committed by authorities is also a crime.[78] At the bottom level of this classification stands the bluff,[79] the lawfulness of which is controversial.

4.3 Material evidence and documents

In practice it is important that witnesses are allowed and obliged not only to refuse to give evidence but also to refuse to hand over material evidence, especially documents, to the authorities. The Hungarian Criminal Procedure Act does not define the special legal notion of documents, thus we can rely on the general legal notion also known in civil and administrative procedures.[80] According to GÉZA MAGYARY, documents can be considered as witnesses or, to be more precise, inanimate witnesses.[81] The protection of secrets is, however, insufficient when material evidence and documents are seized through perquisition or search of pockets.[82] These acts of the authorities are subject to restrictions only when carried out in a lawyer's office, a notary's office or a health institute.

4.4 Confrontation

In terms of confrontation, in the Criminal Procedure Code we cannot find a system of protection of secrets similar to that analyzed above. However, rules of interrogation (including rules relating to refusal to talk or hand over evidence to the authorities) can also be applied to confrontation.

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[77] Majtényi, László: Adatvédelem, információszabadság, üzleti titok. In: Matematikától a kriminálinformatikáig. Emlékkötet Dr. Kovacsicsné Nagy Katalin tiszteletére. Budapest, 2001 p. 154.

[78] Tremmel, Flórián: Bizonyítékok a büntetőeljárásban. p. 157.

[79] Kertész, Imre: A kihallgatási taktika lélektani alapjai. Közgazdasági és Jogi Könyvkiadó, Budapest, 1965 pp. 234-235.

[80] Kertész, Imre: A tárgyi bizonyítékok elmélete a büntetőeljárási jog és a kriminalisztika tudományában. Közgazdasági és Jogi Könyvkiadó, Budapest, 1972 p. 112.

[81] Magyary, Géza: Magyar polgári perjog. Third edition (rev. and exp. ed. Nizsalovszky, Endre) Franklin-Társulat, Budapest, 1939 pp. 422-423.

[82] Király, Tibor: Büntetőítélet a jog határán. Tanulmány a perbeli igazságról és valószínűségről. Közgazdasági és Jogi Könyvkiadó, Budapest, 1972 pp. 133-134.

4.5 Experts and translators

The rules concerning witnesses are to be applied to confrontation too.[83] Experts on the other hand are no witnesses. While witnesses give information of personally perceived facts, experts give expert opinion based on personally perceived facts.[84] As experts carry out a public assignment (and they are public officials in doing so),[85] they are obliged to keep secret all the information which does not have to be included in the opinion. By unlawfully revealing secrets, they may commit the crime 'violation of confidentiality related to law enforcement'.[86] It is also important that defendants and witnesses are allowed to apply for confidential treatment of the findings of expert opinions.[87]

It is the responsibility of the authorities to provide the expert with all the information he needs to give a well-founded opinion, but at the same time, they also have to respect their obligation to keep service secrets and professional secrets.[88]

The rules mentioned above are applicable to consultants, probation officers and translators. The legal status and responsibility of translators is of a special character as the translator is only expected to translate correctly but not to notice and cover secrets revealed by the witness or the accused. Logically, a higher rank of responsibility of translators could be established, but it seems unnecessary since translators are not officials.

The most significant problem concerning the roles mentioned in this chapter is the low number of experts. That is why authorities must work with the same experts again and again. Experts however are forbidden to reveal information obtained in former criminal procedures even if it concerns the actual case unless they have been granted exemption. Allowing exemption can also lead to controversies in case of authorities working in a hierarchical system (all the authorities except courts). Exemption may be allowed by the authority itself, in the proceedings of which the expert has given an opinion. In a hierarchical structure, an authority may have the right to order the subordinate authority (which acted in a former case) to exempt the expert

[83] Criminal Procedure Act, Art. 103, Par. (5)

[84] Kardos, Sándor: A szakértő és az eljárás többi szereplője. In: Elek, Balázs (ed.): Az orvosszakértő a büntetőeljárásban. Debreceni Egyetem Állam- és Jogtudományi Kar Büntető Eljárásjogi Tanszék, Debrecen, 2012 p. 38.

[85] Ibid. p. 36.

[86] Criminal Code, Art. 280, Par. (2)

[87] Criminal Procedure Act, Art. 108, Par. (7)

[88] Herczeg, László: Igazságügyi orvosszakértő szerepe a büntetőeljárásban – a helyszíni szemlétől a jogerős ítéletig. In Elek, Balázs (ed.): Az orvosszakértő a büntetőeljárásban. Debreceni Egyetem Állam- és Jogtudományi Kar Büntető Eljárásjogi Tanszék, Debrecen, 2012 p. 107.

from the obligation of secrecy. In such cases, the decision could be made by the court or by the chief public prosecutor.

Another important requirement is that experts (consultants, translators) cannot smuggle unlawful evidence into the criminal procedure (e.g. by revealing unlawfully obtained information or spontaneous statements of the witness).[89]

4.6 Official witnesses

In terms of the protection of secrets, practical issues concerning official witnesses are similar to those concerning experts. This role played in the criminal procedure is also a public assignment which is linked with the obligation of secrecy.[90] However, the protection of secrets is of higher level, since official witnesses (contrary to experts) are subject to the prohibition of interrogation.[91]

An official witness can be exempted from the obligation of secrecy by the authority in the proceedings of which he has acted.[92] Similarly to witnesses, official witnesses must also be summonsed by the authorities to consider the existence of the prohibition. Obviously, the same authority, in the proceedings of which the official witness has acted, will not summons him unless the authority itself intends to grant him exemption.[93] By unlawfully revealing secrets, official witnesses may commit the crime 'violation of confidentiality related to law enforcement'.[94]

4.7 Diplomatic immunity and consular secrets

In the Hungarian Criminal Procedure Act, the issue of diplomatic immunity is a kind of extraordinary procedure. Practically, however, it is a condition of the procedure and it should be regulated as such.[95]

In terms of the protection of secrets, diplomatic immunity is most significant concerning the interrogation of witnesses. According to the Criminal Procedure Act, a person enjoying diplomatic immunity cannot be heard as a witness until his immunity is absolved. As this is the right of the

[89] Tremmel, Flórián: Bizonyítékok a büntetőeljárásban. p. 165.
[90] Criminal Procedure Act, Art. 183, Par. (6)
[91] Criminal Procedure Act, Art. 81, Par. (1), Subpar. d)
[92] Criminal Procedure Act, Art. 183, Par. (6)
[93] Varga, Zoltán op. cit. p. 83.
[94] Criminal Code, Art. 280, Par. (1)
[95] Bodor, Tibor – Székely, Ákos – Vaskuti, András: Büntető eljárásjog II. Jogi szakvizsga kézikönyvek. Novissima, Budapest, 2011 p. 286.

appointing state, the diplomat is not allowed to testify even though he would like to.[96] Unfortunately, this is contrary to Article 44 of Law Decree № 13 of 1987 ratifying the Vienna Convention of 1963 on Consular Relations, which raises constitutional questions.

Another interesting point is that, according to the Law Decree, despite their legal and political significance, consular representatives are simply allowed and not obliged to keep consular secrets. On the other hand, according to Article 55 of the Convention, when a diplomat is heard as witness, he must respect all the statutes and legal order of the host country. So, consular representatives are under an obligation to keep secrets relating to their public assignment.

4.8 Exclusion of publicity

Publicity, which is one of the basic principles of criminal procedure, especially concerning the proceedings of the court,[97] means that theoretically everyone has the right to attend a trial of the court. This may raise questions concerning the protection of secrets.

The Criminal Procedure Act enumerates the cases when the public (publicity) can be excluded from the trial. One of the grounds for exclusion is the protection of qualified data. According to a literal interpretation of the Act, the exclusion of publicity in order to protect qualified data is only a possibility but, applying a systematic or teleological interpretation, it is also a duty of the courts. Further reasons can be the protection of a witness or a minor and moral reasons. On the broad interpretation of the Act, other types of secrets may be protected under this article, but this can become a double-edged weapon, since if publicity is unlawfully excluded, the appeal court will annul the verdict.[98]

It is important to mention, that anyone who reveals information heard in a closed trial without being permitted to do so, commits the crime ‘violation of confidentiality related to law enforcement’.[99]

As mentioned above, publicity must be excluded *ex officio* in order to protect qualified data. However, the responsibility of the judge failing to exclude the public is not clear. If a judge notices that he should exclude publicity but fails to do so, theoretically, he causes the leak-out of the qualified data and can be guilty of misuse of qualified data.[100] Intentions of

[96] Ibid. p. 290.
[97] Bánáti, János – Belovics, Ervin – Csák, Zsolt – Sinku, Pál – Tóth, Mihály – Varga, Zoltán op. cit. p. 400.
[98] Criminal Procedure Act, Art. 373, Par. (1), Subpar. II. f)
[99] Criminal Code, Art. 280, Par. (2)
[100] Criminal Code, Art. 265

the legislator should be clarified. On the other hand, punishing the judge cannot solve the problem of the revealed secrets.

4.9 Gathering evidence and the principle of legality

The principle of legality means that authorities must respect all the rules written in the statutes and other sources of law. In terms of the procedure, these rules include not only the Criminal Procedure Act but also rules of the protection of secrets. Any evidence gathered by infringing these rules is unlawful evidence which cannot be considered when reaching the verdict.[101] If this breach of procedural law is serious enough, it can lead to an appeal.[102]

We can repeat Article 60 of the Criminal Procedure Act, which says that authorities are obliged to 'prevent the unnecessary revelation of data concerning privacy'. This requirement can also be found in the articles relating to acts of taking evidence and coercive measures like perquisition, search of pockets or search of computer data and electronic systems.[103] Practical problems of this declaration have already been analyzed in this essay.

4.10 Secret investigation

As mentioned above, secret investigation is also connected with the protection of secrets. These actions of the authorities require special guarantees, since neither the person obliged to secrecy nor the beneficiary of secrecy knows that a criminal procedure has been started.

In terms of the secret gathering of data with permission of the judge, the Criminal Procedure Act establishes sufficient guarantees to protect the secrets of those who are legally deserving of the protection (permission of the judge is needed, criminal procedure must be in progress, appropriateness, permitted actions are enumerated, suspicion of a serious crime is needed, personal limitation in case of church personnel and attorneys, limitation in time, content of motion).[104]

Article 206 of the Act defines when the person concerned by the secret investigation must be informed about the proceedings. According to Paragraph (6), the result of covert data gathering may not be admitted as evidence if the person affected by the covert data gathering may not be heard as witness or may refuse to testify under Article 82 Paragraph (1). As this is

[101] Fenyvesi, Csaba – Herke, Csongor – Tremmel, Flórián op. cit. pp. 288-292.
[102] Ibid. pp. 537-539.
[103] Criminal Procedure Act, Art. 60, Par. (1); Art. 77, Par. (2); Art. 158, Par. (1)
[104] Criminal Procedure Act, Art. 200-203

a right of anyone (because of the prohibition against self-incrimination), except for five cases contained in Article 82 Paragraph (4), results of secret gathering of data could hardly be admitted as evidence in practice. This logical tumble obviously needs re-codification. Finally, all the information (private secrets) obtained by the authorities which is irrelevant in the criminal procedure belongs to the field of service secrets or professional secrets.

Secret gathering of information with permission of the judge or the Attorney General does not raise further questions, since the rules mentioned above are applicable to this action of the authorities. Secret gathering of information requiring no permission does not raise further questions, since it hardly (and only indirectly) concerns privacy.[105]

In terms of the so-called 'further gathering of data', problems may occur when only authorities are aware of the fact that a criminal procedure is in progress (where procedure is started against an unknown offender *ex officio* and there is no injured party). In such cases, it can be difficult to protect even legally protectable secrets. Moreover, permission of the public prosecutor is only required if a covert agent is deployed.[106] From the aspect of the protection of secrets, this seems unsatisfactory. Article 178/A allows the authorities to become acquainted with trade secrets and several types of economic secrets. As the significance of these secrets can be very different, a more differentiated regulation may be needed.

To sum up, the biggest problem of secret investigation is that unlawful results of the unlawful actions of authorities cannot be deleted from the knowledge of those who had received the (secret) information. Conclusions drawn from unlawfully obtained information may lead to further evidence the lawfulness of which is doubtful.[107]

4.11 Witness protection

The interest lying in the background of secrecy related to witness protection is the protection of the life, physical and psychical health and personal freedom of the witness (or someone else).[108]

Confidential treatment of personal data of the witness provides shelter from the curiosity of others except authorities. This protection can only be abandoned with the consent of the protected person.[109] This is similar to

[105] Kis, László op. cit. pp. 18-19.
[106] Criminal Procedure Act, Art. 178, Par. (2)
[107] Herke, Csongor – Fenyvesi, Csaba – Tremmel, Flórián: A büntető eljárásjog elmélete. Dialóg Campus, Budapest-Pécs, 2012 p. 147.
[108] Criminal Procedure Act, Art. 95; Art. 97, Subpar. d)
[109] Criminal Procedure Act, Art. 96, Par. (2), Subpar. c)

allowing exemption from the obligation of secrecy, and authorities must also keep secret all the data treated confidentially.

The significance of this legal instrument is increased by the attention of the Constitutional Court. The body criticized that rules of confidential treatment of personal data did not extend to the civil procedure where the enforcement of the civil claim had been referred to 'another legal forum'.[110] Until now, the legislator has not drawn the consequences from the decision. However, there are important interests contesting in the background: witness protection on the one hand, and the content of the civil claim and equality of the parties in the civil case on the other hand. The best solution could be if criminal courts were obliged to judge civil claims on their merits where confidential treatment of personal data was ordered.

In 2010 the Constitutional Court declared: demanding the confidential treatment of personal data is a right (and not only an opportunity) of the witness, which means that the authorities have no constitutional ground to deny this kind of protection.[111]

In terms of the Witness Security Program, it is important to mention that Article 37 of the Witness Security Program Act[112] extends the application of the rules of protection of qualified data to all the data covered by the Security Program that are not qualified.

According to the Criminal Procedure Act, witnesses and defendants can refuse to make a statement on their new personal data received under the Security Program.[113] The effectiveness of this protection is not obvious in cases where the witness (or the accused) refuses to answer the question of a witness or an accused citing this article, since this reaction can sometimes tell enough to the person asking the question.

We have already mentioned the practical problem occurring when someone who is not aware of the protection, initiates the interrogation of a protected witness.[114] Authorities must dismiss the motion giving reasons for the dismissal while they are not allowed to reveal the identity of the protected witness.

In terms of the so-called considerate treatment of witnesses, the interrogation through a closed-circuit communication system should be mentioned first. The problem with Articles 244/A-244/C of the Criminal Procedure Act is that conditions of the different forms of protection (e.g. of the distortion of picture and voice) are not clear enough.

[110] Decision 91/2007 (22nd of November) of the Constitutional Court
[111] Decision 104/2010 (10th of June) of the Constitutional Court
[112] Act LXXXV of 2001 on the Security Program of the Participants of Criminal Procedures and of Individuals Assisting Law Enforcement
[113] Criminal Procedure Act, Art. 98/A, Subpar. e)
[114] Hesz, Tibor – Kőhalmi, László op. cit. p. 103.

The same problem arises in the case of the omission of confrontation and the use of a detective mirror. The term 'must' (instead of 'can') applied in the wording of the Criminal Procedure Act means, however, that these forms of protection cannot be interpreted in a narrow sense.

5. Closing remarks

The aim of the essay was to present the practical problems and questions raised by the protection of secrets in the criminal procedure. Even theoretical issues came up in the analysis when it seemed necessary for better understanding. I hope that the issues mentioned above can clearly illustrate the practical significance of this topic and my *de lege ferenda* proposals can lead closer to the solution of these problems. Finally, repeating the words of ERVIN CSÉKA again, 'professional work of a high standard requires thorough grounding in practical issues which must lean on deep theoretical bases'.[115]

[115] Cséka, Ervin op. cit. p. 11.

Illicit Trade in Art and Antiquities. Legal Background and Recent Developments

NÁTHON, NATALIE

> *"As you know, there's been a debate raging within the art world (…) over who owns antiquity. For centuries, the great empires of Europe looted the treasures of the ancient world with reckless abandon. The Rosetta Stones, the Elgin Marbles, the great temples of ancient Egypt – the list goes on and on. (…)"*
>
> *Daniel Silva: The Fallen Angel*

ABSTRACT The paper deals with the illicit trade of art and antiquities. Theft and trafficking of cultural property objects is a major problem, which is a unique feature of debate at national and international level as well. A global black market has developed in the world of art and antiquities, which is dominated by organized crime groups. The present study intends to give an overview of the legal framework of the illicit trade of art at international, EU and national level, demonstrating its importance from the point of view of the practice.

1. Introduction

The "Arab Spring": demonstrations and protests, riots, revolutions and civil war started in Tunisia in December 2010 and affected the neighbouring countries, as well as the whole Middle Eastern area like Libya, Yemen and Egypt[1] and the still on-going Syrian civil war has caused uncertainty and political instability.

[1] According to the analysis of UNESCO "The recent events in Egypt are only the latest in which objects and places of art have been endangered by wars or armed conflicts. During the protests against Hosni Mubarak, archaeological sites of great importance have been looted. According to a declaration of Zahi Hawass, ancient tombs at Saqqara and Abusir, as well as deposits in Saqqara and at the University of Cairo were looted. At least nine artefacts were robbed from the National Museum of Cairo". It should be also noted that the illicit trafficking of antiquities is estimated to be superior to US$ 6 billion per year according to a research conducted by the United Kingdom's House of Commons in July 2002. Ten years later, the UN report

For the past years many of these countries have been struggling: the democratic transition not only has failed and has not been peaceful, on the contrary, new and new regional, national conflicts have arisen and we are still far from peace and stability. The uncertain political situation aggravated the situation of the protection of cultural property. Looting of and robbery from museums, historical and protected sites have become a common practice. Systematic attacks against archaeological sites and museums, an attribute of wars and transition periods, are frequent. In the meantime, there is high demand for stolen objects from museums and from individuals as well.

Cultural racketeering is the term for the illicit traffic in art and antiquities of organized criminal networks used by the Capitol Archaeological Institute.[2] These days it is a global black market "facilitated by social media [i.e. internet, which includes on-line auctions] and global transportation networks".[3] This fact is also confirmed by a UN draft resolution (*see* below), according to which "[A]larmed at the growing involvement of organized criminal groups in all forms and aspects of trafficking in cultural property (…) and observing that illicitly trafficked cultural property is increasingly being sold through markets, including in auctions, in particular over the Internet, and that such property is being unlawfully excavated and illicitly exported or imported, with the facilitation of modern and sophisticated technologies".

Transnational organized crime is often associated with cross-border activities such as trafficking in arms, drugs and human beings. When it comes to the issue of trafficking in cultural property, organized crime has been associated with it only recently. While there is evidence for a substantial amount of looting around the world, actions to combat trafficking in cultural property have so far not matched the gravity or the extent of the crime. According to the overview of the United Nations Office on Drugs and Crimes, "despite well-established agreements and legislation by bodies such as the United Nations Educational, Scientific and Cultural Organization (UNESCO) to curb the buying and selling of illegally excavated artefacts, it is only in recent years that international efforts to tackle the role of the organized criminal networks that perpetrate this crime have come to the

on transnational crimes calculated that the world traffic in cocaine reached US$ 72 billion; arms 52; heroine 33; counterfeiting 9.8; and cybercrime 1.253. Together with the trafficking in drugs and arms, the black market of antiquities and culture constitutes one of the most persistent illegal trades in the world (www.unesco.org).

[2] An Institute affiliated with the George Washington University, established in 2010. http://research.columbian.gwu.edu/archaeology/ [01.11.2013.]

[3] Lehr, Deborah: Cultural Racketeering and Why it Matters: Robbing the World of History. In: Huffington Post, October 1, 2013.

fore".[4] In October 2012 trafficking in cultural property was recognized as an important aspect to be dealt with. The focus of interest on organized crime is the consequence of two previous intergovernmental expert group meetings (in 2009 and earlier in 2012).[5]

The importance of this subject is also reflected in the recently adopted resolution, entitled "Strengthening crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking" dated 1 October 2013 by the General Assembly of the United Nations.[6] The resolution "[R]equests Member States to continue their efforts to effectively strengthen crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking".

When we speak about art, theft, looting and illicit trade, we should not forget about looting from private individuals. A recent event in October 2013 related to Word War II is the so-called Munich art discovery, where 1500 artworks were found in a Munich apartment. Their fate, their return and restitution is still an unresolved question. This study, due to its complex nature, will not deal with this subject, but I would like to restrict myself to the summary of the presentation of the recent EU regulation, and to the dispositions to be applied in such cases.

The present study intends also to give an overview of the legal framework of the illicit trade of art and antiquities at international and at EU level, and finally wishes to summarize the recent case-law and events.

[4] http://www.unodc.org/unodc/en/frontpage/2012/October/trafficking-in-cultural-property--organized-crime-and-the-theft-of-our-past.html [01.11.2013.]

[5] ECOSOC Resolution 2008/23. Protection against trafficking in cultural property. *See* also: Open-ended intergovernmental expert group meeting on protection against trafficking in cultural property, Vienna, Austria, 24-26 November 2009. http://www.unodc.org/unodc/en/organized-crime/trafficking-in-cultural-property-expert-group-2009.html and open-ended intergovernmental expert group meeting on protection against trafficking in cultural property, Vienna, Austria, 27-29 June 2012. http://www.unodc.org/unodc/en/organized-crime/trafficking-in-cultural-property-expert-group-2012.html. The group's next meeting is scheduled for January 2014. [01.11.2013.]

[6] Sixty-eighth session,Third Committee (Agenda item 108). Crime prevention and criminal justice http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/68/L.3. The General Assembly is expected to approve the Committee's resolution soon. [01.11.2013.]

2. Legal background and recent developments

2.1 The UNESCO Convention

14 November 2013 is the 43rd anniversary of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The UNESCO Convention was the first treaty to recognize the general obligation of states to take steps to prevent the illicit movement or transfer of cultural objects which had been stolen and/or illegally exported or imported.[7] Contracting States are ready to cooperate to protect the cultural property on their territory and fight its illicit import, export and transfer as well.[8] The Convention is the end result of over one hundred years of international law seeking to protect cultural property, but this is the first to account for such property in times of peace on an international scale by codifying pre-existing customary law.[9] According to the website of the UNESCO, "[N]owadays, given the problem of illegal excavations and trade of archaeological objects, the 1970 Convention now stands at the crossroads. Many UNESCO Member States would like to increase its visibility, improve its implementation at national level and reconsider its perspectives for the future".[10]

The UNESCO Convention has been applied by its States Parties in various ways, and with different degrees of vigour. Some have focused on

[7] According to Article 3 of the Convention: "The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit". According to Article 7: The States Parties to this Convention undertake:
(a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. (…)
(b) (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution (…), provided that such property is documented as appertaining to the inventory of that institution;
(ii) (…) to recover and return any such cultural property imported (…) provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property.

[8] Source: http://www.unesco.org/new/en/culture/themes/illicit-traffic-of-cultural-property/ [08.11.2013.]

[9] Schwartz, Robert S.: In Schultz We Trust: The Future of Criminal Prosecution for Importers of Illicit Cultural Property under the National Stolen Property Act. 11 Cardozo J. Int'l & Comp. L. 211, p. 229.

[10] To date, the 1970 Convention has been ratified by 124 Member States of UNESCO, including many culturally rich countries.

establishing mechanisms in terms of Article 9, to allow bilateral agreements to be drawn up at the request of source countries whose cultural patrimony is in danger. Others have put in place systems to regulate their cultural property markets which are capable of affording quite significant protection against illicit imports without the high level of bureaucracy and forward-planning involved in the bilateral approach.[11]

It is important to note that the UNESCO Convention does not apply retroactively. While Article 7 expressly contains a reference to property "illegally removed from the State after the entry into force of this convention in both States", however, Article 3 leaves it open to a State Party to declare illegal all future imports of cultural property which have been illegally exported at any time. It also important to note that the Convention does not apply to property stolen from private individuals or privately owned sites.

The UNESCO Convention is probably too ambitious and it determines methods as models that countries should adopt to facilitate both the reclamation of art stolen from a certain country and the regulation of the art market and museum acquisition. It has not been ratified by the entire international community[12] and the lack of its enforcement has proved to be its downfall.[13] It should be noted that some States have ratified the Convention subject to reservations, particularly concerning the scope of certain rules or the areas to which the Convention applies.[14] Thus, some States have limited the influence of the 1970 Convention, narrowing the definition of cultural goods by specifying financial or date thresholds.[15]

After 43 years the Convention remains unsatisfactory in several points. The ongoing increase of illicit trafficking through the internet also raises several questions.[16] The illicit e-trade of cultural objects is a new area of

[11] UNODC/CCPCJ/EG.1/2009/CRP.1

[12] Regarding the European Union: The majority of Member States have ratified the 1970 Convention (23 States on 15 November 2013), there are still five States who have not ratified yet.

[13] DiFonzo, Monica R.: "Think You Can Steal our Caravaggio and Get Away With It?: Think Again": an Analysis of the Italian Cultural Property Model. 44 Geo. Wash. Int'l L. Rev. 539, p. 541.

[14] UNESCO Member States who have lost certain cultural objects of fundamental significance and who are calling for their restitution or return, in cases where international conventions cannot be applied, may call on the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation. See more on case law at: http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/ [02.11.2013.]

[15] Study on preventing and fighting illicit trafficking in cultural goods in the European Union, CECOJI-CNRS –UMR 6224. Final Report – October 2011, p. 155.

[16] INTERPOL, UNESCO and ICOM issued the "„Basic Actions concerning Cultural Objects being offered for Sale over the Internet".

activity of organized crime[17] and an effective solution can only be established through worldwide cooperation. According to the Basic Actions to counter the Increasing Illicit Sale of Cultural Objects through the Internet (see footnote 13), one of the most important steps is to "[R]equest Internet platforms to disclose relevant information to law enforcement agencies and to cooperate with them on investigations of suspicious sales offers of cultural objects" (Point 2).

2.2 The 1995 UNIDROIT Convention

The UNIDROIT[18] Convention is a complementary instrument to the 1970 Convention. States commit themselves to a uniform treatment for the restitution of stolen or illegally exported cultural objects and allow restitution claims to be processed directly through national courts. According to the commentary of the Convention, the existing international instruments do not, or just partially cover the private law aspects of cultural property protection (one of the chief obstacles to the international recognition of rules by some States in this area is the protection of purchasers in good faith).

http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/basic-actions-cultural-objects-for-sale_en.pdf [02.11.2013.]

[17] Three organizations of archaeologists (the Society for American Archaeology, the Society for Historical Archaeology, and the American Anthropological Association), sent a letter to Amazon.com, Inc. on 3 July 2000. In this letter they asked Amazon to put an end to the sale of archaeological materials on Amazon.com. In their letter they state: "The Internet sale of antiquities has noticeably exacerbated the already-severe problems created by the market for antiquities. The Internet has created an explosion in the number of people who can engage in this trade, and with less concern about the enforcement of existing law. We think it extremely likely that most, if not all of the authentic objects being sold on your auction site were illicitly removed from the ground by bulldozing, dynamiting, hasty shovel work, or other destructive methods" (Letter available at: http://www.saa.org/AbouttheSociety/GovernmentAffairs/LettertoAmazon/tabid/222/Default.aspx. [15.11.2013.] Similarly, as Saadet Güner mentions in his study, "In the United Kingdom, British Museum, Libraries and Archives Council (MLA) accorded with eBay.co.uk which is the branch in United Kingdom of the biggest internet market "eBay" in the World, to prevent illicit trade of valuable antiquities found in the UK through internet. In order to prevent their illegal sales through internet, Portable Antiquities Scheme (PAS) has launched a team to observe the cultural objects being up for sale on ebay.co.uk in 2006". Güner, Saadet: The role of a NGO to counter increasing illicit sales of cultural objects through the Internet. Forum Archaeologiae —Zeitschrift für klassische Archäologie 55 / VI / 2010.

[18] International Institute for the Unification of Private Law, an independent intergovernmental organisation

"UNESCO therefore asked UNIDROIT to draft a new instrument that would take its cue from the 1970 UNESCO Convention but would also incorporate 25 years of reflection on the subject of illicit trafficking".[19]

Moreover, the UNIDROIT Convention covers all stolen cultural objects, not just inventoried and declared ones and stipulates that all cultural property must be returned.[20] In its preamble it states that "deeply concerned by the illicit trade in cultural objects and the irreparable damage frequently caused by it (…) and the resulting loss of irreplaceable archaeological, historical and scientific information", and "determined to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States, with the objective of improving the preservation and protection of the cultural heritage in the interest of all".

Probably the most important provision in the entire Convention is its Article 3(1), which contains the principle that the possessor of a cultural object that has been stolen must return it whatever the circumstances.[21] The Convention determines the circumstances under which property shall be ordered to be returned. Requests for returns shall be brought within three years of the State learning of the location and/or identity of the possessor of the stolen or illegally exported object or within fifty years from the theft.[22]

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[19] The 1995 UNIDROIT Conventionon Stolen or Illegally Exported Cultural Objects. An overview. http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-overview-e.pdf [Overview] [15.11.2013]. For further analysis regarding the problem of acquisition see: UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report prepared by the UNIDROIT Secretariat and by Marina Schneider, UNIDROIT [UNIDROIT Explanatory Report] ("Legal systems approach the problem of acquisition a *non domino* in very different ways: common law systems follow the *nemo dat quod non habet* rule [a purchaser cannot acquire valid title unless the transferor has valid title], whereas the vast majority of civil law systems accord greater protection, albeit to varying degrees, to the acquirer in good faith of stolen property ["en fait de meubles, possession vaut titre"]. http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-explanatoryreport-e.pdf, p. 480. [15.11.2013.]

[20] According to Article 1: "This Convention applies to claims of an international character for:
(a) the restitution of stolen cultural objects;
(b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage ("illegally exported cultural objects").

[21] See footnote 19, Overview, p. 2

[22] According to Paragraph 3: "Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft."

The provision does not specify who may bring the claim; as a rule, claims for restitution before the courts or other competent authorities may be brought either by a private person dispossessed of a cultural object as a consequence of theft, or by a State in similar circumstances (claims for the return of an illegally exported object on the other hand can only be brought by the State whose rules have been infringed); in another scenario, it may be possible for the State to act on behalf of a private person who cannot or does not wish to bring a claim.[23]

The Convention also calls for fair and reasonable compensation (Article 3) to be paid where the possessor of stolen or illegally exported cultural property acted in good faith at the time of the purchase. This provision protects the diligent possessor and is a key element of the compromise package to reconcile two diametrically opposed trends in domestic law (*see* footnote 19 above).[24]

2.3 European Union law

The Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State was adopted on 15 March 1993 (the internal frontiers were abolished on 1 January 1993). One of the main objectives of the Directive is to reconcile the fundamental principle of the free movement of goods, as laid down by Article 34 of the Treaty on the functioning of the European Union (TFEU) with the protection of national treasures, as set out in Article 36 of the Treaty.[25] The aim was to enable EU member countries to reclaim cultural goods classed as "national treasures" that had been unlawfully removed. A special mechanism was created for the procedure.[26]

In 2011, after consideration of the Directive, it was concluded that the system established by it had not functioned well. A revision of the structure became indispensable to make the combat against the illicit trade and trafficking of national heritage efficient and to ensure the return of the

[23] See footnote 19, UNIDROIT Explanatory Report, p. 506.
[24] Ibid.
[25] http://ec.europa.eu/enterprise/policies/single-market-goods/internal-market-for-products/cultural-goods/ [15.11.2013.]
[26] Public consultation on possible revision of Directive 93/7/EEC on the return of cultural objects unlawfully removed from EU member countries. http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=5526&lang=en [31.10.2013.]

artworks.[27] In its press release of 29 November 2011 the Commission called for a public consultation that would be open until 5 March 2012.[28]

In the press release it is stated that "[W]hile most thefts are perpetrated in France, Poland, Germany and Italy, according to Interpol, all Member States are involved. Therefore, the European Commission launched a public consultation on ways to improve the safe-keeping of cultural goods and the return between Member States of national treasures unlawfully removed from their territory. The consultation will provide an insight into the views of public authorities, citizens and other stakeholders on the most effective way to facilitate such return".

Following the consultation it was concluded that a recast of Directive 93/7/EEC was needed.[29] The assessment reports highlighted the need for improved administrative cooperation and consultation between the central authorities in order to enable them to better implement the Directive.

According to the commentary of the Proposal for a Directive of the European Parliament and the Council on the return of cultural objects unlawfully removed from the territory of a Member State[30] the changes made to the provisions of Directive 93/7/EEC concern – among others – "extending the time given to the authorities of the requesting Member State to check the nature of the cultural object found in another Member State", "extending the time-limit for bringing return proceedings", "stipulating that the possessor has the burden of proof that due care and attention was taken when the cultural object was acquired" and "extending the time limit for the reports assessing and reviewing the application of the Directive".[31]

[27] According to the Commission "the most important problems relate to its scope [Council Directive 93/7/EEC] and the conditions for using return proceedings. Moreover, it seems that cooperation and the exchange of information among the competent national authorities should also be improved. Thus (…) it is necessary to explore the best way to achieve the return of unlawfully removed national treasures in the European Union". The Commission wants to facilitate the return of unlawfully removed national treasures. http://europa.eu/rapid/press-release_IP-11-1468_en.htm?locale=en [29.11.2013.]

[28] Ibid.

[29] The adoption of the Proposal for a recast will lead to the repeal of the legislation in force, among them Directive 93/7/EEC

[30] May 30, 2013. COM(2013) 311 final, p. 6.

[31] It is also important to note that "(…) the Union is not competent for determining what is a national treasure or which national courts have competence for hearing the return proceedings brought by the requesting Member State against the possessor and/or holder of a cultural object that is classified as being a national treasure and has been unlawfully removed from the territory of the Member State. These matters are covered by subsidiarity, as they fall within the competence of the Member States". Ibid. p. 7.

It is important to note that the Proposal relates to the return of cultural objects by means of arrangements enabling Member States to protect their cultural objects which are classified as national treasures. According to recital 10 in the preamble of the Proposal "[T]he scope of this Directive must extend to any cultural object classified as a national treasure possessing artistic, historic or archaeological value under national legislation or administrative procedures within the meaning of Article 36 of the Treaty". The commentary draws the attention to the fact that "this proposal meets the repeated demand made by representatives of the Member States for effective arrangements for the return of cultural objects classified as national treasures. It allows Member States to secure the return of cultural objects which are classified as national treasures and have been unlawfully removed from their territory since 1993, and thus provides better protection for the Member States' cultural heritage". "However, the possessor would be able to submit evidence in the return proceedings to argue that the requesting State infringed Article 36 of the Treaty when it classified the object as a national treasure. The court in question will then have to make a ruling, where necessary after sending a referral for a preliminary ruling to the Court of Justice of the European Union".

As far as the recovery of a cultural object by *its owner* is concerned, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[32] provides for the creation of a forum for civil recovery proceedings based on ownership at the courts of the place where the object is located. This new provision would also cover civil proceedings brought for the recovery of cultural objects.

Firstly, the importance of the combat against the trafficking of cultural goods can also be seen in the Proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust).[33] It states "[T]he fight against organized crime and the disruption of criminal organizations remain a daily challenge. Regretfully, the past decade has seen an explosion of cross-border crime.

[32] Regulation No 1215/2012 implements a new, recast version of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I"). It will enter into force on 10 January 2015.

[33] 17 July 2013. COM(2013) 535 final. Eurojust was set up by Council Decision 2002/187/JHA1 to reinforce the fight against serious organized crime in the European Union. Ever since, Eurojust has facilitated coordination and cooperation between national investigative and prosecutorial authorities in dealing with cases affecting various Member States. More on the Proposal *see* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0535:FIN:EN:PDF [29.11.2013.]

(…) A common feature of all these areas of crime is that they are committed across borders by highly mobile and flexible groups operating in multiple jurisdictions and criminal sectors. (…) The increased cross-border dimension of crime as well as its diversification into multi-crime activities make it more difficult for single Member States to detect and tackle cross-border crime, and in particular organized crime". In Annex 1 entitled "List of forms of serious crime which Eurojust is competent to deal with", illicit trafficking in cultural goods, including antiquities and works of art are also enumerated.

Secondly, the Council conclusions on preventing and combating crime against cultural goods request, among others, the Member States – referring to the Work Plan for Culture 2011-2014[34] – to consider the necessity of introducing specific provisions in their national legislation for crimes committed against cultural goods and strengthen coordination between law enforcement and cultural authorities and private organizations (e.g. antique shops, auction houses, online auctions) with a view to facilitating the exchange of information, in accordance with relevant legislation, and best practice at national and international level and for that purpose designate contact points for preventing and combating crime against cultural goods.[35]

3. Recent case law and events

Art disputes, which have arisen during the past decades, demonstrated that this type of procedures is one of the more complex issues in litigation. Broad knowledge, expertise and experience are needed. Disputes are divergent, depending on whether they concern "the return of cultural artefacts to their legitimate owners, the recovery of underwater cultural heritage, the governance of sites of outstanding and universal value, the protection and promotion of artistic expressions, and the protection of

[34] Conclusions of the Council and of the representatives of the governments of the Member States, meeting within the Council. *See* Priority Area D : Cultural heritage (2012-2013): Following the outcome of the ongoing study on prevention and fight against illicit trafficking of cultural goods (report expected mid-2011), the Commission will intensify collaboration between its services. Commission-convened expert group(s), in cooperation with the Member States, may propose a toolkit including European good practice guidelines and a code of ethics on due diligence in the fight against illicit trafficking and theft, building upon existing documents and codes, and considering relevant EU instruments in this area. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/educ/117795.pdf [29.11.2013.]

[35] http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/126866.pdf [29.11.2013.]

cultural sites in times of war".[36] Such disputes have involved a number of different actors and have arisen between states, between states and private individuals, as well as only amongst individuals. As the regulation of cultural goods constitutes a good example of multilevel governance and legal pluralism, art and heritage-related disputes have been brought before national fora, human rights courts, International Economic Law fora and even before the International Court of Justice.[37] Hereafter I have chosen only some of the recent cases, since the presentation of the extensive case law seems to be impossible within the framework of the present overview.

3.1 Germany

A recent German case from July 2013 concerned 25 artefacts from pre-Columbian times. The Oberverwaltungsgericht (Administrative Court of Appeal of Nordrhein-Westfalen) in Munster[38] rejected the claim of Mexico regarding the more than 3000 year-old collection, worth of millions of euros.[39] The case started in Cologne in 2011 when the Auction House Lempertz[40] auctioned the figurines (which had not been held in Mexican territory since the 1950s, they were mostly in US and German private collections). Upon request of Mexico the Nordrhein-Westfalen Landgericht (Court of the First Instance) ordered the stay of the auction because the figurines had been unlawfully removed and illegally exported from Mexico. As a consequence the Auction House was not allowed to hand over the already auctioned works to the new owners.

The Oberverwaltungsgericht rejected the claim of the Mexican government however the possibility of a judicial review remained open. The importance of this case in Germany lays in the fact, as the presiding judge in Munster emphasized, that since the entry into force of the Kulturgüterrückgabegesetz it was the first case of its application. The judge made reference to the German cultural property restitution law dated 2007, which contains provisions for the implementation of the UNESCO

[36] Art and Heritage Disputes in International and Comparative Law, TDM 5 (2013), p.1, http://www.transnational-dispute-management.com/article.asp?key=1993 [28.11.2013.]
[37] Ibid.
[38] Case Number: 5 A 1370/12. Judgement of July 8, 2013.
[39] Press release regarding the case can be found at http://www.ovg.nrw.de/presse/pressemitteilungen/18_130708/index.php [20.11.2013.]
[40] http://www.lempertz.com/[20.11.2013.]

convention as well as for the transposition of Directive 93/7 EEC into national law.[41]

An important question arose during the procedure, namely the date of entry of the figurines into the territory of Germany and the date[42] referred to in §6 of the Kulturgüterrückgabegesetz (namely 26 April 2007). It was essentially disputed whether the illegal export took place after 26 April 2007, since many pre-Columbian artefacts had already been in private art collections in Germany for many years.

The chamber stated that a claim for return in accordance with the applicable national law and with the international treaties can be confirmed only if the cultural objects in question were illegally removed from the country of origin after 26 April 2007. They also emphasized that the UNESCO Convention had entered into force with no retroactive effect, thus it is applicable only after the date mentioned in the Kulturgüterrückgabegesetz, and the balance between the protection of cultural property and the interests of the art trade should be taken into account.

Another recent procedure was closed in November 2013, in the "matter of Flamenbaum".[43] In this proceeding, the Vorderasiatisches Museum in Berlin, Germany sought to recover a 3,000-year-old gold tablet from the estate of Riven Flamenbaum. The tablet was first discovered prior to World War I by a team of German archaeologists excavating at the foundation of

[41] Gesetz zur Ausführung des UNESCO-Übereinkommens vom 14. November 1970 über Maßnahmen zum erbot und zur Verhütung der rechtswidrigen Einfuhr, Ausfuhr und Übereignung von Kulturgut und zur Umsetzung der Richtlinie 93/7/EWG des Rates vom 15 März 1993 über die Rückgabe von unrechtmäßig aus dem Hoheitsgebiet eines Mitgliedstaats verbrachten Kulturgütern) (Kulturgüter-rückgabegesetz - KultGüRückG). http://www.gesetze-im-internet.de/kultg_r_ckg_2007/BJNR075710007.html [20.11.2013.]

[42] § 6 Ein unrechtmäßig nach dem 26. April 2007 aus dem Hoheitsgebiet eines Vertragsstaats in das Bundesgebiet verbrachter Gegenstand ist dem Vertragsstaat auf sein Ersuchen zurückzugeben, wenn ... (An object unlawfully removed from the territory of a Contracting State after 26 April 2007 [and taken] in the Federal territory [i.e. Germany] is subject to be returned, at its request, to the State party if ...)

[43] 2013 NY Slip Op 07510, In the Matter of Riven Flamenbaum, Deceased. Vorderasiatisches Museum, Respondent, Hannah K. Flamenbaum, Appellant, Israel Flamenbaum, Respondent. New York Court of Appeal, Judgment of November 14, 2013. The case can be accessed at: http://www.nycourts.gov/reporter/3dseries/2013/2013_07510.htm?utm_medium=twitter&utm_source=twitterfeed [30.11.2013.]

the Ishtar temple in Ashur, Iraq.[44] The tablet was shipped to the Berlin Museum (now the Vorderasiatisches Museum) in 1926. In 1939, the Museum was closed because of World War II, and objects from Ashur were put in storage. In 1945, at the end of the war, the gold tablet was missing. The tablet resurfaced in 2003, when it was discovered among the possessions of a decedent, a resident of Nassau County who was a holocaust survivor. His son, Israel Flamenbaum notified the Vorderasiatisches Museum (branch of the Pergamon Museum) about the tablet, and the Museum responded that the gold tablet was part of its Assyrian collection and had been missing since the end of World War II.

Thereafter the Museum filed a claim with the Surrogate's Court, Nassau County, to recover the tablet. During the hearing the museum submitted that the tablet, along with many other objects, disappeared from the museum sometime near the end of World War II. They did not have information if the tablet had been taken by Russian troops, German troops, or people who came to the museum to take refuge. The court failed to determine how the Flamenbaum family may have acquired the tablet. The story, according to the family, was that Flamenbaum the Elder, an Auschwitz holocaust survivor, acquired the tablet from a Russian soldier in exchange for cigarettes.[45]

There were two appeals submitted to resolve the dispute over the tablet. In an earlier probate proceeding, the Flamenbaum estate was allowed to keep the tablet on the grounds that the German museum had waited too long to make its claim. The Court of Appeal finally ruled on the restitution of the Assyrian gold tablet to Germany.

3.2 Italy

Until 27 November 2013 the National Museum of Castel Sant'Angelo[46] in Rome exhibited objects of stolen cultural property recovered by Italy. The exhibition was organized under the name: Capolavori dell'archaeologia:

[44] The tablet dates back to the reign of Assyrian King Tukulti-Ninurta I (1243-1207 BCE) and bears an inscription written in Assyro-Babylonian language and Middle-Assyrian cuneiform script.

[45] Fincham, Derek: New York's highest court orders return of Assyrian gold tablet to Germany. November 14, 2013. http://illicitculturalproperty.com/new-yorks-highest-court-orders-return-of-assyrian-gold-tablet-to-germany/ [14.11.2013.]

[46] Capolavori dell'Archeologia. Recuperi, Ritrovamenti, Confronti (Masterpieces of archaeology: recoveries, findings, comparisons). http://castelsantangelo.beniculturali.it/index.php?it/22/eventi/45/capolavori-dellarcheologia-recuperi-ritrovamenti-confronti [27.11.2013.] Press release at: http://castelsantangelo.beniculturali.it/getFile.php?id=363 [27.11.2013.]

Recuperi, ritrovamenti, confronti (Masterpieces of archaeology: recoveries, findings, comparisons).[47]

Items included large pieces of a 1st Century BC Pompei villa fresco recovered from the J. Paul Getty Museum in Malibu; the head and extremities of a Morgantina acrolith recovered from the University of Virginia's Art Museum,[48] and the Euphronios Krater recovered from the Metropolitan Museum of Art (currently exhibited at Villa Giulia in Rome).

The latter case is very important, because in February 2006, the Italian Ministry for Cultural Heritage and Activities and the Metropolitan Museum of Art of New York entered into a landmark agreement[49] with which the ownership title to the Euphronios Krater and other archaeological artefacts was transferred to the Italian Government.[50]

The aim of this exhibition was to present to the large audience the actions taken by the law enforcement agencies[51] for the protection and defence of

[47] Regarding the illicit trade of cultural goods, Italy is one of the most affected countries in Europe. Many treasures remain still buried in the ground and seas. The Italian State however has developed an aggressive policy against illicit trafficking in antiquities, and both art thefts and illegal excavations have greatly decreased.

[48] The acroliths — statues usually made with wooden trunks but stone heads and extremities — were once owned by the New York businessman Maurice Tempelsman. For five years they were on exhibit at the University of Virginia Art Museum in Charlottesville. Povoledo, Elisabetta: Two Marble Sculptures to Return to Sicily. In: The New York Times, September 1, 2007.

[49] Povoledo, Elisabetta: Italy and U.S. Sign Antiquities Accord. In: The New York Times, February 22, 2006,

[50] In November 1972 the Metropolitan Museum of Art acquired the Euphronios Krater for $ 1.2 million. The Krater is a rare large bowl for mixing wine with water, 12 gallons worth, dating to around 510 BC, signed by the painter Euphronios. In 1995, during a routine investigation over illicit trafficking, the Italian Carabinieri (Cultural Heritage Protection Office) discovered an organizational chart showing how the clandestine network was arranged through Italy and elsewhere, i.e. who was in the hierarchy and how they were related to each other, who supplied whom, which areas of Italy were supplied by which middlemen, and what their links were to international dealers, museums and collectors. The chart identified an Italian art dealer, Giacomo Medici, as being a senior figure responsible for bringing archaeological objects out of Italy. More on that case: https://plone.unige.ch/art-adr/cases-affaires/euphronios-krater-and-other-archaeological-objects-2013-italy-and-metropolitan-museum-of-art [20.11.2013.]

[51] One of the most important law enforcement bodies in Italy is the Comando Carabinieri per la Tutela del Patrimonio Culturale, better known as the Carabinieri Art Squad, which is the branch of the Italian Carabinieri responsible for combatting art and antiquities crimes. It was founded on 3 May 1969. It was the first specialist police force in the world in this sector, predating the UNESCO Convention of 1970. The force has four sections: archaeology, antique dealing, fakes, and contemporary art. It is led by a colonel and headquartered in Rome, with twelve regional offices. It

artistic and archaeological properties in Italy. The works on display were recently in the focus of important activities of recovery and discovery, thanks to which it had been possible to return to Italy artefacts stolen from archaeological sites, robbed from tombs or illegally exported from Italy.

The importance of the exhibition was that it drew the attention to the widespread looting and damaging of works of art. Damaging sometimes happens intentionally, as it makes not only the transportation easier, but objects can be sold separately for a higher price. Another tragedy, which is true not only in connection with Italy but it is also a worldwide cataclysm (nevertheless an everyday issue in Egypt, Syria and Libya as mentioned in the introduction) that artefacts looted and robbed are taken out of their natural site, out of their context and out of their historical surroundings. Reconstructing their story, meaning, purpose even their exact origin can become an incredible challenge. Artefacts are connected with each other, are taken from places where only the whole has a meaning: they become part of a puzzle, the parts of which are so small that its reconstruction is nearly impossible.

One of the most popular territories of looters and diggers in Italy is the commune of Cerveteri, a former Etruscan settlement. Most of the tomb robbers "working there", also called *tombaroli*[52] are at the bottom of the hierarchy of criminals, where at the top we can find museums, galleries and private collections and collectors. They also include smugglers and dealers, organized groups, intermediaries and auction houses.[53] The above mentioned 2,500-year-old wine-mixing bowl (Euphronios Krater) was looted from Etruscan tombs that lied under the rolling hills around the town 30 miles northwest of Rome. On the hills of Cerveteri there are thousands of tombs

functions in coordination with the Ministero per i Beni e le Attività Culturali. The force investigates clandestine excavations, the theft and illicit trade in works of art, damage to monuments and archaeological zones, the illegal export of cultural property, and fakes. It is involved in the monitoring and control of archaeological sites, and the activities of art and antique dealers, junk shops, and restorers. More on that body at: http://www.carabinieri.it/Internet/Cittadino/Informazioni/Tutela/Patrimonio+Culturale/ [20.11.2013.]

[52] Tombarolo is an Italian term (plural tombaroli), derived from the Italian word "tomba", meaning tomb or grave. It refers primarily to 'tomb-robbers' operating in Italy. More on that topic: Ruiz, Cristina: My life as a tombarolo, The Art Newspaper http://www.museum-security.org/tombarolo.htm [27.11.2013.]

[53] One of the most famous cases was the Medici trading cartel. Giacomo Medici is an Italian antiquities dealer who was convicted in 2005 of receiving stolen goods, illegal export of goods, and conspiracy to traffic. More regarding the case: http://traffickingculture.org/encyclopedia/case-studies/giacomo-medici/ [27.11.2013.]

laid out by the Etruscans, a place surrounded by trees, which for years – and still – is a target of looters.[54]

The Guardia di Finanza, Italy's finance police has reported recovering 874,163 archaeological works and 2,416 paintings in the past two years.

3.3 Syria and Egypt

"Deeply concerned about the recent wanton destruction and pillaging of cultural objects in Syria", the participants of the third International Conference on the Return of Cultural Property held in Athens, issued a recommendation in October 2013.[55] Points 10 and 11 state that it is recommended that "[S]tates, private entities and individuals make their best efforts to minimize the harmful effects to cultural heritage during armed conflicts and to assist the affected States in the return and restitution of their respective cultural property" and "[M]useums, dealers and all other relevant parties should be diligent to ensure that their policies and practices of acquisition should not be such as to encourage the destruction and looting of the cultural heritage of nations facing crisis or any kind of armed conflicts". In parallel with this recommendation, UNESCO posted in its website a warning regarding "Lootings of museums and warehouses in Syria", which contain artefacts from Heraqla archaeological site.[56] According to information given it had been looted by an armed group. Hundreds of objects made of gypsum, mosaics and pottery, the result of many years of excavation missions, and of important historical and scientific significance, have been stolen. Another warning was issued in November, stating that in Syria, the Tell Merdikh archaeological site in Elba, in the Idlib region, had been subjected to illegal excavations and looting.[57]

Syria's domestic law has forbidden unauthorized excavation and export of antiquities since 1963. That essentially means that there was no legal trade in recently excavated treasures before the fights began. Article 42 of the Antiquities Law expressly states that antiquities authorities have the right to carry out digging and excavation. "It is up to these authorities to allow other

[54] Frammolino, Ralph: In Italian Town Known for Tomb-Raiding, Joy Over a Return. In: The Los Angeles Times, February 6, 2006. http://articles.latimes.com/2006/feb/06/world/fg-art6 [27.11.2013.]

[55] Ancient Olympia Recommendation, conference held in Greece from 23 to 26 October 2013. http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Ancient_Olympia_Recommendation.pdf [30.11.2013.]

[56] http://www.unesco.org/new/en/culture/themes/illicit-traffic-of-cultural-property/emergency-actions/looting-in-museums/[29.11.2013.]

[57] The Syrian Ministry of Antiquities has estimated losses amounting to 2 billion USD since the start of the civil war.

institutions, scientific associations and archaeological missions to excavate antiquities". Excavation by individual persons is forbidden.[58]

However the chaos of the Syrian civil war provides unprecedented opportunities to looters and buyers.[59] This is a clear example regarding the antiquities-for-arms trade. A strong connection between looting, robbery and purchase of arms, namely the funding of a war is based on the destruction of historical, archaeological sites. In May 2013 two investigations explored the Syrian antiquities market in Lebanon. One found material evidence that armed groups were managing to fund their fighting through looting, smuggling and selling antiquities; the other gathered further testimony from illicit antiquities traders that (at least some of) the armed groups selling or bartering antiquities for guns were the Free Syrian Army (FSA).[60]

Hundreds of ancient cities and graveyards also look as cratered as the surface of the moon in aerial photographs taken by archaeologists who are powerless to stop the looting. Since the fights began in 2011, investigators have found hundreds of Syrian antiquities for sale on the black market in Lebanon and Turkey, the first step in a chain of transactions that, in many cases, will lead to sales in the United States and Europe.[61] The International Council of Museums (ICOM) and the US Department of State recently developed a Red List[62] "to respond to the widespread looting of museums and archaeological sites in Syria and to help authorities identify Syrian objects that may be protected by national or international law".[63]

In October 2013 MOHAMED IBRAHIM, Egypt's Minister of State for antiquities and a professor of Egyptology at Ain Shams University in Cairo pointed out in the Washington Post that "Egypt's future lies in its history, particularly its archaeological history. (…) But thieves are raiding our archaeological sites and selling their findings to the highest bidders. They are taking advantage of Egypt's security situation to loot our nation's economic future and steal from our children. (…) Egyptian antiquities are

[58] Antiquities Law of Syria (1963), UNESCO Database of National Cultural Heritage Laws.

[59] Thomson, Erin: To protect Syria's antiquities — don't buy them. Los Angeles Times, September 29, 2013. http://articles.latimes.com/2013/sep/29/opinion/la-oe-thompson-syria-looting-archeology-20130929 [20.11.2013.]

[60] Syria/Lebanon: Syrian-Lebanese antiquities-for-arms trade. http://conflictantiquities.wordpress.com/2013/05/12/syria-conflict-funding-lebanon-illicit-antiquities-trade/ [29.11.2013.]

[61] Thomson, Erin op. cit.

[62] http://icom.museum/uploads/tx_hpoindexbdd/ERL_SYRIE_EN.pdf [29.11.2013.]

[63] Launch of Emergency Red List of Syrian Cultural Objects at Risk, Press Statement. September 23, 2013. http://www.state.gov/r/pa/prs/ps/2013/09/214549.htm [29.11.2013.]

flooding international markets. Recent auctions at Christie's in London and New York included several items from Egypt".[64]

Finally he stated that "it is our common duty, in Egypt and around the world, to defend our shared heritage. International institutions, governments, business, archaeologists and other experts must come together to explore how to help countries in need protect their treasures".[65]

Concerning this problem UNESCO issued several warnings, sent experts, including a representative from Interpol, to assess the security measures taken to protect Egyptian museums, as well as archaeological sites in the country. The experts provided advice on enhanced security measures to protect the museums more effectively from being looted and sites from being illegally excavated in order to minimize the risks of illicit trafficking of Egyptian cultural property.

4. Conclusion

Despite legislative and policy interventions, international and national regulations, cooperation in bilateral and multilateral level, the illicit trade in art and antiquities continues to flourish.

Closer cooperation is needed, harmonization of the national policies, as well as guidelines, regulations, standards and constantly updated centralised databases, to prevent not only thefts, robberies and looting, but the legitimisation of illegally stolen cultural objects as well. If a dealer cannot prove the authenticity of an object beyond any doubt he should either retire from the transaction or disclose the identity of the vendor.[66]

Coordination at national, EU and international level is absolutely necessary, as crime organizations (with hierarchical structure, having

[64] Christie's in London withdrew a number of items that had been stolen. The six objects, withdrawn just days before the May 2 sale, are believed to have been stolen from a recently discovered tomb in Thebes. Experts from Christie's, the British Museum's Egyptology department, the Egyptian embassy and the Art Loss Register identified the stolen pieces in an investigation with Scotland Yard's Art & Antiquities Squad. Berner, Gabriel: Arrest made as Egyptian artefacts are pulled from Christie's London sale, Antiques Trade Gazette, May 28, 2013. http://www.antiquestradegazette.com/news/2013/may/28/arrest-made-as-egyptian-artefacts-are-pulled-from-christies-london-sale/[29.11.2013.]

[65] Ibrahim, Mohamed: Egypt's stolen heritage, The Washington Post, October 18, 2013. http://www.washingtonpost.com/opinions/looting-egypts-heritage/2013/10/18/8a1effdc-380d-11e3-8a0e-4e2cf80831fc_story.html [29.11.2013.]

[66] Christ, Thomas Dr – Van Selle, Claudia: Basel Art Trade Guidelines, January 27. 2012 p. 7. http://www.baselgovernance.org/fileadmin/docs/publications/working_papers/Basel_Art_Trade_Guidelines.pdf

contacts worldwide) are acting cross-border, coordinating widespread and transnational looting.

Another important issue is the reinforced involvement of all operators of the art market, including public and private collections, museums, galleries, dealers, insurers, curators and auction houses in the combat against illicit trade. The latter organizations should elaborate self-regulation guidelines accessible to all, according to which checking the origin/provenance of the artworks in every case shall be mandatory, as well as the references from the sellers. Provenance (the history of ownership of an object) and provenience (information about the circumstances in which it was excavated) are major contemporary issues for the antiquities market. One would have thought that great efforts would be expended by buyers in order to ensure so far as possible that they are not dealing in illicit objects. This has not been the case, however.[67] Research with high level antiquities dealers has shown they are more concerned with collecting these prized objects, wherever they may have come from, than with playing a part in protecting archaeological sites in foreign countries.[68]

Legitimization of stolen goods shall be avoided, close cooperation with the law enforcement level should be a priority.

[67] Background note by the Secretariat on Protection against Trafficking in Cultural Property. First meeting of the open-ended intergovernmental expert group on protection against trafficking in cultural property, Vienna, Austria, 24 to 26 November 2009. p. 5. http://www.unodc.org/documents/organized-crime/V0987314.pdf [21.11.2013.]

[68] Ibid.

Legal means and public law consequences of the solution of economic and credit crisis at the end of the Roman Republic (49-47 BC)*

PÓKECZ KOVÁCS, ATTILA

ABSTRACT *The civil war evolving between Caesar and Pompeius led to a serious economic crisis in the period lasting from 49 to 44 BC. It cannot be regarded simply as a monetary crisis appearing because of cash shortage, since beyond that we can observe an indebtedness concerning every social stratum. The executory procedures also threatened those who had property, since the price of real estates had dropped because of the scarcity of cash, however they still could not be sold. Furthermore, property execution (venditio bonorum), which could be carried out against the debtors and entailed the loss of their entire property, resulted in the decrease of their social esteem (existimatio), since it entailed infamia. In his law (lex Iulia de pecuniis mutuis) passed in 49 BC Caesar obligated the creditors to accept the properties of debtors as a repayment of their credits, what is more, the market values of the pre-civil war period had to be used. At the same time, the already paid interests were counted in the repayment of principal. Before this obligatory performance in kind (datio in solutum necessaria) the estimation of certain property elements (aestimatio) took place. Despite the advantages of the law, the idea of total cancellation of debts (tabulae novae) appeared among debtors. The leaders of this movement were Caelius Rufus, who obtained the function of praetor peregrinus in 48 BC and tribunus plebis Dolabella in 47 BC. Because of the rejection of their bills, affrays broke out in Rome and Italy and it forced the senatus to promulgate the state of emergency (senatus consultum ultimum) two times. Since both of them belonged to Caesar's political party, contrary to the previously passed resolutions of the senatus promulgating a state of emergency, we cannot regard internal political conflict and rivalry between certain people as primary causes. In my view, the economic crisis was the reason for the issue of both senatus consultum ultimums.*

The question of loans borrowed by citizens and the failure in repayment of them are private affairs, for this reason, the legal disputes deriving from them are regulated by private law. If the non-repayment of debts grew to considerable proportions, the problem would become social-sized, thus, sooner or later legislation has to deal with this phenomenon causing social

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and political crises as well. This kind of general financial crisis and – due to credits – debt crisis evolved in the second half of the 1st century BC as a result of civil wars triggered by the confrontation between Caesar and Pompeius. In my short essay I would like to introduce the economic nature of financial and credit crisis, the legal steps in order to solve it and the public law consequences of these steps.

1. Economic, financial and credit crisis in the 40s BC

The civil wars of the 1st century BC led to a financial crisis in Italy many times,[1] and that was the case also from 49 BC after Caesar's rise to power.[2] The primary cause of credit crisis was the indebtedness concerning every social stratum.[3] After the evolving contrast between Caesar and Pompeius had an effect on money circulation that slowed down due to reserve (*thesauratio*), which started as a consequence of the citizens' fear of war, more and more of the debtors were in a position not to be able to repay their debts any more. In this position an executory procedure was carried out against the debtor, and the fear of its strict moral (*infamia*) and property consequences made the public feeling of Romans even worse.[4] Insolvency resulted not only in *infamia* but it entailed the decrease of the person's social esteem (*existimatio*), which meant the loss of their personal respect to Romans.[5] The situation was aggravated by the fact that the crisis also concerned the free middle and upper social strata, which had enough property to repay their debt, but the laggard demands due to the freezing of money circulation did not enable them to alienate their goods.[6] Hence, I find it necessary to introduce the causes of indebtedness concerning both the upper and lower strata of Roman society and the human life situations

[1] Verboven, Karl: Le système financier à la fin de la République romaine, Ancient Society 24 (1993), pp. 69-98.
[2] Carcopino, Jérôme: Histoire romaine II. César, Paris, 1936 p. 949.
[3] Gelzer, Matthias: Die Nobilität der römischen Republik. Stuttgart, 1912 pp. 91-102.
[4] Peppe, Leo: Studi sull'esecuzione personale I, debiti e debitori nei primi due secoli della republica romana. Milano, 1981 pp. 237-259.; Ioannatou Marina: Le code de l'honneur des paiements. Créanciers et débiteurs à la fin de la République romaine. In: Annales Histoires, Sciences Sociales 56 (2001), pp. 1201-1221.; C. R. LÓPEZ: La corruption à la fin de la République romaine (IIe -Ier s. av. J.-C.). Aspects politiques et financiers. Stuttgart, 2010 pp. 199-203.
[5] Cic. Quinct. 50.: *cuius bona ex edicto possidentur, huius omnis fama et existimatio cum bonis simul possidetur.*
[6] Frederiksen, Martin W.: Caesar, Cicero and the Problem of Debt. In: JRS 56 (1966), pp. 128-141.

behind them.[7] First of all, we survey the financial situation of the upper social classes.

However, the upper well-off class was not homogeneous either. We can find well-known persons of political life, the less well-known wealthy and wasteful aristocratic youth, or high-ranking Roman women among them. Dominant politicians, such as Pompeius, Caesar and Cicero also had huge debts, which they had to undertake in order to maintain their luxurious lifestyle (*luxuria*) and promote their political carrier.[8]

Borrowing from individuals concerned not only the upper class, but also the urban (*plebs urbana*) and rural (*plebs rustica*) plebeian strata. People living in towns became indebted due to the high costs of flats in tenement-houses (*insulae*), mainly the increase of rent (*merces*), and the fear of eviction after non-paying. The middle class of plebeians included the tenants of urban stores (*tabernae*) who needed credits in order to meet the expenses of their commercial and craft businesses or pay the rent. Those who lived on rural agriculture needed the use of others' money (*aes alienum*) mainly because of the impoverishment during the long military service.[9]

In the economic situation following civil wars the adherents of *populares* took several actions in the interest of total debt cancellation (*tabulae novae*).[10] The main slogan of the adherents of this revolutionary claim was *tabulae novae*. The *tabulae* marks those tables made of wood, metal or stone, on which Romans engraved the texts of laws, *edictum*s, *senatusconsultum*s, *plebiscitum*s and other official documents.[11] As forms of these tables (*tabulae publicae*) used by public law institutions we can mention the financial records (*tabulae censoriae*) kept by *censor*s and stored in the Nymphae shrine, or tables containing the names of debtors of the treasury (*tabulae aerarii*) that were placed in the Saturnus temple. The word *tabulae* also meant economic books (account books) containing the economic matters of individuals (*tabulae accepti et expensi*), in addition, the *chirographum* and *testatio* documents certifying legal transactions or the

[7] Thébert, Yvon.: Économie, société et politique aux deux derniers siècles de la République romaine in: Annales. Économies, Sociétés, Civilisations 35/5 (1980), pp. 895-911.

[8] Royer, Jean-Pierre: Le problème des dettes à la fin de la République romaine, RHD 46 (1967), pp. 195-198.

[9] Ioannatou, Marina: Affaires d'argent dans la correspondance de Cicéron. L'aristocratie sénatoriale face à ses dettes. Paris, 1998, pp. 35-50.

[10] Piazza, Maria Pia: „Tabulae novae". Osservazioni sul problema del debiti negli ultimi decenni della repubblica", in: Atti del II Seminario romanistico Gardesano. Milano, 1980 pp. 37-107.

[11] Ioannatou, Marina: Affaires d'argent dans la correspondance de Cicéron, p. 73.

reports of auctions carried out by bankers (*argentarii*) were marked by this word.[12]

In connection with the expression of *tabulae novae*, the general interpretation accepted in literature is „new accounting", namely creating a new financial record. The Greek equivalent of this indefinite terminus is *chreon apokopè* and according to this, it can be interpreted as a partial or total debt cancellation as well. However, there is no doubt that in our examined period the term of *tabulae novae* marked total debt cancellation. The cancellation of the texts of tables containing debts and these legal transactions becoming unwritten appear as underlying contents in Cicero's correspondence too. By the 40s BC it unambiguously appeared in the sense of debt cancellation, and not only as a part of political discourse but also in the case of transactions among individuals. Thus, in one of his letters written to his friend Atticus in May 44 BC he had doubts about the fact that his ex-son-in-law P. Cornelius Dolabella[13] would have performed the repayment of dowry for his daughter Tullia (Cic. ad att. 14, 21, 4: …*maxime autem ecquid Dolabella tinniat an in meo nomine tabulas novas fecerit*.)[14] On the other hand, the claim of *tabulae novae* was principally a political claim, which – because of growing social discontent – was applied by certain political groups and persons in order to rise to power.[15]

The overall conclusion is that indebtedness concerned every stratum of society, moreover, the situation was aggravated by the fact that the lenders themselves, who were waiting for the return of their credit, were the debtors of other creditors.[16] In this way, economic difficulties and monetary turmoil made the position of those Romans even worse, who struggled with the repayment of debt.

[12] Jakab, Éva: Borvétel és kockázat. Jogtudomány és jogélet a Római Birodalomban [Wine purchase and risk. Jurisprudence and legal life in the Roman Empire]. Budapest, 2011 pp. 57-60.

[13] Bruhns, Hinnerk: Parenté et alliances politiques à la fin de la République romaine, in: École Française de Rome 129 (1990), pp. 585-587.

[14] Ioannatou, Marina: Affaires d'argent dans la correspondance de Cicéron, pp. 73-75.

[15] Rosillo Lopez, Cristina: La corruption à la fin de la République romaine (II^{e}–I^{er} s. av. J.-C.). Aspects politiques et financiers. Stuttgart, 2010 pp. 204-205.

[16] Andreau, Jean: Activité financière et liens de parenté en Italie romaine, in: Parenté et stratégies familiales dans l'Antiquité romaine. Écoles Française de Rome, 1990, pp. 501-526.

2. Lex Iulia de pecuniis mutuis[17]

In 49 BC Caesar got a new law through the people's assembly to remedy the financial and monetary crisis.[18] The aim of *lex Iulia de pecuniis mutuis* was to permit a kind of obligatory "giving instead of performance" (*datio in solutum necessaria*)[19] to those debtors who could not repay their debt but had property; and the creditors were obliged to accept it (*aliud pro alio*).[20] Therefore, if the debtors transferred their real estates or personal properties, they could get rid of the performance in cash, thanks to which they could avoid the loss of their properties through auction (*venditio bonorum*) or *infamia*.[21] According to the unanimous standpoint of literature, the debtors had full personal liability for their debts, not only the pledges could be used for repayment.[22] The procedure focused on the estimation of the debtor's property (*aestimatio*), where – due to the drastic decrease of prices – they used the values of the pre-civil war period,[23] and they reduced the principal amount with the already paid interests.[24] With the help of this process the amount of credits could be reduced approximately by their quarter. Before the *arbiter* was appointed to determine the value of properties at the

[17] Rotondi , Giovanni: Leges publicae populi romani. Hildesheim, 1962 p. 415.

[18] Rotondi, Giovanni: op. cit. p. 415.; Pinna Parpaglia, Paolo La Lex Iulia de pecuniis mutuis e la opposizione di Celio, Labeo 22 (1976), pp. 30-72.; Giuffre, Vincenzo: La c.d. „Lex Iulia" de bonis cedendis, Labeo 18 (1972), pp. 173-191.; Cordier, Pierre: M. Caelius Rufus, le préteur récalcitrant, MEFRA 106/2 (1994), pp. 533-577.

[19] Bonini, Roberto: La c. d. datio in solutum necessaria (Nov. Iustiniani 4, 3 e 120, 6, 2), in: Problemi di storia delle codificazioni e della politica legislativa, vol. II. Bologna, 1975 pp. 3-45.

[20] Nardi, Enrico: Radiografia dell'«aliud pro alio», BIDR 73 (1973), pp. 71-72.

[21] Cic. ad fam, 9, 16, 7: *Tu autem quod mihi bonam copiam eiures nihil est, tum enim cum rem habebas, quaesticulis te faciebat attentiorem; nunc cum tam aequo animo bona perdas non eo sis consilio ut, cum me hospito recipias, aestimationem te aliquam putes accipere? Etiam haec levior est plaga ab amico quam a debitore.*

[22] Bürge, Alfons: Geld- und Naturwissenschaft im vorklassischen und klassischen römischen Recht, SZ 99 (1982), pp. 135-137.

[23] Caes. B.C. 3,1, 2-3.*:His rebus confectis, cum fides tota Italia esset angustior neque creditae pecuniae solverentur, constituit ut arbitri darentur; per eos fierent aestimationes posessionum et rerum, quanti quaeque earum ante bellum fuisset, atque eae crdetitoribus traderentur. Hoc et ad timorem novarum tabularum tollendum minuendumve, qui fere bella et civiles dissensiones sequi consuevit, et ad debitorum tuendam existimationem esse aptissimum existimavit.*

[24] Suet. de vita Caes. 1,42,2: *De pecuniis mutuis disiecta novarum tabularum expectatione, quae crebro movebatur, decrevit tandem, ut debitores creditoribus satis facerent per aestimationem possessionem, quanti quasque ante civile bellum comparassent, deducto summae aeris alieni, si quis usurae nomine numeratum aut prescriptum fuisset; qua condicione quarta pars fere crediti deperibat.*

beginning of the procedure, the debtor had to take an oath to be insolvent and have appropriate property, in addition he had to guarantee to let his currently possessed property be estimated (*bonam copiam iurare*). Caesar's aim was not to meet all the needs of creditors or debtors, but to have a part of debts repaid, and he tried to defer a serious evolving social conflict. Caesar's provision could preserve social peace, since some people claimed general debt cancellation in the economic situation evolving due to the constant wars and civil wars. By this step, Caesar managed to cease or at least reduce the fears deriving from the general debt cancellation, at the same time he maintained the trust for debtors as partial performance in kind took place. Certainly, the law did not solve the problem of every social stratum, such as a stratum with little existence. Those free Romans, who did not have property and earned money thanks to their working capacity, could not be concerned in bulk by Caesar's provisions. Thus, *lex Iulia de pecuniis mutuis* cannot be regarded as a legal policy action serving the interests of debtors (*favor debotoris*) or that of creditors (*favor creditoris*), but it can be qualified as a compromise from political consideration.[25] The procedural filter of the initiation of debt settlement process was the oath of *iusiurandum bonae copiae* that was followed by the appointment of the person who could estimate the property (*datio arbitri).*[26]

Taking the oath of *iusiurandum bonae copiae* happened during the *in iure* process, as Tabula Heracliensis (a. 709) demonstrates it too. It could be regarded as an oath taken on insolvency according to which the debtor promised to let his property be estimated. Therefore, this oral act cannot be qualified as a phase of an executory procedure,[27] in which the debtor took an oath merely on insolvency.[28] Taking this *bonam copiam iurare* (or *bonam copiam eiurare*) oath prevented the executory procedure against the debtor that could have led to *infamia* as well. Hereby the estimation of property could begin, which meant the determination of the value of personal properties and mainly real estates. Contrary to this, in IOANNATOU's view, the expression of *bonam copiam* refers to the existence of a certain property, thus, it is rather an oath taken on solvency.[29] In fact, if the debtor does not have an appropriate property, partial performance (repayment of credit) expected by Caesar could not take place either. If the debtor had taken an oath only on insolvency, simultaneously with the beginning of the estimation

[25] Bonini, Roberto op. cit. pp. 26-32.

[26] Magdelain, André: La loi Poetelia Papiria et la loi Iulia de pecuniis mutuis, in: Jus Imperium Auctoritas, Études de droit romain. Rome, 1990 pp. 707-711.

[27] Berger, Adolf: *«Bonam copiam iurare»*, In: Studi in onore di Vincenzo Arangio-Ruiz nel XLV anno de suo insegnamento II. Napoli, 1953 p. 127.

[28] FIRA I. p.149. „*quique in iure (bonam copiam abiuravit) abiuraverit, bonamve copiam iuravit iuraverit.*"

[29] Ioannatou, Marina: Affaires d'argent dans la correspondance de Cicéron. pp. 398-403.

of his property, every insolvent debtor could have gained time to avoid the executory procedure against him.[30] As taking the oath of *bonam copiam iurare* was possible only for those who had appropriate property, it was obviously favourable for the wealthy stratum (*locupletes*), because thanks to this method they were saved by the loss of their property. Furthermore, it prevented the spread of revolutionary ideas requiring total debt cancellation (*tabulae novae*) in wider ranges of society.[31] In my opinion, *bonam copiam iurare* is an oath referring to the existence of appropriate property, where the debtor indirectly recognized his insolvency in cash.

The creditors were doubly hit by *lex Iulia.* On the one hand, during the estimation of property the values of the pre-civil war period were used, therefore the creditor received the asset, but if he had wanted to sell it immediately, he could have done it at lower price than it was estimated – if he had succeeded to sell it at all, as there were only a few potential purchaser in this period of money shortage – and it would have been loss-making due to general devaluation.[32] On the other hand, the set-off of already paid interests in the repayment of principal was considered as a partial debt cancellation, therefore, without a legal obligation the creditors would have never accepted the receipt of assets at a price determined by *aestimatio.* In Cicero's correspondence we can find an example that occurred in practice, when L. Papirius Paetus – who, as a creditor, gained significant lands and tried to sell them at an estimated price – complained about the situation evolved by *lex Iulia.* In connection with the success of his efforts, Cicero responded in a pessimistic but waggish tone.[33] However, the application of *lex Iulia de pecuniis mutuis* had only economic character and it was passed as a crisis measure in the period of the normalization of the financial situation.

Although the law tried to achieve a compromise between the interests of creditors and debtors, it was received quite unfavourably. The debtors disapproved of the partial loss of their assets, and it was disadvantageous for the creditors because their liquidity did not get better due to the unsaleability of obtained personal properties or real estates.[34] Knowing all that, a question arises whether politically it would not have been better to favour only one

[30] Magdelain, André op. cit. p. 709.
[31] Piazza, Maria Pia op. cit. pp. 37-107.
[32] Ioannatou, Marina op. cit. pp. 402-403.
[33] Cic. ad Fam. IX.18.4: *Sed quomodo video si aestimationes tuas vendere non potes neque ollam denariorum implere, Romam tibi remigrandum est; satius est hic cruditate quam istic fame. Video te bona perdidisse; spero idem istuc familiaris tuos.*
[34] Pinna Parpaglia, Paolo: Ancora sulla „Lex Iulia de pecuniis mutuis", in: Studi in onore di Arnaldo Biscardi IV. Milano, 1983 pp. 115-141.

sphere of interest without disadvantages? Those, who urged total cancellation of their debts, had just a kind of claim.

3. Caelius Rufus's bills (48 BC)[35]

One of the leaders of the claim of *tabulae novae* was M. Caelius Rufus who was elected as *praetor peregrinus* in 48 BC. In order to understand the role of Caelius Rufus, I would like to outline his career briefly because compared to the politicians of the 1st century BC he belonged rather to the second line.[36] M. Caelius Rufus was born between 88 and 82 BC as the only child of a rich knight family living in Puteoli.[37] After he had achieved *toga virilis*, his father sent him to Rome to get the hang of Roman public life and politics by belonging to the circles of Crassus and Cicero. His father's financial resources provided the lifestyle of „sparks" in Rome, but nevertheless he became indebted. In 63 BC he got involved in the Catilina plot, thus he was compromised. Following that, when Q. Pompeius Rufus was a *proconsul*, he got to Africa Province where his father also had interests. He was a real *homo novus* in Roman political life, and because of his chevalier ancestry he had to make himself known with the members of the senate. Presumably he became a *questor* in 57 BC. In 56 BC a criminal action was brought against him in which he defended himself with the help of Crassus and Cicero.[38] The action against M. Caelius was probably a political attack in which the defendant as the man of Pompeius was attacked.[39] We have no record of him from the years directly after the action, and he appears on the scene of Roman politics again only in 52 BC, after he hed been elected as *tribunus plebis*. In the midst of political confusions of the year 52 BC he belonged no longer to the circles of his master, Cicero, but joined the more radical Cato. Two years later (50 BC) he was elected as *aedilis curullis*, then in 49 BC he became a *praetor* as Caesar's adherent.[40] After Caesar had appointed his elected *praetor*-partner, C. Trebonius, as *praetor urbanus* – contrary to the constitutional traditions of the Republic - the competence of elected magistrates was not decided by a draw (*sortitio*) –

[35] Étienne, Robert: Jules César. Paris, 1997 pp. 175-177.
[36] Dettenhofer, Maria H.: Perdita Iuventus. Zwischen den Generationen von Caesar und Augustus, Vestiga 44. München, 1992 pp. 79-99.
[37] Münzer, Friedrich: Aus dem Leben des M. Caelius Rufus, Hermes 44 (1909), pp. 135-142.
[38] Salzman, Michele Renée: Cicero, the Megalenses and the Defense of Caelius, AJP 103 (1982), pp. 299-304.
[39] Nótári, Tamás: Marcus Tullius Cicero összes perbeszédei [The Orations of Marcus Tullius Cicero]. Szeged, 2010 pp. 118-125.
[40] Dettenhofer, Maria H. op. cit. pp. 158-165.

M. Caelius got only the function of *praetor peregrinus*.[41] The decision, which resulted in his being pushed into the background was a great offence for him, therefore he gradually confronted with the Caesarean regime.[42]

Firstly, taking advantage of the discontent deriving from indebtedness, he took actions against the *praetor urbanus* applying *lex Iulia de pecuniis mutuis*, and he used constitutional means. He set up his bench next to the *praetor urbanus*'s bench, and applying *intercessio* he took an action against the magistrate decision of his officer partner, C. Trebonius, in which an arbiter was appointed. Since also the authority of *praetor*s was decided by *sortitio*, and it did not happen according to M. Caelius's argument, he did not infringe C. Trebonius's rights as a *praetor* because their limits were not determined constitutionally. However, by his veto against the decision of the *praetor urbanus* appointing an *arbiter* he confronted with the Caesarean power itself because the central issue of the application of the law was the estimation of the property of debtors, and as such, it contained subjective elements. By appointing the appropriate person, the *praetor urbanus* could exert influence on the estimation of the value of property, as it could be performed in favour of the creditors and debtors too. Both the creditors and debtors were represented in the Caesarean camp. The steps, which were based on constitutional grounds but caused considerable injury to Caesar and his adherents, did not have a particular response, since the debtors were not interested in disputing the person of *arbiter*s, because the block of the process introduced by *lex Iulia de pecuniis mutuis* would have permitted the start of bankruptcy proceedings (*venditio bonorum*).

As a second step, he submitted a bill[43] about the freeze of loans for six years without paying interests (*rogatio Caelia de pecuniis creditis*).[44] The bill set out from the optimistic view, according to which the credit crisis would cease six years later and the debtors would be able to repay their debts in cash due to economic recovery. The acceptance of Caelius's bill would have suspended the Caesarean mechanism, and its legal policy purposes focused on creditors who tried to get the better part of their credits back and on debtors who were disappointed in the provisions of *lex Iulia*. Under the bill, the creditors would not have lost a part of their claim like in the case of debasement applied by *lex Iulia de pecuniis mutuis*, while the debtors would have gained a breathing space as they would not have been obliged to perform immediately. In addition, they could have attached hopes to the total cancellation of their debts further on. M. Caelius's plan met with a warm response that entailed the opposition of Caesar's party. Caesar's *consul-*

[41] Cordier, Pierre op. cit. 539.
[42] ad. Fam. 8.17.1: *crede mihi, perire satius quam hos videre*.
[43] Caes, civ. 3. 20. 6: …*legem promulgavit, ut sexenni die sine usuris creditae pecuniae solvantur*.
[44] Rotondi Giovanni op. cit. p. 417.

partner, Servilius Isauricus, who resided in Rome, objected to the bill therefore it failed.[45] As a result, it became obvious for M. Caelius that his strategy was not enough for the destabilization of the regime, hence he resorted to more radical means and submitted two more bills.

One of them aimed at the reduction of rents (*rogatio Caelia de mercedibus habitationum annuis*), while the other one referred to the total cancellation of debts (*rogatio Caelia de novis tabulis)*.[46] By the fail of his proposal concerning a six year long moratorium he lost the support of those creditors who – in case of the success of his idea – trusted to the repayment of their debt in cash, but he was able to draw those debtors to his side who did not have enough property to take the oath of *iusiurandum bonae copiae*. As we have already alluded to it, the credit crisis widely concerned the strata without or with little property as well, moreover the rent and the issue of credits related to each other. Many people borrowed money in order to repay their rent debt. The situation was aggravated by the fact that living circumstances became worse and worse even in the pre-civil war period, as in 50 BC Rome was struck by the biggest fire of the Republic, then next year there was an earthquake that destroyed several buildings and induced further fires mainly in densely populated districts. Thus, due to tight supply, rents have gone up considerably. Furthermore, in order to rebuild destroyed buildings soon, the investors needed loans that became more expensive due to financial speculations. With the aim of early payback, the contractors investing in building tenement-houses claimed higher and higher rents *(merces)*. The proposal concerned the lower social strata doubly; on the one hand their previous rents were lost due to cancelled debts, on the other hand they would have got *merces* for a year as payment exemption for their future rents. Therefore the reduction of rents aroused rather the interest of lower social strata, while the upper social strata showed interest in general debt cancellation. In this way, the two newer *Caelius rogatio*s brought the two indebted social strata in the same sphere of interest and it meant a serious challenge for the prevailing power. These proposals met with a warm response and also an uprising broke out against the Caesarean regime that objected to them. The crowd attacked Trebonius first, who was a *praetor urbanus* dealing with the appointment of arbiters on the basis of *lex Iulia de pecuniis mutuis*. Following that, Caelius got his *praetor*-partner removed from his bench. Servilius Isauricus, a *consul* residing in Rome, reported it to the *senatus*, which decided to prohibit M. Caelius from public affairs. It meant in practice that the *consul* expelled him from the *senatus* (*relatio*), and when he tried to speak to the people on *contio*, he was removed from the

[45] Nicolet, Claude: Le sénat et les amendements aux lois à la fin de la république, RHD 36 (1958), pp. 260-275.

[46] Caes. civ. 3. 21. 1: …*duas promulgavit, unam qua mercedes habitationem annuas conductoribus donavit, aliam tabularum novarum*… .

pulpit. Simultaneously, *consul* Isauricus gave an order to break Caelius's office chair (*sella curulis*) that was his due as a *praetor*.[47] This event is also mentioned by Quintilianus in his work, "About Rhetoric": *Laughter may be raised by some act of humor, with a mixture, sometimes, of gravity, as Marcus Caelius the praetor, when the consul Isauricus broke his curule chair, had another fixed with straps (the consul was said to have been once flogged by his father), or sometimes without due regard to decency, as in the story of Caelius's box, which is becoming neither to an orator nor to any man of proper character*.[48] The reason for the decision of the *senatus* must have been the worry of aristocratic landowners, because Caelius's proposal concerning debt cancellation threatened many of them with the loss of their claims and properties, therefore they supported the Caesarean *magistratus*es. Nevertheless, the measures taken against Caelius incurred the hatred of *populares* who protected the interests of indebted plebeians. Therefore, the people's tribunal applied *intercessio* against the decision of the *senatus*, which proves that Caelius had numerous adherents. However, the *intercessio* of the *tribunus plebis* had no effect, since the resolutions passed against Caelius remained in force because of the *senatus*'s process aiming at *auctoritas senatus*.[49] Realizing the seriousness of the situation, the *consul* promulgated a state of emergency (*senatus consultum ultimum*).[50] The executor of *senatus consultum ultimum* was *consul* Isauricus, who could take measures by exceeding the confines of constitutional order. Thus, the *consul* managed to neutralize M. Caelius with constitutional means instead of applying open violence. Prohibition from public affairs did not mean the deprival of his function as *praetor*, merely the practice of his rights arising from it were suspended temporarily, in particular: he was not allowed to summon the *senatus* or submit proposals (*ius agendi cum senatu*), and the

[47] Dio Cass. 42.22.25.

[48] Quintilian. *Institutes of Oratory*. Ed. Lee Honeycutt. Trans. John Selby Watson. 2006. Iowa State. 17 Oct. 2013. <http://rhetoric.eserver.org/quintilian/>. Quintil, Inst.6.3.24: *Facto risus conciliatur interim admixta gravitate: ut M. Caelius praetor, cum sellam eius curulem consul Isauricus fregisset, alteram posuit loris intentam dicebatur autem consul a patre flagris aliquando caesus*.

[49] Thomas, Yan: Cicéron, le Sénat et les tribun de la plèbe, RHD 55 (1977), pp. 189-210.

[50] Dio Cass., 42.23.2.: □πειδ□ τε □ Κα□λιος □κε□νους τε □π□λασε κα□ α□τ□ν τ□ν □πατον □ς θ□ρυβον κατ□στησε, συν□λθον α□θις φραξ□μενοι το□ς στρατι□ταις, κα□ τ□ν φυλακ□ν τ□ς π□λεως τ□ Σερουιλ□□, □σπερ □νω μοι πολλ□κις περ□ α□τ□ς ε□ρηται, παρ□δοσαν. G. PLAUMANN, Das soggennante Senatus consultum ultimum, die Quasidiktatur der späteren römischen Republik, in Klio 13 (1913), p. 327.; Attila Pókecz Kovács:: Les crises politiques à la fin de la république romaine et le senatusconsultum ultimum (121 – 40 av. J.-C.). In: (Ed. Chevreau, D Kremer, A Laquerrière-Lacroix) Carmina iuris. Mélanges en l'honneur de Michel Humbert. Paris, 2012 pp. 679-692.

same rule referred to his rights in connection with the people's assembly (*ius agendi cum populo*). On the one hand, the breach of *sella curulis* meant the loss of his powers connected to jurisdiction (*iurisdictio*), on the other hand – since the function of *praetor* together with the sticks (*fasces*) was an important symbol of power – it sent a clear message about the loss of his power. Thus, his magistrate power became empty, and the rights arising from it were transferred to another *praetor*. By taking these measures Isauricus did his best, however, he did not want to decide regarding the person of *praetor peregrinus,* who was deprived of his power, therefore this question was postponed because of Caesar's return to Rome.[51]

Caelius retreated from the measures taken by the senate, and because of the fact that he could have acted only as a simple *privatus* from that time on, he rather pretended to visit Caesar and left Rome.[52] After his previous official actions he did not have hope of being pardoned and regaining his office from Caesar, therefore he started off to Milo's troops, which landed at Capua. However, Milo and Caelius could not meet because Servilius Isauricus prevented it by ordering a *tribunus* to escort Caelius to Rome and then take him under supervision in a suburb.[53] Meanwhile, the *senatus* declared Milo – on his way to Campania – to be the enemy of the Republic (*hostis iudicatio*), and declared that everybody who helped him would be regarded as *perduellis*.[54] The pronouncement *hostis* made it possible to resort to considerable military forces against Milo. In the meantime, Caelius managed to escape from Rome and he started off to South Italy again. Nevertheless, by that time Caesar's troops had killed Milo, and that was the destiny of Caelius too, who – before he could have set up serious troops – was slaughtered by Caesar's adherents in the neighbourhood of Bruttium. The rebellions in South Italy make it obvious that the crisis in 49-48 BC was not only a financial one, but in a broader sense it was a part of an economic depression, which brought about social discontent and led to armed insurrections as well.

The political events connected to the name of *praetor peregrinus* M. Caelius make it obvious that the law with compromissory character, which was passed in order to cease the indebtedness caused by Caesarean legislation, could not solve the problem without bringing about social discontent, in spite of its significant innovations in civil law either. During Caelius's official year, serious constitutional problems turned up too. The Caesarean replacement of a draw (*sortitio*) – regulating the competences between elected *praetor*s – with a simple appointment led to a legal dispute

[51] Dio Cass., 42.23.3.
[52] Cordier, Pierre op. cit. 553.
[53] Dio Cass. 42.24. 4.
[54] Allély, Annie: La déclaration d'*hostis* sous la République romaine. Bordeaux, 2012 pp. 73-76.

between the *prator urbanus* and the *praetor peregrinus*. Initially, the *consul* was able to regularize the conflict between the two *magistratus*es. Following that, the *praetor peregrinus* – practising his right to prepare a bill – confronted with the *senatus* and it ended in the removal of the *praetor peregrinus* from the *senatus*. This lead to a political conflict between the *tribunus plebis* contesting the *senatus consultum* and the *senatus* itself, and the *senatus* could avert it only by the application of *auctoritas patrum*. In consideration of the seriousness of the situation, the promulgation of the state of emergency (*senatus consultum ultimum*) took place as well, on the grounds of which the powers of *praetor peregrinus* were suspended.

4. Senatus consultum ultimum because of P. Cornelius Dolabella's revolt (47 BC)

The case of *tabulae novae* turned up again a year after Caelius's death. This time P. Cornelius Dolabella, a *tribunus plebis* from the circle of *populares*, placed it in the centre of his political ambitions.[55] He was the descendant of one of the most high-ranking Roman *patricius* families called Corneliuses (an assumption has appeared recently in literature, according to which Dolabella was Caesar's secret child).[56] He became the son-in-law (adfinitas) of Cicero after he had married his daughter called Tullia.[57] We do not know his date of birth and we have to be doubtful about the reference of Appianos,[58] which states that at the time of his election as *consul*, in 44 BC, ha was only 25 years old. Presumably he was not born in 69 BC, but rather around 80 BC. At first he occupied smaller official functions and worked as a lawyer then he joined Caesar from 49 BC. He acquired the office of *tribunus plebis* in 47 BC, then taking over M. Caelius's efforts he took steps for the cancellation of rents and debts (*tabulae novae*), moreover, he prepared a bill in connection with it (*rogatio Cornelia de mercedibus habitatiorum annuis et de novis tabulis*).[59] His claims led to affrays and armed insurrections (*seditio*), as a consequence of which wooden towers were set up on the Forum, and they were ready to take armed actions against any kind of recalcitrant. In consideration of the civil war situation, the *senatus* promulgated the state of emergency (*senatus consultum ultimum*)

[55] Dettenhofer, Maria H. op. cit. pp. 119-122.
[56] Syme Ronald: No Son for Caesar, Historia 29 (1980), pp. 431-437.
[57] Bruhns, Hinnerk: Parenté et alliances politiques à la fin de la République romaine. In: Écoles Française de Rome. 1990 pp. 585-587.
[58] Appian, BC 2.129.
[59] Rotondi, Giovanni op. cit. p. 418.

again.[60] The *senatus* entrusted *magister aequitum* Marcus Antonius – who substituted for *dictator* Caesar while he was not in Rome – with the regularization of the actual situation due to the promulgation of the state of emergency.[61] Caesar preferred not to turn against Dolabella personally, therefore the pronouncement *hostis* did not happen either. The armed insurrection was suppressed soon, and Caesar pardoned Dolabella, who occupied the function of *consul* later on (44 BC).

5. Conclusions

The civil war evolving between Caesar and Pompeius led to a serious economic crisis in the period lasting from 49 to 44 BC. It cannot be regarded simply as a monetary crisis appearing because of cash shortage, since beyond that we can observe an indebtedness concerning every social stratum. Moreover, Roman economic life became more aggravated due to the earthquake (49 BC) and the housing difficulties after the biggest fire of the Republic (50 BC). Because of the scarcity of credits the destroyed tenement-houses could be rebuilt only expensively and partially. Since the building contractors wanted an early return of their credits, rent became even more expensive. The general economic crisis produced social discontent, and political life tried to benefit from this atmosphere soon. In the period of Caesar's autocracy (49-44 BC) two states of emergency (*senatus consultum ultimum*) were promulgated because of the bills, in which the cancellation of debts and rent in arrears were promised; at first by *praetor peregrinus* M. Caelius Rufus (48 BC), secondly by *tribunus plebis* P. Cornelius Dolabella (47 BC). Both Caelius and Dolabella belonged to Caesar's political party, thus, contrary to the previously passed resolutions of the *senatus* promulgating a state of emergency, we cannot regard internal political conflict and rivalry between certain people as primary causes. In my view, the economic crisis was the reason for the issue of both *senatus consultum ultimum*s.

[60] Dio Cass. 42.29. 3; 42. 32. 1.
[61] Halfmann, Helmut: Marcus Antonius. Darmstadt, 2011 pp. 46-51.

Birth of the Modern Turkey: Brief History and Features of the Constitution of the Turkish Republic of 1924

RÁCZ, ATTILA

„Sovereignty belongs unconditionally to the people! Once you have said that, you can ask whoever you like, and they will tell you that it means a Republic. That is the name of the new-born child"[1]

Abdurrahman Şeref[2]

ABSTRACT *This article aims to pursue the main developments and cusps of transformation that took place in the Ottoman Empire from the beginning of the Tanzimat Era to the establishment of the Republic of Turkey. This tract of time could be defined as the "longest century of the Ottoman Empire", in the course of which more remarkable legislative actions happened than during the previous history of the Ottoman state. The very first reform efforts of the Ottoman Empire were related to military affairs, but the leaders of Tanzimat educated Western-style, brought differing remedy for the "Sick Man of Europe" than their forefathers. Besides the transformation of the administrative system, the issue of representative political bodies and rights of the subjects became more and more timely. The Constitution of 1876 and the restoration of the Constitution in 1908 gave experience for the Ottomans on Western-style parliamentary monarchy. World War I drifted the Turks to an unexpected direction. During struggle of the Turks against the Allied Powers for national independence, a new leader emerged in the person of MUSTAFA KEMAL ATATÜRK. After the international status of Turkey had been settled, ATATÜRK began his internal reforms. His aim was to turn Turkey into a European state and the Turkish people into a European nation. The wind of political changes blew off the institution of the Sultanate of the Ottoman Empire and the Caliphate of Islam. However it gave birth to a new state, the Republic of Turkey. The main focus of the*

[1] Lewis, Bernard: The emergence of modern Turkey. Oxford Uniersity Press, 2nd edition, London, 1967 p. 263.

[2] Abdurrahman Şeref was the last Ottoman Imperial Histographer, the first President of the Turkish Historical Society, and a deputy of Istanbul in the Grand National Assembly at the time of nativity of the Turkish Republic.

article is the shifting of sovereignty during Tanzimat and the Turk Revolution as well as features of the Constitution of the Republic of Turkey of 1924.

1. Constitutional antecedents

After serious defeats of the Ottoman Army from the 17th century, the decadence of the Ottoman Empire was bit by bit detected not only by its adversaries, but also by the Ottoman ruling elite. In order to halt the diminution of the power of the Empire and to regain the operability of the army and central administration that held up the Golden Age of SÜLEYMAN I the Magnificent (1520-1566) as a model, the Ottoman bureaucrats almost continually were trying to rearrange the actual structure of the state for over two centuries. Since "the Ottoman government had been an army before it was anything else … in fact, Army and Government were one,"[3] it is not so strange that the initial arrangements were related to the army. Having come into closer contact with the Western countries, the Ottomans, mainly the narrow strata of the educated statesmen and officers, took an interest in Western technology, the military system, administrative methods, culture and society, searching for new inspiration. Following the French Revolution in 1789, nationalistic and liberal ideas of the West began to penetrate the Empire, and reforms, not only of the military system, but also of the state administration, as well as social changes became pivotal agenda for the Ottoman intellectuals.

1.1 The Tanzimat Era

In the 15th century the formidable Janissary infantry corps became the scourge of Europe. During the centuries of decline of the Janissary, in alliance with the *ulema* (highest corp of the Islam religion), encroached on palace politics, they became a greater threat to their Sultan than to his enemies, what is more, they became a massive obstacle to reforms. When the Janissaries rebelled again, actually against the military reforms of MAHMUD II (1808-1839) in 1826, the Sultan in conjunction with the *Şeyh-ül-Islăm*[4]

[3] Lyber, A. H.: The government of the Ottoman Empire in the time of Suleiman the Magnificent. Mass, Cambridge, 1913 p. 91.

[4] The title was given to the followers of Islam and scholars of the Qur'an who acquired deep knowledge of its principles**.** Later it became a highly prestigious position in the Ottoman Caliphate, and governed all religious affairs of the Ottoman Empire.

abolished the institution of slave soldiers,[5] the Janissary. On 15th June, the day that was called „Auspicious Event", the newly set up units, *Asâk'ir-i Mansure-i Muhammediye* (The Victorious Soldiers of Muhammed),[6] who were kept under the personal control of the Sultan, resolved the crisis for ever.[7] At the same time this event gave way to levelling up the transformational efforts of the Empire.

On 3 November 1839, as the first important arrangements towards the transformation of the Ottoman Empire, the *Hatt-ı Şarif of Gülhane*, literally the Noble Rescript or Edict of the Rose Chamber was announced and proclaimed by MUSTAFA REŞID PAŞA in the name of Sultan ABDÜLMECID I (1839-1861). The Gülhane Edict could be considered as the beginning of the *Tanzimat* (Reorganization) Period. It was proclaimed in the Edict that the principles of the security of life, honour, and private ownership, the abolition of *iltizam* (tax-farming) system, regular and orderly conscription into the army, fair and public trial of persons, and equality of persons without respect to their religious affiliation should be ensured.[8] In addition, the drafters of the Edict aimed to strengthen the operation of the Empire by establishing the institutions of *Meclis-i Ahkam-ı Adliye* (Supreme Council of Judicial

[5] The kul-system or "Servant of the Sublime Porte," was the tool or instrument of the central power. Devoted servants of the Sultan were entrusted with important military and administrative duties and shared governmental responsibilities. Janissaries (originally in Turkish "Yeni çeri", literally new soldier) used to be an elite corps in the infantry corps of the Ottoman Empire from the late 14th century. Highly respected for their military prowess in the 15th and 16th centuries, the Janissary became a powerful political force within the Ottoman state. The Janissary corps were originally staffed by Christian youths from the Balkan provinces who were converted to Islām on being drafted into Ottoman service. Subject to strict rules, including celibacy, they were organized into three unequal divisions and commanded by an Ağā. In the late 16th century the celibacy rule and other restrictions were relaxed, and by the early 18th century the original method of recruitment was abandoned. The Janissaries frequently engineered palace coups in the 17th and 18th centuries, and in the early 19th century they resisted the adoption of Western-style reforms by the army. On learning of the formation of new, westernized troops, the Janissaries revolted. Sultan Mahmud II declared war on the rebels and, on their refusal to surrender and had cannon fire directed on their barracks. After the Auspicious Event most of the Janissaries were killed, and those who were taken prisoner were executed.

[6] Öztas, Sezai - Öztas, Candan - Said, Ahmet: Renewal Efforts in the Ottoman Education System until Tanzimat. In: World Applied Sciences Journal, IDOSI Publications, 2012. 19 (8), pp. 1225-1338. p. 1226.

[7] Toker, Hülya: Turkish Army from the Ottoman Period until Today. In: International Review of Military History, No. 87. pp. 105-123. p. 108.

[8] Karpat, Kemal H.: The Transformation of the Ottoman State, 1789-1908. In: International Journal of Middle East Studies, Vol. 3, No. 3 Jul/1972 pp. 243-281 p. 258.

Ordinances) and *Dar-uş Şura Bab-ı Seraskeri* (Council of the Ministry of National Defence).[9] During the Tanzimat Era, the reformist Ottoman intelligentsia, who had a Western-style education and experienced life in foreign countries, e. g. in France, Germany and Great Britain as envoys and ambassadors, played a more leading role than the Sultan himself. The Gülhane Edict was not an enforceable sort of constitution, moreover it lacked the purpose of limiting the Sultan's power, since the Sultan himself issued it and could abrogate it at his own will. In the Edict the Sultan called the curse of God upon the violators of the laws, as follows: „May those acting in the opposite of these preached laws obtain the damn of Allah and not get salvation eternally."[10] After all, the Gülhane Edict could be regarded as a proto-constitutional charter, since it included a promise of the Sultan to abide by any law enacted by the given legislative mode. At the same time the edict formalized the new interpretation of the scope and responsibility of the Ottoman State.

1.1.1 Islâhat Fermânı of 1856

On 18 February 1856 a new charter, namely *Islâhat Fermânı* (literally, Imperial Reform Rescript) was issued, prepared by the Prime Minister, ALI PAŞA, and Minister of Foreign Affairs, FUAD PAŞA. The declaration was formulated mostly under Western diplomatic pressure, especially coming from Britain and France, who allied with the Ottomans against the Russians in the Crimean War of 1853-1856.[11] The text of the Reform Rescript is as follows, „The guarantees promised on our part by the Hatt-ı Hümayun of Gülhane, and in conformity with the Tanzimat, to all the subjects of my Empire, without distinction of classes or of religion, for the security of their persons and property and the preservation of their honour, are today confirmed and consolidated, and efficacious measures shall be taken in order that they may have their full and entire effect."[12] The Sultan repeated the provisions of the Gülhane Edict of 1839, because some of them existed only as empty words, and had not been taken into effect. Besides the rights that were granted by the Gülhane Edict, the Ferman also contained new

[9] Acer, Zabit: Ottoman Modernization and Effects of the Tanzimat Edict on Today. In: Ozean Journal of Social Sciences 2009/2(3) p. 191.
[10] Ibid. p. 194.
[11] Davison, Roderic H.: Reform in the Ottoman Empire 1856-1876. Princeton, 1963 p. 43.
[12] Rescript of Reform - Islâhat Fermânı of 1856. Boğaziçi University, Atatürk Institute of Modern Turkish History http://www.ata.boun.edu.tr /Department%20Webpages/ATA_517/Rescript%20of%20Reform,%2018%20February%201856.doc [18.03.2011.]

fundamental reforms, by way of example: creation of mixed courts for both the Muslims and non-Muslims, treatments of the non-Muslims as fully equal, protection for all faith distinctions, establishments of mixed assemblies in bureaucracy and judicial ranks and acceptance of the non-Muslim members into the *Meclis-i Ahkam-ı Adliye*.[13]

1.1.2 The First Constitutional Period

In the 1860's a new political-ideological movement, called Young Ottomans, came to light and played an important role in paving the way to the first Ottoman Constitution. The basic aims were the creation of a new identity for Ottoman subjects regardless of religion, the abolition of the millet system,[14] the introduction of the general military service, which had been in practice limited to Turks and developing a Western-style bureaucratization of the Empire.[15] The leading figures agreed on the aim of saving the decadent Empire, and wanted to correct the mistakes of previous measures of the Tanzimat, but they had different ideological approaches. For example NAMIK KEMAL placed emphasis on the Islamic character of the state and tried to reconcile Islam with Westernization by stating that *me□veret* (consultation) and *bay'a* (representation), as a matter of fact, existed in the Holy Book of Islam as way of practice of authority.[16] NAMIK KEMAL's poem *Hürriyet* (Freedom) and the play *Vatan* (Fatherland) provided the basic ideas for the new political culture that demanded the sacrifice of individual goals for the sake of the greater community, the Fatherland. Namik Kemal's ideology, thus rooted in the Islam, it could hardly be acceptable for non-Muslim groups, which were about to make efforts to establish their own national Fatherlands. These main writings of him could be regarded as the seeds of Turkish nationalism. As BERKES highlighted in his book, *The Development of Secularism*, the letter of MUSTAFA FAZIL PAŞA to Sultan ABDULAZIZ, in 1867, could be considered to have been the first manifesto of the liberals. MUSTAFA FAZIL PAŞA wrote, „Your subjects of all faiths are consequently divided into two classes: those who oppress without checks and those who are oppressed, without mercy."[17] Therefore the cause of all these laid in the lack of freedom of the political

[13] Lewis, Bernard op. cit. p. 137-138.
[14] The Millet system is the way in which the Ottoman Empire allowed non-Muslim minorities control their own affairs, including education and judicial affairs, and these groups were headed by their own religious leader.
[15] Karpat, Kemal H. op. cit. p. 263.
[16] Helvacı, Pelin: A Critical Approach: Political Thoughts of Young Ottomans. In: European Journal of Social Sciences – Volume 16, 2010/No. 3. p. 443.
[17] Karpat, Kemal H. op. cit. p. 263.

system. He proposed a liberal regime with a Constitution, which would create a common bond among the Ottoman citizens, since "a Constitution would guarantee the people their sacred religion, fortune, and property, as well as the security of home."[18] Contrary to this, NAMIK KEMAL, MUSTAFA FAZIL PAŞA asserted that religion and tradition had nothing to do with a constitutional regime, which could be the only legitimate form of government for Turkey.

Nevertheless, the *Birinci Me□rutiyet* (First Constitutional Period) was a consequence of the conflict between the ruling elite of the Sublime Porte and the conservatives, and had been continuing since the *Tanzimat* Period. The leader of the modernist faction, MIDHAT PAŞA,[19] who led the process of dethroning Sultan ABDULAZIZ and helped Sultan ABDÜLHAMID II (1876-1909) to ascend the throne,[20] prepared a 57-Article memorandum, the *Kanun-ı Cedid* (New Law). This draft proposed a parliamentary government in its full form. MIDHAT PAŞA designed a model of government which adopted the political responsibility of the *Vükela* (Council of Ministers) before the *Mebusan Meclisi* (Assembly of Representatives). That was totally unacceptable for the Sultan. Since ABDÜLHAMID II intended to prevent the dominance of MIDHAT PAŞA, he ordered SAIT PAŞA to study the French Constitution,[21] who then added annotations to various clauses. Subsequently, SERVER PAŞA was appointed head of the Preparation Committee of the Constitution, called *Cemiye-i Mahsusa* (Private Committee). After vehement discussions on the text of the motion, named *Heyet-i Vükela*, it was approved, and the *Kanun-u Esâsî*, literally the Main Law or Fundamental Law, was proclaimed as a kind of *ferman anayasa* (imperial rescript of basic law) by Sultan ABDÜLHAMID II on 23rd December 1876.[22] According to Article 3 of the *Kanun-u Esâsî, the* Ottoman sovereignty was united in the person of the sovereign of the supreme *Kalifat* of Islam, and the position belonged to the eldest of the princes of the Ottoman dynasty and conformed

[18] Helvacı, Pelin. op. cit. p. 443.

[19] Shaw, Stanford J.: The Central Legislative Councils in the Nineteenth Century Ottoman Reform Movement before 1876. In: International Journal of Middle East Studies, Cambridge University Press, Vol. 1, No. 1 (Jan. 1970), pp. 51-84. p. 83. http://www.jstor.org/stable/162065. [18.03.2011.]

[20] Buzpinar, Tufan: Opposition to the Ottoman Caliphate in the early years of Abdulhamid II: 1877-1882, In. Die Welt des Islams, New Series, Vol. 36, Issue 1 (Mar., 1996), pp. 59-89, p. 60. http://www.jstor.org/stable/3693438. [15.06.2011.]

[21] Shaw, J.S. - Shaw, E.K.: History of the Ottoman Empire and Modern Turkey. Vol. II., Cambridge University Press, Cambridge, 1977 p. 154.

[22] The Ottoman Constitution, Promulgated the7th Zilbridje, 1293 (11/23, December, 1876). In: The American Journal of International Law, Vol. 2, No. 4. Supplement: Official Documents (Oct., 1908), pp. 367-387. http://www.jstor.org/stable/2212668 [15.06.2011.]

to the rules established *ab antiquo*.[23] It is very important to highlight that sovereignty according to the *Kanun-ı Esasi* did not belong to the nation or national representatives but to the Sultan himself. Nevertheless, all the other institutions remained valid. While in the past, the source of sovereignty was dependent upon religion and tradition, after the enactment of the Constitution, the monarchy would start to gain its sovereignty from a secular document.

The second part of the *Kanun-u Esâsî* (Articles 8-26) enumerates the public rights of Ottoman subjects. All subjects of the area of the empire are called *Osmanli*, without distinction and irrespective of the faith they profess,, "All Ottomans are equal in the eyes of the law. They have the same rights, and owe the same duties towards their country, without prejudice to their religion. „According to the Constitution, the power of legislation was bicameral, therefore the General Assembly was divided into *Heyet-i Ayan* (Assembly of Notables) and *Meclis-i Mebusan* (Assembly of Representatives), and they were united under the title of *Meclis-i Umumi* (The General Assembly). No-one could be a member of both chambers at the same time. The President and the members of the Senate (Assembly of Notables), who had to be at least 40 years of age, were appointed directly by the Sultan for life, but the number of Senators could not exceed one-third of the number of the members of the Chamber of Deputies.[24] *Meclis-i Mebusan*, regardless of all the restrictive clauses pursuant to Article 68, "There cannot be elected as deputies: those who do not belong to the Ottoman nationality, who by virtue of a special regulation in force enjoy the immunities attached to a foreign service which they exercise, who do not know Turkish, who are not 30 years of age. People in the service of a private man. Bankrupts. Those of notoriously bad character. Individuals who have been judicially condemned so long as they are not pardoned. Those who do not enjoy their civil rights. Those who claim to belong to a foreign nation". Notwithstanding it was the first representative legislative body in Ottoman-Turkish history.[25] According to Article 27 the Grand Vizier was invested by the Sultan, and the *Vükela* (Council of Ministers) was assembled under the presidency of the Grand Vizier. Powers of the Council of Ministers comprised all of the important affairs of State whether internal or external. Those of its deliberations which had to be submitted for the Sultan's sanction were validated by an Imperial *Irade* (rescript).[26] After the election was held in 1877, the Parliament assembled on 19th March, and it was opened in person by the Sultan, who, in his speech from the throne, repeated his promise for social reforms and promised a reorganization of the army

[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.

and the navy. In his opening speech the Sultan stated, "it is with the greatest satisfaction that I open the Parliament of my Empire, which meets to-day for the first time. You all know that the development of the greatness and strength of states, as well as of the people, depends upon justice. My Imperial Government has derived, from the beginning, its strength and influence in the world from the regard it has shown to justice, both in the administration of the state and the rights and interests of all classes of its subjects."[27] After the new elections the Parliament reopened and operated from 13 December 1877 to 14 February 1878, when Sultan ABDÜLHAMID II, deeming it necessary because of the Ottoman-Russian War (1877-78), closed but not dissolved the General Assembly. He could do this because extending or shortening the legislation period were some of *hukuk-u mukaddese-i Sultani* (Sultan's Holy Rights). Furthermore the Sultan suspended the Constitution, and a new absolutist regime was initiated in the life of the Ottoman Empire.[28]

1.2 Revolution of Young Turks

In order to protest against the suppression of freedoms and ask for the reinstatement of the Constitution of 1876, new secret associations of intellectuals, called Movement of Young Turks, were formed in 1889. Turk meant not only an ethnic identity but also a political one.[29] They claimed the following three important matters: the abdication of the Sultan, a radical change of the actual regime and establishment of a representative parliament. ABDÜLHAMID II emphasized the Islamic character of his reign and of the Empire, in order to counterbalance the influence of Western liberal ideas. During his reign, the agitation for a return to a constitutional and parliamentarian rule was under process, however, it gained a far broader basis through the expansion of modern, Western-type education in the Empire.[30] The constitutional movement started to expand rapidly in the 1890's, but in 1896, the police succeeded in crushing the illegal movement and for the next ten years the reformists were active mostly as exiles foremost in Cairo and Paris.[31] "There the movement eventually crystallized into two distinct factions: the nationalist and centralist one around AHMET

[27] The New Constitution in Turkey and International Law. In: The American Journal of International Law, Vol. 2, No. 4. 1908/Oct. p. 843. http://www.jstor.org /stable/2186652. [15.06.2011]
[28] Cleveland, William L.: A History of the Modern Middle East, Westview Press Place of publication: Boulder, COPublication, 2nd Edition, 2000 pp. 84-86.
[29] The New Constitution in Turkey and International Law. p. 842.
[30] Shaw, J.S. - Shaw, E.K. op. cit. p. 112-113.
[31] Ibid.

RIZA (*Ittihad ve Terakki Djemiyeti* - Committee of Union and Progress) and the liberal and decentralist one around Prince SABAHATTIN (*Teshebbüs-ü Shahsi ve Adem-i Merkeziyet Djemiyeti* - League for Private Initiative and Decentralisation)."[32] From 1906 onwards, the constitutional movement underwent a new period of growth within the Empire, especially within the armies in the European part of the Empire. Basically, this was an autonomous growth, but the movement merged with the faction of AHMET RIZA and adopted its name, Committee of Union and Progress (C.U.P.) in 1907. In July 1908 this Organisation because of the threat of armed Intervention in the Balkan,[33] succeeded in forcing the Sultan to restore the Constitution of 1876 and reconvene Parliament.

At the beginning of the *İkinci Me□rutiyet* (Period of Second Constitution), the increasing number of students, intellectuals, bureaucrats, and army officers joined the party of opposites, and on 23 July 1908, the Young Turks Movement succeeded in enforcing the Sultan to restore the Constitution of 1876 that the Sultan himself had shelved thirty years earlier. After the elections held in November, the new Parliament amended the Constitution in order to increase the powers of the legislature, and to narrow the powers of the new Sultan, MEHMET REŞAD V (1909-1918), who came into power on 27 April 1909.[34] This way the Constitution, more or less, took after a parliamentary monarchy of Western Europe.[35] In a little while a small group of the C.U.P. party, headed by the triumvirate of General ENVER, TALÂT and CEMAL PA□A turned the state into a dictatorship, and led the Empire on its kismet, World War I.[36]

2. Turkish Revolution[37] - Process of metamorphosis

By the end of 1918 defeat of the Central Powers became clear, herewith the *Sick Man of Europe* terminated its five-year agony. Due to the *Armistice*

[32] Idris, Bal: The Turkish model and the Turkic Republics. Journal of International Affairs 1998/Sept-Nov. Vol. III No. 3. https:/www.sam/gov.trWp-content/uploadsidris_bal.pdf [11.03.2011]

[33] Non-Moslim nationalities in Balkan sought their independency supported mainly by Russia, and he Ottomans sustained serious defeats during the Balkan Wars.

[34] Özbudun, Ergun: Constitutional Law. In: Ansay, Tu□rul-Wallace Jr., Don (ed.): Introduction to Turkish Law. Kluwe Law International Bv, 6th edition 2011 pp. 19-50. p. 20.

[35] Ibid.

[36] Ahmad, Feroz: The Making of Modern Turkey. Routledge, London 1993 p. 2.

[37] In accordance with the words of Mustafa Kemal Atatürk: "A ruined land on the edge of a precipice …bloody battles with various enemies … years of struggle and then, respected at home and abroad, a new country, a new society, a new state, and to achieve these, ceaseless reforms – this is, in a word, the Turkish Revolution."

with Turkey signed on board His Britannic Majesty's Ship *Agamemnon*, at Port Mudros, Lemnos, on 30th October 1918, hostilities between the Allies and Turkey ceased from noon, local time, on Thursday, on 31st October 1918.[38] Pursuant to Paragraph I of the Armistice, the Dardanelles and Bosporus were occupied.[39] Sixty warships of the Allied Powers sailed in front of the silent guns of the Gallipoli Peninsula,[40] where the „cohors of Mehmetçik"[41] commanded by MUSTAFA KEMAL ATATÜRK[42] halted them heroically in 1915-16. The Clauses of the Armistice were formulated primarily with the aim of strategic access to Russia rather than with internal order in mind, the aim being to prevent the penetration of Bolshevism into the defeated areas.[43] As British Foreign Secretary ARTHUR BALFOUR commented to the Italian ambassador, "Having opened the Straits, and communication with the Black Sea, having occupied Constantinople, and having reduced Turkey to absolute military impotence, the conditions left out of the armistice could be imposed by any of the Allies at the peace negotiations."[44]

The C.U.P. as well as the government collapsed and its leaders ran away abroad. Sultan MEHMED VI VAHIDETTIN (1918-1922) dissolved the C.U.P. dominated legislature on 21 December 1918. Although the Turkish Constitution required new elections within three months, the Sultan announced that, owing to the turmoil of the times, elections would not be held again until four months after the signing of the peace treaty. The once great Ottoman Empire lied supine. Istanbul, the Arab provinces, Syria, Cilicia, Cyprus, the most important strategic points all over the Mediterranean coastline and the Anatolian railway were occupied by British, French and Italian troops. The fate of the Turks seemed to depend on American or British mandate. On 15May 1919, contrary to the Mudros

[38] Armisticewith Turkey. In: Helmreich, Paul C.: From ParisTo Sevres - The Partition of the Ottoman Empire at the Peace Conference of 1919-1920. Ohio State University Press, Columbus, 1974

[39] Helmreich, Paul C.: From ParisTo Sevres - The Partition of the Ottoman Empire at the Peace Conference of 1919-1920. Ohio State University Press, Columbus 1974 p. 4.

[40] Lewis, Bernard op. cit. p. 239.

[41] Mehmetçik, literally Little Mehmet, is a general term used affectionately to refer soldiers of the Ottoman and later Turkish Army.

[42] Mustafa Kemal ATATÜRK was born in 1881 in Salonika (now Thessaloniki). At the age of 12, he was sent to military school and then to the military academy in Istanbul, graduating in 1905. When surnames were introduced in Turkey, he was given the name Atatürk, meaning 'Father of the Turks'.

[43] Mayer, Arno J.: Politics and Diplomacy of Peacemaking: Containment and Counterrevolution at Versailles, 1918-1919. New York, 1967. pp. 95-96.

[44] Helmreich, Paul C. op. cit. p. 4.

Armistice, the Greek Army landed at Izmir (Smyrna) and advanced towards Anatolia to make the aim of restoring the Greek Byzantine Empire obvious.

2.1 National Resistance

The situation was almost hopeless as ATATÜRK depicted, „Those who dragged the nation and the country into the Great War had thought only of saving their own lives and fled abroad. VAHIDETTIN, who occupied the position of Sultan and Caliph, was a degenerate who, by infamous means, sought only to guard his own person and throne. The cabinet, headed by DAMAND FERID PAŞA, was weak, cowardly, and without dignity…"[45] The strict conditions of the Armistice, the occupation, the eastward advance of Greeks generated mass demonstrations in Istanbul and the rise of a secret resistance movement. In a word, Turks were ready to struggle for their land and sovereignty, only a respectable leader was awaited.

In the middle of November ATATÜRK was sent to Anatolia as Inspector-General, in order to supervise the disarmament and demobilization of the remaining Ottoman forces, to disarm and disperse the semi-military bands, to settle Muslim-Christian disturbances and to restore the order.[46] Instead of fulfilling the original errand, in the Turkish heartlands ATATÜRK recognized the possibility for joining up the links between existing, but isolated resistance groups and preparing for the armed defence against invaders. In June 1919 a secret meeting was held in Amasiya, attended by the local mufti and dignities, comrades of ATATÜRK, for example ALI FUAT (CEBESOY), HÜSEYIN RAUF (ORBAY), REFET (BELE), KAZIM KARABRKIR PAŞA, who became important figures of the Turkish Revolution in various posts.[47] After the meeting a circular telegram was sent to a number of civil and military authorities setting forth the nationalist programme. The text also contained a demand for convening a congress, free from any influence or interference, in order to assert the rights of the Turkish nation before the world and called on each district to send delegates, in secret to Sivas. As the activity of ATATÜRK took wind, the Minister of War immediately called on him to return to Istanbul. Instead of doing so, to avoid any open act against the legitimate Ottoman government, he resigned from the army and put on civil clothes.[48]

After that ATATÜRK became a member of the Association for the *Defence of the Rights of Eastern Anatolia* founded in Erzurum on 3 March 1919, which provided the base for legal continuity and the instrument for

[45] Lewis, Bernard op. cit. p. 246.
[46] Ibid.
[47] Ibid. p. 247.
[48] Ibid. p. 248.

organization efforts. On 23 July the Association assembled in Erzurum and ATATÜRK was elected as chairman. ATATÜRK'S speech reflected charisma and solid goals as he stated, „Freedom and independence are my character. I am a person who was created with a love of independence, which was one of most valuable legacies of my nation and my ancestors. This love of mine is known by all people who know my family and every stage of my private and official life from childhood until today. In my opinion, the establishment and existence of honor, self-esteem, virtue and humanity in a nation depends absolutely on the fact that nation has its freedom and independence… I need to remain as the son of a totally independent nation in order to live! For this reason, in my opinion, national independence is matter of life."[49] These views made him the acceptable leader of the national movement. On 4 September the Sivas congress was opened with the attendance of delegates from all over the Turkish districts of the Empire. The two of the most supported, however separated national organizations were united under the name of *Association for Defence of the Right of Eastern Anatolia and Rumelia*, with a permanent Representative Committee headed by ATATÜRK. The Congress reaffirmed its loyalty to the Sultan and the Caliph, but a telegram was sent to the Grand Vizír DAMAND FERID PAŞA with the words, „The nation has no confidence left in any of you other than the Sultan, to whose person alone therefore it must submit its reports and petitions. Your cabinet (…) is coming between the nation and the Sovereign. If you persist in this obstinacy for one hour longer, the nation will consider itself free to take whatever action it thinks fit, and will break off all relations between your illegal cabinet…"[50] After an unsuccessful attempt of the Istanbul Government to stir up the Kurdish tribes, with some British help, against MUSTAFA KEMAL ATATÜRK, the new Grand Vizír opened negotiations between ATATÜRK and the Istanbul Government in Amasiya. Some measures of agreement were reached, involving the new elections for the Ottoman Parliament. The Kemalist party won a majority and the new Parliament was assembled first on 12 January 1920. The Parliament voted the *National Pact* that was based on previous declarations of Erzerum and Sivas with demands of territorial integrity and national independence, the abolition of the Capitulations[51] and other exterritorial jurisdiction in

[49] Atatürk'ün Söylev ve Demeçleri. Vol. III, Ankara 1989, p. 31. citated by Türkmen, Zekeriya: Atatürk and Kemalist Thought. In: International Review of Military History: Turkish Military History and Military Culture. Ankara, TATK 15/2007 pp. 309-348.

[50] Lewis, Bernard op. cit. p. 250.

[51] The very first Capitulation was a unilateral document, a grant or concession by the Sultan to his alien friend, the King of France. It permitted to French subjects the rights to travel all parts of the Ottoman Empire, rights of residence, trade and local jurisdiction within the Empire. Naturally enough, other Western powers soon

Turkey,[52] as the National Pact stated, „the possession of complete independence as sine qua non of our national existence."[53] In the National Pact there was no intention to alter the form of the state and the government, but the subservience of the government to the Allied Powers led to its being identified with the cause for the enemies of the nation. The Allied Supreme Council reacted sharply. They decided on a reinforced occupation of Istanbul and the arrest of nationalist deputies. On 18 March 1920, on its last meeting, after unanimously voting a resolution of protest against the arrest of some of its members, the Parliament prorogued itself indefinitely. Finally the Ottoman Parliament was dissolved by the Sultan on 11 April.[54]

In a manifesto made on 19 March ATATÜRK announced that "an Assembly would be gathered in Ankara that would possess extraordinary powers, how the members who would participate in the assembly would be elected and the need to realise elections at the latest within fifteen days". Besides, he stated that the members of the dispersed Chamber of Deputies could also participate in the assembly in Ankara, to increase the representative power of the Parliament. The body of delegates, under the name of Grand National Assembly met in Ankara on 23 March 1920. The *Turkish Grand National Assembly*, established on national sovereignty, held its inaugural session on 23 April 1920, and proclaimed their loyalty to the Sultan of the Empire and the Caliph of Islam.[55] Even so the Sultan opened a last and bitter attack by using all - religious, political and military - weapons against the newly formulating national sovereignty. The *Şeyh-ül-Islăm* issued a fetva declaring that the killing of rebels, on order of the Caliph, was a religious duty. The Court Martial in Istanbul sentenced KEMAL ATATÜRK and other nationalist leaders to death in absentia. What is more, the *Kuvva-i Inzıbatiye* (Disciplinary Forces) was established so as to kill the members of the National Assembly and their supporters. The nationalist replied in kind. The Grand National Assembly instituted the Council of Ministers. The Mufti of Ankara, BÖREKÇIZADE MEHMED RIFAT EFENDI, issued a fetva, endorsed by 152 other Mufties in Anatolia, declaring that fetva of Şeyh-ül-Islăm issued under foreign duress was invalid, and called on the Moslems to

successfully sought to secure the same privileges as France, for instance England, Netherlands and Austria. In fact the Western nations at last had imperia in imperio. As a result of privileged juridical status of foreigners residing in the Empire, abuses of the grosses arose and gradually led Western citizens to consider themselves not to be subjected to Ottoman law.

[52] Mead Earle, Edward: The New Constitution of Turkey. Political Science Quarterly, Vol. 40, Issue 1, Mar./1925 pp. 73-100. p. 81.

[53] Ibid. p. 82.

[54] Lewis, Bernard op. cit. p. 251.

[55] Ibid.

liberate their Caliph from the captivity of the Allied Powers.[56] On 10 August 1920, the Ottoman Empire signed the ignominious Peace Treaty in one of the exhibition rooms of the famous china factory in Sevres.[57] The long struggle to create a peace treaty with the Ottoman Empire ended, but the Allied Powers soon found they could not achieve their aims. The fact of the acceptance of Allied peace conditions caused an immense revolution of feeling in Turkey against the regime that accepted it. Furthermore, the widespread indignation opened the door to strengthen the moral power of the national movement leaded by ATATÜRK.

2.1.1 The Lausanne Treaty

The above mentioned political occurrences shoulder to shoulder with ATATÜRK organized an independent army of Turkish nationalist resistance. The Army succeeded in arresting the Greek army, moreover, the Army of Turkish Independence won a crushing victory at Dulumpınar and reoccupied Izmir completing the reconquest of Anatolia from the enemy, and soon made operational movements in Thrace. By the spring of 1922, the Allies were voluntarily seeking to revise the treaty in favour of the Turks, and a total Nationalist military victory in the summer of 1922 resulted in the negotiation of a new peace treaty at Lausanne. The Treaty of Lausanne was the only World War I peace treaty that was truly negotiated between victor and vanquished. The Treaty of Lausanne renovated the respectful international status of Turkey under Article 1, "From the coming into force of the present Treaty, the state of peace will be definitely re-established between the British Empire, France, Italy, Japan, Greece, Romania and the Serb-Croat-Slovene State of the one part, and Turkey of the other part, as well as between their respective nationals. Official relations will be resumed on both sides and, in the respective territories, diplomatic and consular representatives will receive, without prejudice to such agreements as may be concluded in the future, treatment in accordance with the general principles of international law."[58] Article 28 contained the other important goal of the National Pact, as follows, „Each of the High Contracting Parties hereby accepts, in so far as it is concerned, the complete abolition of the Capitulations in Turkey in every respect."[59]

[56] Ibid. p. 252.
[57] Helmreich, Paul C. op. cit. p. 321.
[58] Treaty of Peace with Turkey Signed at Lausanne, July 24, 1923. In: The Treaties of Peace 1919-1923, Vol. II, New York: Carnegie Endowment for International Peace, 1924. http://wwi.lib.byu.edu/index.php/Treaty_of_Lausanne [05.06.2013.]
[59] Treaty of Peace with Turkey Signed at Lausanne, July 24, 1923.

2.2 Abolition of the Sultanate

After the international status of Turkey was settled, ATATÜRK began his internal reforms. His aim was to turn Turkey into a Western-style state and the Turkish people into a European nation. ATATÜRK expressed his intentions with the words, „Our point of view, which is populism, means that power, authority, sovereignty, administration should be given directly to the people, and should be kept in the hands of the people."[60] On 1 November 1922, the post of Sultan was abolished by the Grand National Assembly, and as an indirect result of that, the Ottoman Empire was extinguished.[61] This decision was explained as follows, „The Palace of the Sublime Porte having, through corruption and ignorance, for several centuries provoked numerous ills for the country, has passed into the domain of history. Recently the Turkish nation, the real master of its own destinies, the founder of the Ottoman Empire, revolted against its foreign enemies in Anatolia and undertook a struggle against the Palace of the Sublime Porte, which took sides with its enemies and against the nation, and that end it constituted the Grand National Assembly of Turkey its Government. …The sovereignty of the Sultan is assumed by the nation; executive and legislative powers are conferred upon the nation. … The former Ottoman Empire has collapsed and in its place the new national Turkish State is called into being,"[62] The conservatives assumed that there was no alternative to a constitutional monarchy under the Ottoman dynasty and the Caliph with spiritual powers would continue to rule as head of state; that is why they agreed to the abolishment of the Sultanate.[63] Thus the institution of Caliphate still existed. Pursuant to Article 2, the Caliphate belonged to the Ottoman House, but it also laid down that the Caliphate rested on the Turkish state. In addition, the Grand National Assembly would choose as Caliph a member of the Ottoman dynasty, who was in learning and character most worthy and fitting.[64] On 17 November the last Sultan of the Ottoman Empire, MEHMED VI VAHIDETTIN, did not wait for the Assembly's judgement of his learning and his character, and slipped out the palace and boarded a British warship, on which he fled to Malta.[65] After that, the Assembly declared that VAHIDETTIN was deposed, and his cousin ABDÜLMECID (1922-1924) was elected as Caliph by the Grand National Assembly.

[60] Lewis, Bernard op. cit. p. 257.
[61] Mead Earle, Edward op. cit. 84.
[62] Ibid. p. 84-85.
[63] Ahmad, Feroz op. cit. p. 52.
[64] Lewis, Bernard op. cit. p. 259.
[65] Ibid.

2.3 Abolition of Caliphate and Proclamation of the Republic

After the abolition of the Sultanate, ATATÜRK had to face the next stage of political struggle. The *Association for Defence of the Right of Eastern Anatolia and Rumelia* served well during the War of Independence, but for the support of internal revolution, they needed a political instrument. Therefore ATATÜRK strived to transform it into a real political party called *People's Party*. On 16 April 1923, the Grand National Assembly, which had grown from a „rebellious band" to a national Parliament, disbanded itself after a several-year preparation for the first real election, in order to be able to represent sovereignty in exterior and interior level. The elections were held in June and the new Assembly with 286 deputies opened its session on 11 August. The new Assembly elected MUSTAFA KEMAL as President of the Republic, before the definite announcement of the republic was made.[66] On 23 August 1923, the Assembly ratified the Lausanne Treaty. There was only one binding tie between the newly formed state and the Ottoman Empire, namely the Caliphate. As ISMET[67] wrote in his memoir it was a logical and necessary step towards a republic, "We encountered the greatest resistance when we abolished the Caliphate. Abolishing the Sultanate had been easier, as the survival of the Caliphate had satisfied the partisans of the Sultanate. But the two-headed system could not go on for ever. It nourished the expectation that the sovereign would return under the guise of Caliph (…) and gave hope to the Ottoman dynasty. This is why the abolition of the Caliphate (…) had deeper effects and was to become the main source of conflict."[68] In late October after carefully prepared political manoeuvers, the following constitutional amendments were proposed: governmental form is republic, the President of the Republic of Turkey is elected by the Assembly and the President is the head of the state. After hours of debate the amendments were voted by 158 deputies with several abstentions. ATATÜRK was elected as first President of the Republic of Turkiye. It was proclaimed all over the country and greeted by a salute of 101 guns.[69] On 1 March 1924, ATATÜRK opened a new session of the Assembly and suggested three main points to be supported: safeguard and stabilization of the Republic; the creation of a unified education system; the need to „clearise and elevate the Islam faith, by rescuing it from the position of a political instrument, to which it has been accustomed for centuries."[70] The right interpretation of the third point led to the decision of 3 March 1924, when the Grand National

[66] Ibid.
[67] Hero of the War of Independence at Battles of Inönü, second President of the Republic.
[68] Mango, Andrew: Atatürk. John Murray, Paperback edition, London 2004 p. 403.
[69] Lewis, Bernard op. cit. p. 262.
[70] Ibid. p. 264.

Assembly exiled the Caliph along with all other members of the Ottoman dynasty from Turkish territory. The Caliphate was formally abolished, every allusion to the Caliph was omitted from *Selamlik* (Official State Pray on Friday), and the favour of God was implored for the nation and Republic instead.[71] Thus there was no more shackle in the way of springing to earth of a new independent state and nation with a new Constitution. [72]

3. The Constitution of the Republic of Turkey, 1924

The Constitution of the Republic of Turkey, composed of Article 105 and divided into six sections, was voted and published on 20 April. [73] Pursuant to Article 105 the Constitution should come into force immediately upon proclamation. Under Article 104 the Constitutional Law of 1878 together with its amendments and the Organic Law (with other words the *National Pact*) of 30 January 1921, and the amendments thereto thereby were annulled. The possibility of amendments to or modifications of the new Constitution might have been made only upon the following conditions, "The proposal to amend must be signed by at least one-third of the total number of deputies. The proposed amendment must be thereafter discussed by the Assembly and adopted by vote of two-thirds of the total member of deputies." (Art. 102.) Same Paragraph, however, excluded any proposals to alter or amend Article 1 of the Constitution, specifying that the form of government is Republic.

3.1 Fundamental provisions

The Fundamental Provision of Section I declared that the Turkish State is a Republic (Art. 1), and the sovereignty belongs without restriction to the nation (Art. 3). Article 4 enunciated the bedrock of sovereignty: "The *Türkiye Büyük Millet Meclisi* (Grand National Assembly of Turkey) is the sole lawful representative of the nation, and exercises sovereignty in the name of the nation." According to Article 5 the legislative and executive powers are vested in the Grand National Assembly, whilst independent tribunals wielded the judicial power that is derived from the Grand National

[71] Mead Earle, Edward op. cit. p. 84.
[72] Lewis, Bernard op. cit. p. 264.
[73] Source of all citation of the Constitution of the Republic of Turkey promulgated in 1924 is based on Mead Earle, Edward: The New Constitution of Turkey. Political Science Quarterly, Vol. 40, Issue 1, Mar./1925 pp. 73-100. http://links.jstor.org/sici?sici=0032-3195%28192503%2940%3A1%3C73%3ATNCOT%3E2.0.CO% 3B2-6 [18.03.2011.]

Assembly, and constituted in accordance with the law (Art. 8). Although the Constitution of 1924 stated that the religion of the Turkish state was Islam (Art. 2), this provision was abolished in 1928 as final act of the process to tend towards the secular state.[74]

3.2 The legislative power

The legislative power was exercised directly by the Grand National Assembly (Art. 6). Article 26 determined the scope of authority of the Grand National Assembly. „The Assembly itself executes the holy law; makes, amends, interprets and abrogates laws; concludes conventions and treaties of peace with other states; declares war; examines and ratifies laws drafted by the Commission on the Budget; coins money; accepts or rejects all contracts or concessions involving financial responsibility; decrees partial or general amnesty; mitigates sentences and grants pardons; expedites judicial investigations and penalties; executes definitive sentences of capital punishment handed down by courts." Initiation of legislation rested with the members of the Assembly and the Cabinet (Art. 15). Legislative elections had to take place every four years (Art. 13), and the Grand National Assembly should meet every year on the first day of November, without convocation (Art. 14). Holding the office of deputy and other public offices simultaneously was prohibited by Article 23.

3.2.1 Members of the Grand National Assembly

Article 9 and 10 declared that the Grand National Assembly was composed of members elected by the nation, in conformity with the electoral law, and every Turkish citizen over the age of eighteen possessed the right to vote at legislative elections. Whilst to be eligible to election to the Grand National Assembly, candidates had to be over the age of thirty (Art. 11). Under Article 12 there were some restrictions. Persons ineligible to be deputies were: those in the service of foreign power, who were condemned to penal servitude and convicted for fraudulent bankruptcy, persons acknowledging foreign nationality, people who had been deprived of their civil rights and citizens who could not read and write in the Turkish language. It was declared and guaranteed that legislative elections would take place every four years and members whose term had expired were eligible for re-election. It is noteworthy that each deputy had the obligation to represent not only the constituency which had elected him, but the whole

[74] Lewis, Bernard op. cit. p. 276.

nation (Art. 13). On the day of deputies' admission to the Assembly, the representatives had to take the oath prescribed by Article 16, „I swear before God that I will have no other aim but the happiness and safety of the fatherland and the absolutely unrestricted sovereignty of the nation and that I will never forsake republican principles."

3.3 The Executive Power

The Assembly exercised the executive power through the intermediary of the President of the Republic, whom it elects, and through a Cabinet chosen by the President of the Republic. However the Assembly controlled the acts of the government, and had the right to withdraw the power from it (Art. 7). According to Article 38 the President of the Republic, after his election should have to take the following oath in the presence of the Assembly, „As President of the Republic, I swear to dedicate myself exclusively to the respect, defence and execution of the laws of the Republic and of the principles of national sovereignty, to devote all my efforts loyally to assure the happiness of the Turkish nation, to contend with all my strength against every danger which may menace the Turkish state, to cherish and defend the glory and honor of Turkey, and in general to conduct myself so that I may never fail in the performance of the duties with which I am entrusted."

3.4 Public Law of the Turks

Section V (Art. 68-88) set out the public law of the Turks. Article 88 accounted for the expression "Turk" that stands in the title of the fifth section instead of the term citizens or subjects, "The name Turk, as a political term, shall be understood to include all citizens of the Turkish Republic, without distinction of, or reference to race or religion. Every child born in Turkey, or in a foreign land of a Turkish father; any person whose father is a foreigner established in Turkey, who resides in Turkey, and who chooses upon attaining the age of twenty to become a Turkish subject; and any individual who acquires Turkish nationality by naturalization in conformity with the law, is a Turk."

The population of the Turkish Republic was far more homogenous than the population of the Ottoman Empire. However, there were still some religious minorities, such as various groups of Christians and Jews. Within the Muslim population of Anatolia, there were ethnic differences, for example Turks, Kurds, Laz, Circassians, etc., and differences of sects. Whereas religion united the Sunni Muslim population during the Ottoman Empire, and the absence of a cultural and a religious policy eased the

differences between people most of the time. The importance of religion was reduced in the state and society, so the Islam faith could no longer be the basis for unifying the nation. ATATÜRK's solution to the problem was to define an entity called Turk and urge the citizens to unite around it. Although ATATÜRK was a nationalist, his nationalism was not based on race, but limited by the boundaries of Turkey and open to all citizens. It was a quick and practical solution to the problems to create a new identity and a culture which would cut its ties with the undesirable sections of its past. Now the peoples of the new Republic had to unify around "Turkishness" which, as defined by ATATÜRK, emphasized the centrality of being a Turkish citizen, and took no account of the origins of its constituent people. Anyone who carried a Turkish identity card and called Turkey his or her homeland was a Turk. Hence, being a Turk was a question of citizenship rather than of race, and in theory, Atatürk's nationalism disregarded differences in race and religion. "Proclaiming oneself a Turk thus became a badge of pride and the key to full membership of the state, rather than the social stigma it had been under the Ottomans."[75] ATATÜRK summarized and expressed his idea on nationhood with the phrase, *"Ne Mutlu Türküm Diyene"* (Happy is the one who calls himself a Turk); a phrase still to be found on the walls of important official buildings and statues.

The first Article of this section stated that, "All citizens of Turkey are endowed at birth with liberty and full right to the enjoyment thereof. Liberty consist in the right to live and enjoy life without offense or injury others." The only limitations on liberty were those imposed in the interest of the rights and liberties of others, and limitations should have been defined only in strict accordance with the law. As the Gülhane Edict promised in 1839, almost hundred years before, the life, the property, the honour, and the home of each and all were inviolable (Art. 71). In accordance with Article 39 of the Lausanne Treaty[76] as an international guarantee for all citizens, either Muslim or non-Muslim, Article 69 declared that "All Turks are equal before the law and are obliged to respect the law. All privileges of whatever description claimed by groups, classes, families and individuals are

[75] Atatürk has been accused of hidden racism and the official argument used by the state against those who accuse him of racism is that, "Turkishness" in Atatürk's sense was never related to race. Two important figures during the foundation process of Turkish nationalism and who inspired Atatürk were racially non-Turks, namely Ziya Gökalp (ethnically Kurdish) and Tekin Alp (Moiz Kohen; ethnically Jewish). For a sample of this official argument, see Yetkin, Çetin: Atatürk Milliyetçilyi ve Terrör. Yeni Forum, Vol. XIV, No. 286, 1993, pp. 55-56.

[76] "Turkish nationals belonging to non-Moslem minorities will enjoy the same civil and political rights as Moslems. All the inhabitants of Turkey, without distinction of religion, shall be equal before the law." http://wwi.lib.byu.edu/index.php/Treaty_of_Lausanne [05.06.2013]

abolished and forbidden." No one might be molested on account of his religion, his sect, his ritual, or philosophic convictions (Art. 75). Article 72 and 73 embraced the principle of *habeas corpus*. This section expressed the freedom of speech, of the press, of movement, of entering into contracts, of assembly, of association, of labour, of incorporation, of conscience, of thought and the inviolability of the secrecy of letters and telephone communications. As obligation for the citizens paying taxes, in conformity with the law, and primary education were determined (Art. 84-85; 87).

3.5 The Council of State

The Constitution did not contain any special sections for the Council of State, because its duty and operation were not clearly worked out. The roots of the institution of the Council of State can be traced back to the beginning of Tanzimat. The Council of State was transformed from the *Meclis-i Vala-i Ahkam-ı Adliye* (Supreme Council for Judicial Regulations). The Supreme Council was established during the reign of MAHMUD II, and developed after the declaration of the Gülhane Edict, but later divided, according to the duties conferred upon them, into two councils. One of those councils was called the *Meclis-i Ali-i Tanzimat* (Supreme Council of the Reforms), while the other maintained the name of the Supreme Council for Judicial Regulations. The French Ambassador in Istanbul, Monsieur Bourrée suggested to the Grand Vizier that the Ottoman administration should be strengthened with liberal organizations. He also recommended that a council like the Conseil d'Etat of France should be established to represent the Muslim and the Christian in a common body.[77] The Council of State which had developed into an advisory and examining body during the Ottoman Empire was duly abolished like all other organisations of that era on 4 October 1922. During the War of Independence and following the first years of independence, the duties undertaken by the Council of State by various laws were carried out by a special committee within the Grand National Assembly. Ultimately, need for a Council of State so strongly was felt that Article 51 of the Constitution of 1924 ordered the establishment of the Council of State once again.[78] The Council of State was really re-established on 23 October 1925. However the President and the members of the Council of State were not elected until 23 June 1927. At that time the Council of State was composed of four divisions, one being a judicial division and the

[77] Council of State. http:/www.danistay.gov.tr/%5/eng/history.html [011.05.2012]
[78] Ibid.

other three being administrative divisions: Division of Reforms, Division of Territorial Affairs and Division of Finance and Public Affairs.[79]

3.6 Summary

There is no doubt, the Constitution of 1924 was democratic in spirit, but it was a "Rousseauist", or majoritarian concept of democracy, rather than a liberal democracy based on an intricate system of checks and balances. Whilst the Constitution was the culmination of a more than a century long struggle against the Sultans, it is not surprising that the revolutionists thought that there would be no need to protect the nation against its own representatives. The majoritarian concept holds that sovereignty is the general will of the nation, and it is absolute, indivisible and infallible. Limiting the powers of the assembly would be tantamount to limiting the sovereignty of the nation. The drafters were not sufficiently aware of the fact that the tyranny of a majority was just as possible and as dangerous as personal tyranny. Lack of constitutional checks and balances did not cause a problem during the single-party years lasted to the late 1940's, when the weakness of the Constitution became obvious.[80]

[79] Ibid.
[80] Özbudun, Ergun op. cit. p. 22.

Taxation of electronic commerce - are the current rules appropriate to tax electronic commerce?

RÓZSA, PIROSKA

ABSTRACT *In my article I make an attempt to represent the changes brought by the Internet, which are the greatest economic developments of the 20th century in our business life and also the challenges caused to tax authorities. I would like to give an insight, in the first part, into electronic commerce and e-retailing. In the second part I evaluate tax problems and the world's response to them. From my point of view, a good article gives a wider picture of relevant issues and tries to put them in context. It does not only examine a problem by itself as when we give advice to a client as legal experts; we also need to take different factors into account. As it was stated in the case of Hurlingham Estate v Wilde and Partner, in which the judge said that no business decision should ever be taken into account without considering its fiscal consequences, and no professional adviser should offer advice without addressing the fiscal side of the case. Legal advisors need to make sure their clients are informed and have reasoned information about the fiscal consequences of their problem.*[1]

The new form of retailing brought quite a few problems that I would like to elaborate on here, but we need to bear in mind that each of them by itself would deserve a whole article.

I would like to provide some preliminary thoughts. First of all, the academic literature that I could find is very narrow. Books and journals with the title or subject of electronic commerce normally say only few words about electronic commerce and then continue explaining the traditional taxation and leave out the electronic commerce taxation questions.

Secondly, thanks to the nature and the features of electronic commerce there are situations that countries cannot handle by themselves. Economic activities have become really mobile and borderless. Global features of electronic commerce challenge legislators and the legal world. Governments need to keep pace with new technological and non-technological developments.

The final point is that the Internet makes tax collection and fragments corporations very difficult, and makes it easy to relocate companies, eliminate locations and business activities. New products have appeared that

[1] Hurlingham Estate v Wilde and Partner [1997] Lloyd's Reo 525.

lack the features on which the tax system has been built. Tax administration, attribution of profit, transfer pricing and classification of income and many more tax areas need to face issues caused by electronic developments. Despite the significant challenges law makers gave quick responses to the changes. As we will see, they have tried to adjust the existing system and have not tried to create brand new rules as the response to the challenges.

1. Changes generated by the Internet

The Internet has brought important changes in our life and challenged both businesses and governments. It has changed our legal, economic and social life as I mentioned in my introduction. The development of information and communication technologies modified the nature of retailing and conducting business and it transformed the way business is carried out. It created new models and consumption habits which all have an effect on the tax world. That is the reason why I would like to detail them in this section.

First and foremost, vendors gained a new borderless area to sell their products and services all over the world. It helped to open up new markets and made the globalisation of the retail sector quicker. New competitors have appeared as there are now global companies entering new markets beside the local players.

Secondly, new products entered the market e.g. software. Customer and consumption habits have changed. It provides a very convenient way of shopping. We do not have to go out of the house to buy food, clothes or electronic goods. We can shop online on our PCs, laptops or, now one of the most popular, shopping on our smart phones. We use our phones for browsing more and more frequently. The mobile internet traffic compared to the total internet usage increased from less than 1% to over 10% by 2012.[2] The costumer is provided with the opportunity to compare prices, to find the best place to shop and to reduce the price of the desired products. One of the most important features of the new space is that servers can be easily located anywhere and this location is generally unknown. This space is owned by no one and cannot be controlled by anybody or any kind of international organisation.

Thirdly, new business models were created. Stakeholders can arrange their business activities more easily and a lot faster. There is no slowdown in the business world these days. It operates 24/7. However, the biggest

[2] Global perspectives on retail: online retailing, Cushman and Wakefield Research Publication, 2013 www.ecommercefacts.com/research/2013/07/report-online retail/index.xml [09.08.2013.]

challenge, which relates significantly to taxation, is that the traditional retailing has a physical presence. Today services can be delivered without physical existence and we can receive goods that have never had physical features. Taxation needs to face that issue because although it was established on the base of physical existence, lots of goods or services are intangible in the 21st century. This change can hit the monetary, fiscal and political autonomy of any state. Another benefit of the business model is that business owners do not need a shop to carry out their activities. Therefore, it reduces the costs of running a business e.g. no rent, no bills and fewer staff to pay.

In conclusion, thanks to all the above mentioned changes, the internet challenges all areas and branches of law. Lawyers need to deal with consumer protection, data protection, intellectual property rights, electronic contracting and electronic payment methods and from my point of view, one of the most important challenges is the taxation of online retailing. The topic is very problematic because the sovereignty of a country and globalisation need to face each other. The main aims are to avoid non- taxation and also to avoid double taxation.

2. Definition of electronic commerce

There is no generally accepted definition of electronic commerce, but there is one common or mutual feature of the different definitions: it is a transaction delivered by electronic means.[3] Basically, it means conducting business activities and transactions over computer networks.

E-commerce – according to Eurostat, the statistical office of the European Union - is trade (selling and purchasing) in goods and services whether between businesses (B2B), households, individuals (B2C and C2C) or private organisations through electronic transactions over computer networks.[4] Orders of goods and services are sent over computer networks, but payment and delivery is not necessarily conducted online.[5]

OECD has almost the same working definition.[6] E-commerce or online retailing transaction (I use them as synonyms in my dissertation) is the sale or purchase of goods or services over computer mediated networks as we

[3] Bevers, Gwen: Value added tax and electronic commerce In: British Tax Review 2001/6. p. 449.

[4] European Commission: E-commerce statistics http://epp.eurostat.ec.europa.eu /statistics_explained/index.php/E-commerce_statistics [01.06.2013.]

[5] European Commission: Glossary: e-commerce http://epp.eurostat.ec.europa.eu /statistics_explained/index.php/Glossary:E-commerce [01.06.2013.]

[6] Measuring the information economy http://www.oecd.org/sti/ieconomy /2771174.pdf [03.06.2013.]

normally call the Internet.[7] Exchanging goods, services and information through electronic networks is also part of e-commerce.[8] Orders received or placed over phone, fax, letters or emails are excluded. Therefore, the method by which the order is placed or received has importance when we would like to determine whether a transaction is an online transaction or not. Typical e-commerce activities are: online shopping, booking flights and holidays. Easier access to the Internet, improvement of security and improvement of different secure payment methods contribute to the growth of e-commerce significantly. More and more businesses and enterprises are connected to the Internet. It is not only the e-commerce that has a significant importance, but businesses manage their supply chains, logistics and distribution and manage also production processes over online networks. We can also mention here finance, marketing, or human resources that are managed online.

The "electronic commerce" term is defined - by the World Trade Organisation- as the production, distribution, marketing, sales or delivery of goods and services by electronic means.[9]

The European Union also tried to define what electronic commerce or transaction can be in the e-commerce directive.[10] Its definition is: *"any services normally provided for remuneration, at a distance, by means of electronic equipment for the processing or storage of data, and at the individual request of a recipient of the service"*. It is a commercial activity which involves computers and networks where the transaction takes place between the parties at a distance without even physical presence or connection. New features of commercial activity are that it involves lots of intangible goods or services.[11]

Another significant source of e-commerce taxation is the Internet Tax Freedom Act of the United States, which states that electronic commerce is "*a transaction conducted over the Internet or through Internet access, comprising the sale, lease, licence, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of internet access"*.

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[7] Fredriksson, Trojnborn: E-commerce and development http://www.wto.org/english/tratop_e/devel_e/wkshop_apr13_e/fredriksson_ecommerce_e.pdf [02.06.2013.]

[8] Conference on empowering E-consumers: Strengthening consumer protection in the Internet economy http://www.oecd.org/ict/econsumerconference/44047583.pdf [04.06.2013.]

[9] World Trade Organisation: Work programme on electronic commerce http://www.wto.org/english/tratop_e/ecom_e/wkprog_e.htm [06.06.2013]

[10] Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services

[11] Walden, Ian: Regulating electronic commerce: Europe in the global E-conomy. In: European Law Review 2001/26. p. 529.

The European Commission differentiates between direct and indirect electronic commerce. We can talk about direct electronic commerce when the customer orders and pays online and the intangible goods and services are delivered online. Indirect service is when the order and the payment take place through the Internet, but the goods are tangible and delivered physically.[12]

I would like to mention only one definition from the academic literature. According to Doernberg and Hinnekens, "*electronic commerce refers to a wide array of commercial activities carried out through the use of computers, including on-line trading of goods and services, electronic funds transfers, on-line trading of financial instruments, electronic data exchange between and within companies*".[13] It includes the use of computer networks to facilitate transactions involving the production, distribution, sales and delivery of goods and services in the marketplace.[14] It is a new way to conduct business that includes marketing, advertising, ordering, processing orders and payment. Basically, it means computer involvement in conducting business in a way that helps to satisfy customers in a more efficient and effective way.

Normally a typical transaction can be divided into 3 different stages. The first stage is when the customer gathers some information about the wanted product or service. In the second stage, the real transaction takes place when the purchaser selects the product, orders it and pays for it. The third stage is the delivery.[15]

Every part of a business became more effective and cost-efficient with the help of the Internet e.g. outsourcing, delivery, marketing and distribution. It created lots of opportunities and benefits both for businesses and consumers. It developed a new space to perform old-fashioned/traditional business functions. It absolutely abolished the barriers between countries and continents. It generated new distance selling space. Now parties do not see each other, very often they are not even in the same country.

3. General legal background of e-taxation

WTO, OECD and the EU realised the potentials and the dangers of the new opportunities, so they started dealing with internet governance in the

[12] European Commission, Communication: A European Initiative in Electronic Commerce (Green Paper) COM (97) 157, April 15, 1997.
[13] Doernberg, Richard – Hinnekens, Luc: Electronic commerce and international taxation, Kluwer law international, 1999 p. 3.
[14] Ibid. p. 45.
[15] Lesguillons, Henry: Foreword. In: International Business Law Journal 1998/3. p. 275.

90's. It is necessary to create e-rules at national and international level as well. Countries and different international organisations need to keep up the pace and adopt measures that can keep the competitiveness of a market in a knowledge-based economy. The international community realised they need to review the existing tax system because the Internet created new business models. The international society became aware that e-commerce had the ability to undermine tax principles.[16] Therefore, an urgent action had to be taken.

There were debates about the way in which electronic commerce could be taxed. The question was: what can be the best solution or way to regulate the taxation of electronic commerce? The options were the following: regulation either with new tax rules or with traditional principles adjusted to electronic commerce, non-regulation or self-regulation. The first option was not to tax this form of commerce to help the new sector to develop and strengthen its position in the economic world, so the sector should be left tax free. Another way could have been to introduce new taxes on electronic commerce. The third option was to apply the existing system to electronic commerce because it was only a new space to commerce and we needed to stick to the principle of neutrality.[17] Finally, the last option could have been a kind of non-regulation by governments or international organisations, but they could create moral codes or principles and leave the sector to create their own rules. The base of no taxation was that in the early years, e-commerce might need some support to develop. The third option has been chosen.

The USA is a good example of one way to regulate electronic commerce. The United States left electronic commerce tax free for a while to support its development. The Supreme Court supported that way by making a decision that states can collect taxes from businesses only if they have physical presence or nexus in that state. As a consequence, off-line retailers found themselves in a very disadvantageous position because they had to pay tax despite the fact that online retailers did not pay tax. The practice changed when the court decided that a company needed to pay tax although it had no presence in the given state. The case concerned Borders, which used Amazon.com and its own website to sell its products.[18] The company sold products in California where it had no premises, employees or accounts. Therefore, in accordance with the old practice it would not have had to pay tax. An argument could be started whether it is necessary to tax e-commerce or not.

[16] E-commerce: impacts and policy challenges http://www.oecd.org/eco/outlook/2087433.pdf [02.06.2013.]
[17] Doernberg, Richard – Hinnekens, Luc op. cit.
[18] Frieden, Karl: Cybertaxation, The taxation of E-commerce. Arthur Andersen, 2000

OECD has a major role in and influence on establishing EU rules since all EU members are members of the organization. UNCTAD, which is part of the United Nations, also assists governments in preparing for the harmonisation of the legal framework of e-commerce. It includes representatives from private and public sectors and its task is to provide information on trade.

As I have already mentioned, the international community started to handle the question in the 90's. The OECD had its first conference on this subject in Finland in 1997.[19] The international organisation identified the danger and problems of electronic commerce like anonymity, easy access to offshore centres and enforcement problems.[20] In Ottawa, general principles to be applied to e-commerce were agreed on. These are the following: neutrality, certainty, efficiency, simplicity, effectiveness, fairness and flexibility.[21] The OECD made model treaties to try to harmonise the tax regulation of the member states. For instance, according to the OECD, income taxation depends on the place of the residence, or in the case of companies it depends on the place where the company was established or the place of permanent establishment. Whereas in the case of consumption taxes, like VAT or sales taxes, there is a growing tendency to tax in the place of consumption.[22] In accordance with the OECD Model Tax Convention, foreign income or profit can be taxed in that country if it arises from the activity of a permanent establishment which is a fixed place of business. It - generally speaking - includes an office, a branch or a factory. However, mobile places are excluded from that definition. The features of a PE: the existence of a place of business, the place of business must be fixed, carrying the business through the permanent establishment, which usually means personal involvement.

To present a complete picture, it should be noted that beside international resolutions, double taxation treaties have also been created in the interest of some harmonisation and the employment of similar approaches. In these treaties most countries recognise the same tax principles following the OECD Model Treaty. Although the countries recognise the same principles, the charges vary, which challenges tax authorities and gives the opportunity to taxpayers. We also need to bear in mind that there are exceptions. For

[19] P.C.A. Keith Stuart, D. Von Mecklenburg: Internet taxation, electronic commerce and the main trading notions 1999/5. C.T.L.R. p. 135.

[20] Hickey, Julian: The fiscal challenges of e-commerce In: British Tax Review, 2000/2. p. 91.

[21] Tax and e-commerce by OECD, Tax administration aspect of electronic commerce: responding to the challenges and opportunities http://www.oecd. org/ctp/treaties/1923272.pdf [03.06.2013.]

[22] E-commerce the key to avoiding global division http://www.out-law.com/page-2171[12.06.2013.]

example, normally UK treaties follow the OECD Model Treaty, but there are exceptions. Where the UK uses the model treaty, we can use the commentary of it which helps us to find the right answer to the questions raised by a case. However, countries can have reservations and have alternative interpretation of the articles.

As a consequence, it is generally accepted and generally true that electronic commerce is treated in the same way as normal retail, but what happens if there is no economic parallel in traditional retail?[23]

4. Policy challenges

The Internet presents regulators with difficulties. It has features that can challenge policy makers. In this section I would like to point them out.

The Internet comes with anonymity. It is getting more and more difficult to identify parties and transactions. Authorities need to monitor and identify customers and transactions because different taxpayers pay different taxes on different transactions.

For businesses, the Internet gives opportunities to mitigate their tax obligations. These possibilities include that they can find low tax jurisdictions or can give change for the re-characterisation of an income.[24]

Electronic commerce means that businesses can operate through multiple servers through different jurisdictions and companies can fragment the economic function of their business. A company can allocate its functions in different jurisdictions where it is either not taxed or taxed at a very low rate. International supply chains and outsourcing are other key issues. In that case, different phases of production take place in different countries. So activities with different risks can be allocated to be performed under different jurisdictions, which gives the opportunity to lose less.

The problem with e-commerce is that it has a global nature and since different countries have different rules and rates, the same transaction can fall under different rules. It can create extra costs to companies and businesses to get to know the rules of different jurisdictions.

Major issues in relation to taxing electronic commerce:

- To determine the jurisdiction (legal authority of a state) that has right to tax has become quite difficult. The determination is normally based on some kind of physical presence of the taxpayer, but one of the most

[23] Ivinson, Jonathan: Overstepping the boundary- how the EU got it wrong on e–commerce 2004/10 E.B.L. p. 7.

[24] Ahmad, Nehaluddin: The tax net and the challenges posed by e-commerce: a critical examination' 2008/14. C.T.L.R p. 230.

important features of electronic commerce is that it lacks physical existence[25]

- Attribution of income; concept of PE: attribution of income is an essential feature of taxation. It needs to be attributed to get taxed. Without it an income can escape from taxation obligations. The concept of PE is important because if a company is not established in a country, but has PE, authorities need to attribute an income to a PE to get taxed. Therefore, if a state cannot establish the existence of a PE, they cannot attribute an income. So, it stays without getting taxed. The question is whether a server or a website can be a PE in accordance with the traditional definition of permanent establishment.
- VAT: in case of VAT, the question is who can collect the VAT, which services and goods can be subjects of that indirect tax, who needs to pay it and where it needs to be paid.[26]
- Classification of income: it is significant to classify the income and e-commerce raised questions regarding that it cannot fit in tax law terms. New products like software and downloading music entered into the market, and they were difficult to be categorised whether it is goods or services. Incomes need to be classified because different incomes can be taxed in different ways and in accordance with different tax principles.
- Erosion of tax base: natural and legal persons try to reduce their tax obligation and pay less tax. The easiest way is that they reduce the tax base. The Internet gives opportunity for "forum shopping". Businesses can divide their businesses into different parts and allocate these parts to low tax jurisdiction countries or where they can find lenient rules and/or better treatment.
- Tax enforcement mechanisms and administration: tax administration and enforcement have also become more difficult since electronic commerce lacks physical presence. Its global and multinational nature also contributes to confusions.
- Tax havens: tax havens are countries where there is no obligation to pay taxes or on a very low base. Stakeholders can easily establish companies there and conduct business activities from those countries, which is even easier through the Internet.[27]
- Transfer pricing: multinational companies can reduce their tax liabilities with transfer pricing which means that they need to conduct their business activities within the company as if they were independent entities. With the help of the Internet, it is even more

[25] Hickey, Julian op. cit. p. 91.
[26] Ahmad, Nehaluddin op. cit. p. 230.
[27] McKeown, Patrick – Watson, Richard: A guide to the World Wide Web and electronic commerce, Version 2.0, John Wiley and Sons, Inc. 1997

complicated to follow transactions within an international company. Therefore, they can play with rules.

As we can see there are serious taxation problems connected to electronic commerce. These problems need to be solved. In this article I will not be able to elaborate on all these issues. I will focus mainly on VAT.

5. Problems with the major taxation principles

There are two major tax principles related to taxes which are the source and the residence principles. These two elements of international taxation help to determine who can tax arising incomes. International allocation on taxing rights depends on the personal and territorial links between the natural and legal person and the state; this link can justify the right to tax an income.[28] It is accepted that personal attachment to the state can justify the full taxation on a person's income arising worldwide.

Due to electronic commerce, to apply traditional principles is becoming difficult. Problems arise when a person residing in one country earns money in another country because in that case, both countries have the right to tax that person or company/business.[29] The Internet makes it easier to earn money in different countries. The problem is the same with companies; they are incorporated in one country, have branches in another country, work with an agent in a different country, and have a website or a website with server in a fourth country. So the options are uncountable and escaping from or mitigating tax obligation is easier in the electronic world. Two main tax principles are in conflict: the residence rule and the source rule. Sometimes in the traditional retailing, it was also difficult to determine who can tax income, but the activity of OECD helped a lot. The existence of the new electronic world caused geographical issues and even if it is clear which country can tax an income, it is not easy to determine the tax rate to levy on the income as it depends on the type of the income. Different tax rates are charged on royalties, dividends, interests, rental incomes or payments for goods and services.

Tax liability can depend on residence. According to that theory all residents of a country are liable to pay tax, non-residents pay tax on income and on the profit of the business which arises on the territory of that country, or the profit is attributable to a permanent establishment situated in the

[28] Schon, Wolfgang: Persons and territories: on the allocation of taxing rights, British Tax Review 2010/6. p. 554.

[29] Hedley, Steve: The Law of Electronic Commerce and the Internet in the UK and Ireland. Cavendish Publishing, 2007

country.[30] An example of that is from the UK through the case of Colquhoun v Brooks , where it was held that income tax has a territorial limit meaning that either the taxable income derived must be situated in the United Kingdom or the person whose income is taxed must be resident in the United Kingdom.[31] The OECD Model Treaty states in Article 4 that generally the domestic laws of the various States impose a comprehensive tax liability based on the taxpayer's personal attachment to the state. This liability is not only imposed on persons who are domiciled in the country, but it is extended to comprise persons who stay continually or maybe for a certain period of time in the territory of the State.[32] It means that not only citizens, but anybody who has presence in the country for a certain period of time needs to pay taxes. Citizenship based taxation would not be sufficient in these decades due to migration and globalisation. In the Finanzamt Koln-Alstadt v Schumacker,[33] it was held that a residual obligation of the country of residence takes account of the global tax capacity of a person and therefore, allows deductions for personal expenditure which cannot be deducted elsewhere.[34]

On the other hand, companies are taxed where they were incorporated, which means that incorporation, just like residence in the case of natural persons, establishes the link between a state and a company. Talking about companies, it makes their situation even more difficult because they can be taxed where they have the effective place of management. Nowadays it is not easy to identify where the place of the effective management is because headquarters are not necessarily the place where the board executes its tasks.

Countries usually collect tax on a national or on a territorial basis. Territorial attachment can justify taxation of income arising in a certain country. Justification for taxing on a territorial basis is that a person or a company who or which conducts business in that country enjoys services of the state like citizens of the state. Therefore, they also need to contribute to the expenses of the state. This is the source principle.

Residence depends on the domestic law. If one business is the resident of two countries, usually international treaties will decide.

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[30] Are the current Treaty rules for taxing business profit appropriate for e-commerce? http://www.oecd.org/tax/treaties/35869032.pdf [03.06.2013.]

[31] (1889) 14 App. Cas. 493 at 503, approved by the House of Lords in *National Bank of Greece SA v. Westminster Bank Exor and Trustee Co. (Channel Islands) Ltd* [1971] A.C. 945 at 954, and *Clark (Inspector of Taxes) v. Oceanic Contractors Inc.* [1983] S.T.C. 35 at 41. Assets for the purposes of the TCGA 1992 are "All forms of property" [S. 21(1)].

[32] OECD Model Tax Convention on Income and Capital

[33] C-279/93 [1995] ECR I-225

[34] Schon, Wolfgang op. cit. p. 554.

The other doctrine is the source principle. Money can be taxed at its source where it arose.[35] There are different methods to determine the source that is taxable. It can be determined by the source of certain items of income in the taxing state, or by specifying the items of the income which are taxable.[36] Both methods can establish the right of a state to tax according to the OECD Model Treaty 1992. It states the items of income which a source state can tax in the hands of a resident of the treaty partner state. Problem can arise when states use different definitions in their internal law from the treaty they entered into. In that case, the treaty has priority over internal rules. In the case of source taxation, the tax is levied on the source or payer of the income, but he can recover the tax by deducting it from the income paid to the recipient.

The tiebreaker rule is usually where the effective management is situated regardless of where the money was earned. De Beers Consolidated Mines Ltd v Howe[37] is about central management and control of the company, which shows the importance of the board of the company in a foreign country. According to that test, residence depends on where the business operates although the board operates in a different country. However, there are cases which are against this decision, and consider the company as the resident of that country where the executive directors operate, exercise effective control and manage the company. As a tiebreaker rule, OECD uses the place of effective management which is the place where the most important decisions are made.[38] However, it is very difficult to determine where that place is due to technological developments. Central management can be exercised in more than one country. Key managers can hold conference calls, members of the board can be in different countries; they can direct the company and conduct the business without meeting each other. Therefore, not only the activities of the business are fragmented, but the decision making as well.[39] That is why it is easy to question the traditional tests and avoid paying tax.[40] In the UK the test for residence is where the real business of the company is carried out, which was established in the Calcutta Jute Mills Co Ltd v Nicholson Ex D case,[41] which is about

[35] Lee, Natalie: Revenue law, Principles and practice, Bloomsburry Professional, 2012

[36] John F. Avery Jones: Tax treaty problems relating to Source. In: British Tax Review, 1998/3. p. 222.

[37] [1906] AC 455

[38] Morse, Geofffrey: David Williams Davis, Principles of tax law. Sweet and Maxwell, 2012

[39] Gruber, Joseph – Gershumy, Philip: Tax and the Internet, 2000/. 11. I.C.C.L.R. p. 42.

[40] Singleton, Susan: Business, the Internet and the Law. Tolley, 1999

[41] [1876] 1 Ex. D. 428

where the central management and control take place. It means the highest level of control and it is not necessarily where the business operates.[42] In the De Beers Consolidated Mines Ltd v Howe case, it was held that the company is a resident in that country where the board meeting on important issues takes place and where the majority of the board reside.[43] The question in relation to electronic commerce is that if a company operates in France, the board meeting is conducted through Skype while the board members are in different states, where will the place of the central management be? The picture is even more difficult if we talk about international companies with subsidiaries and with websites and servers in different countries.

There is another concept which is withholding at the source. It is another way of collecting taxes at the source and the point is the same as with source taxation. In both cases, the recipient bears the burden of the tax; it is reduced from its income and the tax is collected from the source or payer of income.[44] In that case, the payer of the income must withhold tax from certain income when he pays that income and remits it to the government. In case of the source principle, to pay the tax is part of the payer's general tax obligations while in case of withholding taxes, the payer's tax obligation to pay tax on his own income is separate from the withheld tax. Piroska E. Soos explained the difference between the two concepts; the taxpayer "deducts and retains" in case of taxation at the source, and "deducts and remits" in case of withholding taxes.[45] It is quite important when we talk about royalties. If we buy products or services that include intellectual property rights, royalties need to be paid. The question is who has the obligation to pay or withhold it. However, we need to distinguish royalties and services, which is a matter of consideration and a matter of classification.

An example of how difficult it can be to determine whether the UK has the right to tax a company. In case of corporation tax, we need to know the definition of company, profit, scope (territorial and residential), central management control, incorporation and PE. The United Kingdom can impose tax on a business if it carries out trade. Trade is therefore a must have on the list. So we need to know what constitutes trade in the UK.[46] The branch or agent needs to be the centre of the economic operation and make profit. In the case of Grainger and Son v. William Lane Gough, Lord Herschell said that there is a broad distinction between trading with a

[42] Tiley, John – Loutzenhiser, Glen: Advanced topics in revenue law. Oxford: Hart, 2012
[43] [1906] A.C. 455
[44] Soos, Piroska: Taxation at the source and withholding in England 1512 to 1640. In: British Tax Review, 1995/1, p. 49.
[45] Ibid.
[46] Lymer, Andy – Oats, Lyenne: Taxation: policy and practice. Fiscal Publication, 2012

country and carrying on a trade within a country because only the latter is taxable.[47] He also said that the export of goods does not constitute trade within the United Kingdom and soliciting orders do not trade by themselves. To use a website to advertise goods or services is also not trade.[48] The next case where the definition of trade was discussed is Maclaine v Eccott.[49] Whether trade is exercised in the United Kingdom is a matter of fact, but sales of goods or services always constitute trade and it is exercised where the contract is made.[50] However, the most important factor should be where the operation of the business is from which the profit arises because the global market makes it difficult to identify the place where the contract is made. The main test in the United Kingdom is that if the contract is made in the UK, it has the right to tax that transaction.[51] Therefore, if the contract is made outside the UK, it will not be taxed by UK authorities. The more appropriate test now is that the authority can tax where the operations take place from which the profit substance arises. Under English law contract is made where the contract was communicated. However, if the mode of communication is instantaneous, the place of taxation is where the acceptance is received.[52] There can be a question whether the internet is an instantaneous mode of communication or not. The general rule is that a UK resident company is liable to corporation tax on its worldwide income including earning through a foreign PE. A foreign company is liable to corporation tax that arises through permanent establishment.

6. The concept of permanent establishment

In the business world, it is typical that a company operates in different countries. As I have already discussed, the state has a right to tax the company on its world-wide profit if the company was established in that country. However, a state has a right to tax a non-resident company if it carries out its business through a permanent establishment. Any kind of profit that can be attributed to that PE is taxable. Therefore, to establish the existence of a PE and to attribute profit to it is essential.

Electronic commerce raised the question whether a website can be a PE. In accordance with the OECD Model Treaty, an enterprise providing services abroad is taxable in that country if it conducts business through a

[47] [1896] A.C. 325.
[48] Hickey, Julian op. cit. p. 91.
[49] 10 T.C. 481, 131 L.T. 601
[50] Salter, David – Snape, John – Lee, Natalie: Revenue law: Text and materials. Tottel, 2007
[51] Craid, William: Taxation of electronic commerce Tolley, 2000
[52] Taxation of e-commerce, http://www.out-law.com/page-7512 [13.06.2013.]

permanent establishment.[53] It is the profit that would be attributed to the distinct or separate entity by the ordinary process of good business accountancy.[54] When the OECD started the discussion about taxing e-commerce, it decided that a website by itself cannot be a permanent establishment and if the company's website is hosted by an internet service provider, it will not constitute a permanent establishment either, but we can find exceptions to that rule. However, if computer equipment is an essential part of the business, it can be a permanent establishment.

In Europe and in the USA, the server is usually a permanent establishment if it takes orders from customers or processes credit cards, but it is not true in the United Kingdom.[55]

There can be another question as to whether the business should operate the website on its own to be taxed by the authorities, or it can be taxed if a third party or service operates its website. The OECD gives some exceptions that can never be a permanent establishment like storage, display or delivery of goods or merchandise belonging to enterprises. PE is a geographically fixed place, which is permanent in time plus all parts of the business activities must be conducted from there.[56] A website cannot have a place and it does not have a geographically fixed place. Therefore, it cannot constitute the place of the business. However, in certain circumstances it can be a permanent establishment. These are the following: the server must be located at a certain place for a sufficient period of time. The other requirement is that the business needs to be carried out partly or wholly from that place which is subject to a decision made case by case. No personal presence is required. It is also decided on a case by case basis whether the activity carried out is preparatory or auxiliary. The activity needs to be an essential or significant part of the business. A website is a PE if it performs typical functions related to sales.

The OECD Model Treaty states that a profit can be attributed to a permanent establishment which it might be expected to make if it were a distinct or separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment. This test is known as "the arm length" test. To decide whether a website can be a PE, it is

[53] OECD Model Tax Convention on Income and Capital article 7(2)

[54] Birla, Arun: The attribution of profits-facts or fiction. In: British Tax Review, 2005/2. p. 207.

[55] Curious welcome by Inland Revenue for e-commerce tax proposals http://www.out-law.com/page-1383 [10.06.2013.]

[56] Pahlsson, Robert: The e-com strain on tax law concepts, 2002/3 E.B.O.R. 195

necessary to examine the business functions and activities performed by the server which hosts the website.[57]

In the UK, the accepted view is that a website cannot constitute a PE. It is the view regardless of the fact that OECD accepted that in certain circumstances it can constitute a PE. An interesting case on the debate about permanent establishment is India-Galileo International Inc. v Deputy Commissioner of Income Tax.[58] Galileo is an American company owning a computer reservation system located in the USA. The system was accessible to an agent in India using hardware, software and connected systems provided by Galileo. The company had a distributor who was responsible for travel agents in India. However, the travel agents were paid by airlines for successful bookings. A Delhi tribunal held that Galileo had a PE in India because the CRS extended to India through telecom networks and the company carried out businesses through computers installed on the travel agents' premises in India. The distributor was found an independent agent. As a consequence of the case, Indian authorities accept low PE thresholds, and adopt aggressive PE-based position.[59]

According to the OECD Model Tax Convention, there is a difference between a website and a server. If a business owns the server that operates the website, it has an impact on where the business operates and the server has physical presence. Therefore, it can be a permanent establishment. However, if a business only pays to a service provider to operate a website, it cannot be a permanent establishment. Human involvement is another question in the case of PE. To what extent - if any - human involvement is necessary to constitute a PE? There are different views on it.

In Berkholtz v Finanzamant Hamburg – Mitte – Altstadt, the European Court of Justice recognised a server as a fixed establishment. The place of supply, according to the ECJ, is the supplier's place of business.

Automated machinery e.g. a gambling machine itself cannot be a PE, but if the business carries out business activities besides setting up of the machine, it is a PE.[60] It is a PE if the business maintains and operates the machine on its own account or an agent (in the ordinary course of business) does it on behalf of the business.

[57] Miller, Anghard – Oats, Lyenne: Principles of International Taxation. Bloomsbury Professional, 2012

[58] [2008] 19 SOT 257 Delhi

[59] Permanent Establishment and income attribution in India by Ernst and Young http://www.evatassurance.com/NR/rdonlyres/eeo6vcr4kjslbkfiztkac6f525es7nmrdaupvhrkv2xfxxaj6haxn6bi4mvkpqqcktnhwwgkh26w4trgptfb7qwrmrc/ITS+in+the+News+15.pdf [20.08.2013.]

[60] Non-residents trading in the UK http://www.hmrc.gov.uk /manuals/intmanual /INTM266090.htm [08.08.2014.]

An establishment can be permanent if it has a sufficient minimum strength in the form of permanent presence of human and technical resources necessary for supplying special services. Therefore, a server can be a permanent establishment only if the suitable human and technical factors are available to provide service, and it can be an establishment only if it is more practical than to choose the suppliers' place of business.[61]

In the world of electronic commerce it is difficult to pass the traditional fixed place of business test.[62]

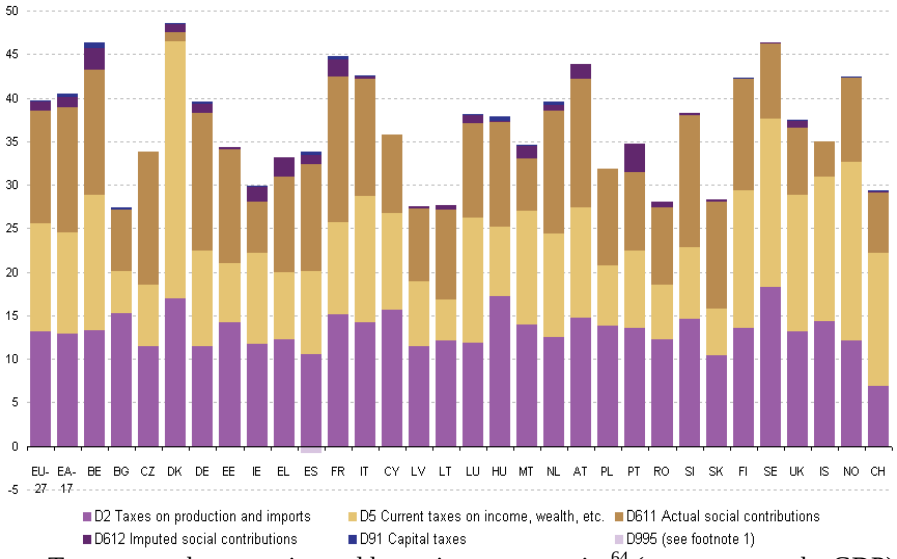
In conclusion, the UK does not accept the view of the OECD, which states that a server can constitute a fixed place of business as PE. In the UK a server - either alone or together with a website - cannot constitute a permanent establishment that is carrying out electronic commerce regardless of whether it is owned or rented by a business. According to the OECD, a mere server without a website can constitute a PE if it is located in a certain place for a sufficient time.

7. VAT

VAT is an important part of the revenue of a country. It is an indirect tax that is levied on goods and services. It does not take any personal circumstances into account. Electronic commerce raises questions on VAT because there are new products and services on the market now. Another question is where and who will pay the tax.

The European Union needs to be very careful when regulating tax matters if it would like to preserve its competitiveness because as we know it has a high tax level compared to other advanced economies like the USA, Japan or Canada. In the EU the overall tax-to-GDP ratio is 38.8% while the same ratio is 25.2% in the USA and 28.7% in Japan.[63] Tax revenue is one of the most important sources to keep the whole EU alive. The table below shows the tax revenue by countries and by main tax categories compared to the GDP in percentage. As we can see VAT is the main part of the revenue.

[61] Hickey, Julian op. cit. p. 91.
[62] Schon, Wolfgang op. cit. p. 554.
[63] Taxation trends in the European Union http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/economic_analysis/tax_structures/2013/report.pdf [08.08.2013.]



Tax revenue by countries and by main tax categories[64] (percentage to the GDP)

The main aim of the EU is to create a free market without any barriers and with free movement of goods and services. The EU needs to remove the regulatory barriers to cross-border trade. Tax rules can be serious obstacles that competition needs to cope with. The European Union needs to offer tax rules that make the EU competitive by themselves and EU countries need tax rules that keep them competitive among themselves, but in a way not to damage the competitiveness of the EU. So, when we create new tax rules, we need to bear in mind competition both at vertical and horizontal levels. Tax charges can put down products and make them less competitive: e.g. we can buy an iPod at the same price, but different tax charges can make a product more expensive than the other one. Therefore, it makes it less competitive.

VAT is an essential question in the case of electronic commerce. At the beginning of the century EU businesses had to apply VAT regardless of whether they conducted their business inside or outside the European Union and at that time the US did not apply VAT. Therefore, EU businesses could not compete with their American rivals. The EU had to react to that issue. The European e-business Tax Group intended to introduce a single VAT in which a seller from outside the EU needs to register, and then it pays local VAT charges. According to the OECD model this tax is payable where the

[64] European Commission breakdown of tax revenue by country and by main tax categories http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:5_Breakdown_of_tax_revenue_by_country_and_by_main_tax_categories%28percentage_of_GDP%29.PNG&filetimestamp=20120105113223 [15.08.2013.]

consumption takes place, but the EU did not comply with that rule because if a service was originated from the EU, it would be subject to VAT regardless of the place of the consumption. VAT rules are needed because suppliers outside from the European Union to non-business customers are not subject to VAT and they are therefore in a better position than their EU competitors. A business should only find a tax haven and can avoid paying tax. VAT depends on the place of supply. However, it is sometimes difficult to detect the place of supply, mainly when the business operates through different servers. So, if the place of supply is not in the UK, we cannot charge VAT on the supply. The place of supply is where the supplier or recipient belongs to. It is defined so in the VAT act under the current VAT regime in the EU.[65] A taxable person is any person who independently carries out, in any place, any economic activity defined to include all activities of producers and traders. Economic activity is all activities of producers, traders and a person concerning services, but the person who is under employability does not carry out the activity independently. Taxable transactions are supply of goods, which means the transfer of the right to dispose of tangible property as owner and supply of services, which means any other transactions not constituting supply of goods. Therefore, supply of intangible goods - like software - is supply of service and not of goods. In the Theotrue case the ECJ defined the term “supply of goods” as the transfer of goods from one taxable person to another, either immediately or at a future date implying the existence of the goods when the transfer takes place.[66] VAT arises when the property of the goods is transferred by sale or by any agreement that states that the property will pass. Taxation is more complicated in the case of services because it depends on the type of the product. It can be either the place of the supplier or the customer.

On 1 July 2003 the EU introduced new VAT rules. VAT is a transaction-based tax which is levied on each stage of the supply chain.[67] Until that day electronically provided services e.g. downloading books or music were subject to tax rules that the supplier of the service belonged to even if they provided service to an EU customer. So a non-EU supplier did not have to charge VAT if it belonged to a country where the service was tax free. However, from that date a service provider - if they provide the service to private customers and non-business organisations - has to pay VAT in accordance with the tax rules where the private customers or non-business organisations belong to. In the case of business to business selling, the EU introduced the reverse charge system, which means that the EU business customers - not non-EU suppliers - need to pay the VAT and remit the tax to

[65] Miller, Anghard – Oats, Lyann op. cit.
[66] 1983 ECJ VATTR 88
[67] Bevers, Gwen op. cit. p. 449.

their tax authorities.[68] That can cause some difficulties. For instance, how should an overseas business know whether it deals with a business or a private customer, how should it know the actual tax regulations of the country where the customer belongs to? To avoid any inconvenience, it would be a good idea to establish a permanent establishment - e.g. a branch in one state - and follow its tax rules. There are two approaches regarding where we should pay VAT. These are the origin and the destination theories.

Since 2010, if the subject is digitalised goods - which are treated as a service - it has been subject to the VAT rules where the customer belongs to. Digitalised goods can be online auctions, distance teaching, access to online databases, broadcasts and supplies of software.[69] In the case of private persons, this place is where they are residents. In the case of companies, it is the place where the business or the permanent establishment enjoys the service. If they are in the same state, the supplier needs to pay the tax. However, if they are based in different countries, the reverse charge applies, which means the supplier does not need to pay the VAT regardless of whether the customer is in the EU or outside of the EU. If the customer is in the EU, it needs to pay the VAT. Plus, reverse charge applies when an EU business accepts services from a non-EU business. In that case the EU business needs to pay the VAT. The supply of service is treated in a different way. If it is supplied to a private customer, it is treated as if it was made where the supplier belongs to, but if the supplier is from outside the EU, it is treated as it was made where the customer belongs to. No VAT needs to be paid by the EU business if the customer is private and belongs to somewhere outside the EU and also, if the business supplies are from outside the EU and the private customer belongs to the EU. Reverse charge is one of the most effective ways to tackle tax avoidance. It means that the customer needs to pay the tax within the jurisdiction where the consumption takes places. However, it is difficult to apply the reverse charge in the case of a private customer.

The obligation of a business to pay VAT depends on different factors. It depends on whether the supplied thing is goods or services, whether the customer is in EU or non-EU states or whether the supply is treated as made.[70] If the goods are ordered through the Internet, but it was dispatched because the goods have physical existence, the tax treatments follow the rules of the place where the physical goods were dispatched. It is regardless

[68] E-commerce VAT changes for non-EU businesses http://www.out-law.com/page-3684 [12.06.2013.]

[69] Campbell, Dennis: E-Commerce: Law and Jurisdiction. Kluwer Law International, 2002

[70] Introduction of taxation of e-commerce http://www.out-law.com/page-7512 [13.06.2013.]

of whether the order was placed over the Internet. However, digitalised goods are not goods; they are treated as a service.

In the decision of the ECJ adopted in the case of Sparekassernes Datacenter v. Skatteministeriet, it is stated that in relation to VAT there is no difference between the ways in which the transaction is performed, which means VAT is levied on goods and services regardless of the way it is performed. The fundamental nature of the transaction has not changed. A court in the UK also dealt with that issue in the case of Forexia Ltd v Commissioners of Customs and Excise. The company distributed news digests to its clients by fax, website and email. UK authorities intended to treat it as provision of information and charge the standard rate on it. However, the company argues that it should have been treated as distribution of leaflets, which was zero-rated.

In conclusion of the rules for EU VAT, electronic service is subject to VAT in the country where the customer resides if it is supplied by non-EU business to a private customer or a non-business organisation e.g. governments. Therefore, non-EU businesses do not need to register themselves for VAT purposes in every member state, they need to register themselves only in one. From 2015, the EU VAT system is going to change. Now, the VAT needs to be paid where the business supplier is established. In the case of the supply of broadcasting, e-services and telecommunication to private customers, the VAT is going to be paid in the member state where the customer is located. So the service is to be taxed appropriately where it is consumed.[71]

The other solution can be to create or introduce a general VAT rate that would apply in all EU states.

8. Conclusion

Developments in the electronic world had a significant impact on our life in the last few decades. It changed the way we live and brought new rules into existence. The Internet created a new space to conduct business activities and also created a global market where borders do not exist. There are countless advantages and disadvantages of the new electronic space. Due to these changes, law makers had to adopt new rules and adjust old ones. Reflecting on tax challenges, The OECD decided to preserve old rules but made some amendments to make them workable in the 21 century. As we have seen, the Internet challenged almost all areas of taxation e.g. tax administration, tax havens, VAT and definition of permanent establishment.

[71] VAT MOSS http://www.hmrc.gov.uk/budget2013/vat-place-supply-rules.pdf [08.08.2013.]

It is also obvious that international cooperation is necessary due to the global nature of the phenomena. As a consequence hardly any electronic goods or services can escape from tax liability.

My first aim was to point out the changes and challenges that the new space created in the commercial world. The second aim was to represent the response given to those challenges. The main aim of the OECD to tax electronic goods and services like off-line goods and services is achieved but, as usual, there are many areas that still need improvement like tax administration. However, we need to bear in mind that there is a limit here to evaluate those issues as all would deserve their own article. In conclusion we can say that current rules with some adjustments are appropriate to tax electronic commerce.

The Cultural Dilemma: the EU and its Cultural Competence Viewed from an International Trade Perspective

SZALAY, KLÁRA

ABSTRACT *Culture surrounds us like nature. It is part of how we are born and buried. We feel it, breathe it, and suck it in. We listen to it, see it, talk about it and project it as we talk. We consume it. We give a culture to everything: a nation's culture, European culture, the American way of life, business culture, community culture, agriculture etc. The international trade of cultural goods has increased dramatically in the last two decades. On the other hand, culture as merchandise, is somehow different. Among this many understandings of culture, is there one that prevails, a common understanding perhaps? At first, the current article aims to unfold how the EU has approached the issue of culture. How the balance between the trading value of culture and its nation-building role has dominated the EU discourse. It also means to point out the controversy that lays in the EU's limited competence to influence the cultural policies at Member State level yet, the powers it possesses to safeguard competition. In the next part of the article we explore the culture-related cases of the European Court of Justice (ECJ) to point out the principles of legal interpretation of the culture clause the Treaty of Maastricht has incorporated. Expanding our scope, we then look at trading culture from an international perspective (WTO, UNESCO) hoping to pinpoint tendencies in dealing with the delicate balance between the culture and the trade perspective.*

1. The development of EU cultural competence

The origins of the European Union can be traced back to 1951 to the establishment of a common market of coal and steel in order to stabilize post-war relations between the founding countries and to bring peace and economic prosperity to the region. That market functioning well, political will further opened towards pursuing a broader economic integration. At the same time, this broadening integration included expanding Community competence to new areas. Each treaty revision together with the expansion of the Community seemed to require more economic and monetary integration and the broadening of Community competence. And the further the Community expanded the more support it needed for even more

integration. However, the bigger the Community grew over the years, the more the need grew to go beyond economic integration, and soon a strong case was built for the creation of a common European culture and identity to rely on.

According to the theoretical background, democratic political systems always seek legitimacy in the cultural field (Habermas).[1] "To date, however, lack of popular support for the EU remains a key obstacle to its project for European integration."[2] The support of the so called European public could provide the legitimacy to the EU's institutions, which, in turn could claim to represent the European interest. This lack of direct connection is often referred to as the 'democratic deficit', which in Shore's logic easily turns into a 'cultural deficit' or the "European Union's lack of 'cultural legitimation'".[3]

Looking at the 1957 Treaty of Rome reveals only two minor references that later could be interpreted to be cultural in nature; one on 'non-discrimination' and another on exceptions to the free movement of goods especially for "the protection of national treasures possessing artistic, historical, or archaeological value."[4] This exception turned out to be important in later multinational negotiations, as France invoked specifically this clause during the GATT world trade negotiations to defend the French film industry.

Technically speaking, however, there was no legal basis the Commission could rely on for the involvement in cultural affairs. Nonetheless, the Commission – early on – issued two communications relating to culture,[5] both of which focused on culture from an economic perspective, assessing its impact on the free movement of goods, and on the economy (employment, resource generating capacity through tourism and research).[6] DELORS,[7] in his first speech as Commission President, accepting this line of approach, pointed to the following:

"Under the terms of the Treaty we do not have the resources to implement a cultural policy; but we are going to try to tackle it along economic lines… We have to build a powerful European culture industry that will enable us to be in control of both the medium and its content…"[8]

[1] Shore, Chris: "In uno plures" (?) EU Cultural Policy and the Governance of Europe. In: Cultural Analysis, vol. 5. (2006), University of California, p. 11.
[2] Ibid.
[3] Ibid.
[4] Articles 7 and 36 of the Treaty of Rome (CEC 1983)
[5] Community Action in the Cultural Sector COM (77) 560, and Stronger Community Action in the Cultural Sector COM (82) 590
[6] Cunningham, B. Collette: 2001, pp. 128-129.
[7] President of the European Commission in office between 1985-1995
[8] Shore, Chris op. cit. p. 12.

The next turning point was at the Copenhagen summit in 1973, where leaders adopted a communiqué on European identity with the aim of reviewing the common heritage of the Member States. What should be pointed out here is the shift in the discourse towards a common European identity. It was as early as 1977 that the Commission proposed involvement in the economic and social aspects of culture.[9]

Later, in 1984 – prompted by the low turn-outs in European Parliamentary elections – the so called ADDONINO Committee was established by the Council to look at measures strengthening and promoting the EC's identity and image among its citizens and in the world. A great number of measures were suggested by this committee in its two reports outlining cultural strategies for promoting the European idea. These included, among others, a multilingual television channel, the Euro-lottery, school exchange programmes, more access to information on Community activities, new European symbols like a logo, flag and anthem, harmonised passports, driving licences, car number-plates, naming the 'Europe day' etc. "Behind these seemingly mundane cultural initiatives lay a more profound objective: to transform the symbolic ordering of time, space, education, information, and peoplehood in order to stamp upon them the 'European dimension'. In short, to reconfigure the public imagination by Europeanising some of the fundamental categories of thought."[10]

In his analysis SHORE also points to the fact that the Commission, too, worked hard to exploit the position that opened with the introduction of these new concepts and terminology into the European discourse. It not only established its cultural unit that later grew into the cultural sector of the Commission, but also affirmed the existence of a European consciousness saying that "Europe's cultural identity is nothing less than a shared pluralistic humanism based on democracy, justice and freedom."[11] "The Commission's third communication on culture, titled A Fresh Boost for Culture in the European Community (1987),[12] now revealed a vision of culture more removed from economic notions."[13] The recognition that culture deserves not only economic, but social attention too led to the adoption of framework programmes for culture[14] and gained support from the European Parliament.

[9] Field, Heather: EU Cultural Policy and the Creation of a Common European Identity. In: (ed.) Bianchini, A., Dolby, J., Holland, M.: Proceedings of the Joint Conference of the Australasian Political Science Association and the European Studies Association of New Zealand, 1998 p. 278.
[10] Shore, Chris op. cit. p. 15.
[11] CEC 1987, p. 5.
[12] CEC 1987, COM (87)603 final
[13] Cunningham, B. Collette op. cit. p. 130.
[14] For the years 1988-1992 or 2000-2004 for example

'The unity in diversity' approach started shaping EU cultural policy from the 1990s. At the intergovernmental conference in 1990 the idea to incorporate cultural policy into the Treaty was raised and won support from a number of governments, among them Denmark, France, Germany, the Netherlands, and Spain proposed to expand Community competence in this field.[15]

The fundamental change came with the adoption of the Maastricht Treaty, the Treaty on European Union (TEU, 1992.). The European Union itself was born, 'European Citizenship' as a legal category was introduced, and Community jurisdiction was substantially enlarged. Culture de jure became a treaty matter. After careful wording to avoid references to notions like 'European identity' or 'European cultural dimensions', culture got its own chapter in the Treaty. However, a proper definition for culture has never been agreed upon or worded in the treaties. Article 167 TFEU[16] (ex-Article 151 TEU) gave no legal mandate to the Commission to lead or control cultural policies of the Member States, instead it used words such as

[15] See also Cunningham, B. Collette op. cit. p. 133.

[16] Consolidated version of the Treaty on the Functioning of the European Union (TFEU)

Article 167 currently reads as follows:

"1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if

necessary, supporting and supplementing their action in the following areas:

- improvement of the knowledge and dissemination of the culture and history of the European peoples,
- conservation and safeguarding of cultural heritage of European significance,
- non-commercial cultural exchanges,
- artistic and literary creation, including in the audio-visual sector.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.

4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.

5. In order to contribute to the achievement of the objectives referred to in this Article:

- the European Parliament and the Council acting in accordance with the ordinary legislative

procedure and after consulting the Committee of the Regions, shall adopt incentive measures,

excluding any harmonisation of the laws and regulations of the Member States,

- the Council, on a proposal from the Commission, shall adopt recommendations.

"encourage" and "if necessary, support" Member States' actions. There were two other principles laid down in relation to culture. One excluded any harmonization of laws in relation to culture, while the other recognized the interrelation between culture and other policy areas, stating that "the Community shall take cultural aspects into account in its actions under other provisions of the Treaty".[17] I argue that these two principles analysed together very obviously gave a ranking to culture as one aspect among the many, and foreshadow placing culture in a subordinate position compared to fundamental Community values, or the four freedoms. Culture as such is acknowledged, cultural aspects are important to take note of, but by no means are they a reason to go as far as harmonization of laws.

The voting procedure adopted in measures of culture was co-decision, however, at Council level agreements needed to be reached unanimously, rather than by qualified majority, thus limiting Community power in the cultural field.

According to the treaties, actions of the European Union in the field of culture are governed by three principles, namely, the principles of conferral, subsidiarity and proportionality. The principle of conferral is explained in Article 5.2 TEU[18] and states that the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties and only to attain the objectives identified by the Treaties. Under the principle of subsidiarity (Article 5.3 TEU) the Union can only act if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can be better achieved at Community level. Finally, proportionality is explained in Article 5.4 TEU and strictly limits Community action to what is necessary to achieve the objectives set out in the Treaties. A Protocol on the application of the principles of subsidiarity and proportionality further regulates these principles.

1.2 Competition Policy, State Aid Rules

The mission of competition policy in the EU is to make markets work better, to adapt to the more competitive environment brought about by globalization. Competition policy as such covers a whole array of policy areas, such as antitrust, cartels, mergers and state aid rules, it manages intensive relations of an international scale, but it has also been instrumental in liberalising certain sectors where markets traditionally were not open to competition.

[17] Article 167(4) TFEU
[18] Consolidated version of the Treaty on European Union, TEU

Culture, and especially the audio-visual sector, is perceived to have a key economic role in the EU. In 2008, audio-visual broadcasters generated a turnover of EUR 64 billion and the sector employed over 1.5 million people.[19] On the other hand, however, it seems common understanding that, in order to produce, the European audio-visual sector largely depends on state aid mainly provided through national support mechanisms. This is where the European Commission steps in as it is its duty to assess whether these national support schemes comply with the competition rules of the Treaty.

Article 3(b) TFEU establishes the exclusive competence of the EU to enact competition rules necessary for the functioning of the internal market. As far as the audio-visual sector is concerned, however, the most important rules are those concerning state aid, laid down in Articles 107-109 TFEU. A major characteristic of these state aid rules is that Member States have to communicate their proposed aid scheme in advance to the Commission, which, having assessed whether the aid scheme respects the general legality principle, then turns to assessing the compatibility of the support scheme with Treaty provisions on state aid.[20]

Article 107 TFEU declares incompatible with the common market "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods… in so far as it affects trade between Member States." All of the criteria in Article 107 (i.e. state aid or resources, selectivity, advantage for the undertaking, distorts or threatens to distort competition, affects trade between Member States) have to be met simultaneously in order for a grant to qualify as state aid.

As to what is understood under the term 'undertaking', the case law of the ECJ is indicative: "the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed".[21] Consequently, an entity engaged in cultural activities as a business activity or for profit shall qualify as an undertaking from the point of view of state aid rules.

According to the Commission, the presumption that trade between Member States is affected holds true in almost all cases. In other words, there has been no minimum threshold under which it can be stated that the aid has no effect on trade between Member States (with the exception of the de minimis rules of course).

[19] EU Commission website: http://ec.europa.eu/competition/sectors/media /overview_en.html [17.10.2013.]

[20] Blázquez, Francisco Javier Cabrera: Towards a New Cinema Communication. In: Iris Plus, European Audiovisual Observatory, 2012/3, pp. 7-23. http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus3LA_2012.pdf.en [17.10.2013.]

[21] C-41/90 Klaus Höfner and Fritz Elser v. Macrotron GmbH. 21.

However, there are possible exceptions to the main rules outlined above. From the point of view of the audio-visual sector, Article 107.3 (c) and (d) are the most relevant as they incorporate these exceptions to the general rule. According to the two paragraphs, there are two types of aid that may be considered compatible with the common market:

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest.

In practice, Article 107.3 (d) seems to be the cultural exception clause based on which the Commission on average approves an approximate number of 30 programmes per year. Most of them are programmes to promote film production, film distribution, and support for public broadcasting,[22] and there are occasionally programmes handed in for approval in the field of cultural heritage preservation.[23]

In the following section of the article we shall analyse culture-related cases of the ECJ in order to test the effectiveness of the Maastricht incorporation of the culture clause into the Treaty, and to evaluate the interpretation of the culture clause, as well as to see what aspects jurisdiction picks out in its evaluation of the law.

2. Culture-related cases of the ECJ

Culture-related cases are worthy of analysis to determine what – even if little – has been said about the interpretation of the Article on culture in light of the Treaty principles. In her article CUNNINGHAM argues that the

[22] For further details see: Szalay, Klára: The Development of the European Union's policy on State aid to public service broadcasting – from early cases to formulating policy. In: Balogh et. al (eds.): Studia Iuridica, Pécs 150., 2012. pp. 251-272., Szalay, Klára: The Development of the European Union's policy on State aid to public service broadcasting – cases leading to policy revision. In: Ádám, Antal (ed.): PhD Tanulmányok 11., Pécs, 2012., pp. 553-578., and Szalay, Klára – Tosics, Nóra: Jutalom a nyomravezetőnek! A szökevény produkciók nyomában, Filmes adókedvezmények versengése Európában. In: Infokommunikáció és Jog 2012/2. pp. 43-57., Szalay, Klára – Tosics, Nóra: Wanted! In search of runaway productions: Film tax incentives in Europe. In: Kwartalnik Naukowy Prawo Mediów Elektronicznych 2012/3 pp. 30-39.

[23] Lucius, Ágnes – Remetei Filep, Zsuzsanna: Az EUMSZ 107. cikk (3) bekezdésének d) pontja szerinti kulturális támogatások. In: Állami Támogatások Joga, 2011/4. pp. 19-52.

inclusion of a separate title on Culture should have been interpreted as providing a general cultural exception. She summarizes culture-related cases of the ECJ until the year 2000 and finds that no change in jurisdiction may be observed in cases pre-1992 or after. Having analysed culture-related cases myself until 2012, I argue that in fact the ECJ seems very consistent in its evaluation of the cultural clause as well as the limits it sets to serve legal certainty.

The first case Union Royale Belge des Societes de Football Association vs. Bosman[24] was a case for preliminary ruling on rules permitting national football associations to limit the number of foreign players to go on the field in competition matches. The German Government argued that sport such as football is not an economic activity, but has points of similarity with culture, and according to the Article on Culture, the Community must respect the national and regional diversity of the cultures of the Member States.[25] In response to those arguments the Court noted that "sport is subject to community law only in so far as it constitutes an economic activity".[26] However, the essence of the judgment in so far as it relates to culture is in paragraph 78 basically stating two principles: firstly, that the question submitted by the national court "does not relate to the conditions under which Community powers of limited extent, such as those based on Article 128(1),[27] may be exercised" and secondly, that the question really relates to "the scope of freedom of movement of workers... which is a fundamental freedom in the Community system". In other words, it endorses the interpretation that the cultural clause describes the powers of the Community to be of a limited extent and secondly, it asserts that by no means is culture superior to a fundamental freedom.

In Commission vs. Belgium[28] the case was centred around the failure of Belgium to harmonize its rules with a Directive on television broadcasting activities. The article on culture[29] was invoked by the Kingdom of Belgium claiming that articles of the contested Directive should be construed in light of Article 128 EC[30]. The Court stated that the latter article in no way authorizes the State receiving broadcasting signals from another Member State to make programmes subject to further control, as it cannot be interpreted as a derogation based on cultural reasons.[31]

[24] C-415/93 Judgment of the Court 15 December 1995
[25] C-415/93 paragraph 72.
[26] C-415/93 paragraph 73.
[27] Article 128 EC, later Article 151 TEC, currently, Article 167 TFEU
[28] C-11/95 Judgment of the Court 10 September 1996.
[29] Article 128 EC, later Article 151 TEC, currently, Article 167 TFEU
[30] Article 128 EC, later Article 151 TEC, currently, Article 167 TFEU
[31] C-11/95 paragraphs 46-50.

The next case – the last one quoted by CUNNINGHAM – Daniela Annibaldi vs. Sindaco Del Comune di Guidonia e Presidente Regione Lazio[32] was an issue of legal competence where the Court held that a law establishing a Nature and Archaeological park "in order to protect and enhance the value of the environment and the cultural heritage of the area concerned"[33] fell outside the scope of Community law. The Court argued that there was nothing in the case that suggested that the Regional Law was intended to implement a provision of Community law either in the sphere of agriculture, or that of the environment, or culture.[34] The law itself was general in character and the objectives it pursued were other than that of the common agricultural policy.[35] Finally, there were no Community rules on expropriation.

The case European Parliament vs. Council of the European Union[36] concerning annulment of Council Decision 96/664/EC of 21 November 1996 on the adoption of a multiannual programme to promote linguistic diversity of the Community in the information society was a case where determining the legal basis of action was in question. Parliament argued that the programme should have had a double legal basis one of which should have been the culture clause of the Treaty. The Commission's argument for rejecting the dual legal basis centred round the wording of the principal objective of the programme, i.e. "to encourage industrial actions to provide multilingual services".[37] They argued that the cultural, social gains were incidental, and did not affect the main objective of the programme. The direct beneficiaries of the programme were persons engaged in economic or institutional activities, and therefore, a double legal basis could not be justified. On the other hand, the Parliament argued that by seeking to promote the linguistic diversity of the Community the programme also pursued a cultural objective, which justified the double legal basis. The Court examined whether, according to its aim and content, the decision was concerned, indissociably, both with industry and with culture. If the cultural component was merely incidental, then it followed that it conformed with the Treaty provision according to which the Community was to take cultural aspects into account in its action under other provisions of the Treaty. "It is clear from that provision that not every description of the cultural aspects of Community action necessarily implies that recourse must be had to Article 128[38] as the legal basis, where culture does not constitute an essential and

[32] C-309/96 Judgment of the Court 18 December 1997.
[33] C-309/96 paragraph 3.
[34] C-309/96 paragraph 21.
[35] C-309/96 paragraph 22.
[36] C-42/97 Judgment of the Court 23 February 1999.
[37] C-42/97 paragraph 24.
[38] Article 128 EC, later Article 151 TEC, currently, Article 167 TFEU

indissociable component of the other component on which the action in question is based but is merely incidental or secondary to it."[39] The Court concluded its examination by stating the fact that "the object of the programme, namely the promotion of linguistic diversity, is seen as an element of an essentially economic nature and incidentally as a vehicle for or element of culture as such" [40] and reinforced basing the programme on a sole legal basis.

Next, mention should be made of the case Fachverband der Buch- und Medienwirtschaft vs. LIBRO Handelsgesellschaft mbH,[41] a request for preliminary ruling among others concerning the interpretation of Article 167 TFEU (ex-Article 151 TEC). The aim of the procedure was to seek an order against LIBRO to cease advertising books for sale in Austria at prices which were lower than those set by the Federal Law on the obligation to sell books at a fixed price. The main question for the Court to decide from the cultural perspective was whether a binding price scheme constituting a restriction on the free movement of goods contrary to the Treaty may be "justified for cultural reasons and by the need to maintain media diversity".[42] In accordance with its previous case law the Court stated firstly, that the "protection of cultural diversity in general cannot be considered to come within the 'protection of national treasures possessing artistic, historic or archaeological value' within the meaning of Article 30 EC".[43] Furthermore, it observed that Article 167 TFEU (ex-Article 151 TEC) provides the framework of activity of the Community in the field of culture, but it could not be invoked as justification of any national measure hindering intra-Community trade. In other words, the clause on culture was not a cultural exemption clause to limit fundamental freedoms established by the Treaty. The free movement of goods could be restricted in the public interest – protection of books as cultural objects could be interpreted as such a public interest – on condition that the measure was appropriate for achieving the objective fixed and did not go beyond what was necessary to achieve it.[44]

Most recently, the case Föreningen Svenska Tonsättares Internationella Musikbyrå u.p.a. (Stim) vs. European Commission[45] touched upon the issue of interpreting Article 167 TFEU (ex-Article 151 TEC). The contested Commission decision – brought as a result of a procedure pursuant to the competition rules – concerned the conditions of management and licensing of copyright relating to public performance rights of musical works solely

[39] C-42/97 paragraph 42.
[40] C-42/97 paragraph 61.
[41] C-531/07 Judgment of the Court 30 April 2009.
[42] C-531/07 paragraph 11.
[43] C-531/07 paragraph 32.
[44] C-531/07 paragraph 34.
[45] T-451/08 Judgment of the Court 12 April 2013.

with respect to exploitation via internet, satellite and cable transmission. The Commission explained that in its decision it did not call cultural diversity into question, but only challenged the national territorial limitations established by the system as a result of concentration. The applicant, however, claimed breach of Article 151(4) TEC.

"That single plea in law is composed, in essence, of three parts, relating to, first, the consequences which the prohibition of the concerted practice relating to national territorial limitations has on cultural diversity in the European Union, secondly, the actual scope of the restriction on competition arising from that concerted practice and, thirdly, the application of Article 81(3) [T]EC."[46] The Court found that, in fact, the Commission carried out an assessment of the case from the perspective of Article 151(4) EC when it applied Article 81 TEC,[47] that is, it took into consideration the objective of respecting and promoting cultural diversity. In the second part, the applicant claimed that the Commission should have considered that any restrictive effect arising from the national territorial limitations was inherent and proportional to the pursuit of the cultural objective. Here, the Court stated that the fact that cooperation between collective societies is a necessity does not however mean that every form of this cooperation is in accordance with Article 81(1) TEC.[48] Finally, the applicant claimed that the conditions for the exemption under Article 81(3)[49] applied. While examining these conditions, the Court stated that the burden of proof did not reverse "merely by the effect of Article 151(4) [T]EC"[50] and that "the concerted practice relating to national territorial limitations is not indispensable for the maintenance of the national one-stop-shops",[51] which means that at least one condition out of the four cumulative conditions was not fulfilled and therefore, the exemption under Article 81(3) TEC was not applicable.

In summary, the handful of cases relating to the interpretation of the culture clause introduced by the Treaty of Maastricht show that the ECJ has a very consistent approach to culture and the interpretation of Article 167 TFEU that rests on the following principles:

- the article provides the framework of activity of the Community in the field of culture that is of a limited extent;
- it asserts the fact that the article may not in general be interpreted as a cultural derogation clause, or invoked as justification of any national measure hindering the emergence of fundamental freedoms of the Treaty;

[46] T-451/08 paragraph 61.
[47] Currently Article 101 TFEU
[48] T-451/08 paragraph 90.
[49] Currently Article 101 TFEU
[50] T-451/08 paragraph 103.
[51] T-451/08 paragraph 105.

- it stated that the burden of proof does not reverse by the effect of Article 167(4) TFEU
- it interprets the Treaty provision according to which the Community is to take cultural aspects into account in its action under other provisions of the Treaty as an obligation, but acknowledges the fact that not every description of the cultural aspects of Community action necessarily implies that recourse must be had to the article as the legal basis of the action particularly where the cultural aim is merely incidental.

So far, we have examined the evolution of cultural competence within the EU and then looked at culture-related cases of the ECJ that revealed a sound legal interpretation pinpointing limited Community competence in culture. However, globalisation had an effect on the cultural scene as well and brought with it the demand and possibility of trading culture on a larger scale. The next section of the article therefore, is devoted to unfolding how the issue of culture, cultural diversity has become international, particularly a part of international trade law, especially featuring in the multinational negotiations of the WTO and UNESCO.

3. The international scale: challenges of trading culture

To illustrate the size of the international audio-visual market we are looking at, let us quote statistics[52] of the Motion Picture Association of America (MPAA). According to their website this audio-visual industry of the U.S. alone "registered a positive balance of trade in nearly every country in the world with $14.3 billion in exports worldwide in 2011, up 5% from 2010. The film and television services sector realized a 7 to 1 export to import ratio". Big business, indeed, especially for the United States – undeniably the largest exporter of cultural content items in the world.

Mapping the international trade scenario, mention must be made of the General Agreement on Tariffs and Trade (GATT), later incorporated in the World Trade Organization (WTO), embodying the principal rules of trade in the world trading system. Accordingly, international trade rests on the main principle of non-discrimination, which usually comprises national treatment and the most-favoured nation treatment. "The first requires that the countries entering those agreements grant to products and services originating from the other parties the same treatment they apply to their own products and

[52] http://www.mpaa.org/Resources/92be6469-1d3c-4955-b572-1d3f40f80787.pdf [17.10.2013.]

services. The second prohibits discrimination among foreign trade partners."[53]

The Uruguay Round of trade negotiations of the WTO, from 1986 to 1994, marked, to a great extent, the debut of services in trade negotiations.[54] However, over time, the almost exclusive competence of the WTO became shared with an increasing number of preferential trade agreements (PTA), recently also incorporating rules on trade in services too. Preferential trade agreements are of particular importance from two aspects: firstly, as to their impact on the future of multilateral negotiations in the WTO, and secondly, the pattern of agreements emerging in the field of audio-visual services seems noteworthy of attention.[55] It is precisely the audio-visual sector that has failed to attract significant commitments in the General Agreement on Trade in Services (GATS) or offers in the Doha round of the WTO, leading to the greatest contrast between multilateral and preferential commitments and a current stalemate of negotiations. One of the underlying reasons is seen in the perceived polarity regarding the cultural aspects.[56]

The issue of culture and trade has long been debated on the international scene. The conflict between trade and culture is often illustrated by the Canadian Periodical Dispute. This case was centred round the split-run periodicals printed in Canada – editions of foreign periodicals with advertisements directed at a Canadian audience. In 1995 with an amendment of the Excise Tax Act the Canadian Parliament imposed an excise tax of 80% on the value of the advertisements placed in these split-run periodicals which were essentially popular US magazines in order to protect Canadian periodicals in the domestic market. The United States decided to challenge the legitimacy of this excise tax. However, instead of turning to provisions in the North American Free Trade Agreement (NAFTA) to which both Canada and the U.S. were parties, in 1996 the U.S. decided to take the case to the WTO. It argued that the Canadian restriction on split-run edition periodicals violated GATT Article III (national treatment). The appellate body – in agreement with the U.S. position – concluded that since the tax was imposed on the periodical itself and since the split-run periodicals were 'like products' of the Canadian periodicals according to provisions of the GATT, they should fall under national treatment. Canada's request to consider their cultural argument was rejected on the basis that measures to protect cultural

[53] Hanania, Lilian Richieri: Cultural diversity and Regional Trade Agreements – the European Union experience with Cultural Cooperation Frameworks. In: Asian Journal of WTO and International Health Law and Policy, 2012/2. p. 425.
[54] Marchetti, A. Juan – Roy, Martin: Summary and Overview. In: Marchetti and Roy (eds.) Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations, WTO and Cambridge University Press, 2009.
[55] See further section 3.2 of the current article
[56] Marchetti – Roy op. cit. p. 6.

identity were not at issue in the case.[57] "Apparently, the protection of cultural goods and services under the WTO law is very limited, and normatively speaking, there is little room… to evaluate the cultural content of goods and services under this regime."[58]

The case of the Canadian Periodicals illustrates the fact that the idea of a general cultural exception was tabled. Most recently the cultural exception clause was examined with a careful eye in the GATS negotiations, but then was ultimately considered to be unnecessary and the fact remained that neither the GATT nor the GATS explicitly provided for a cultural exception to the WTO law. Thereafter, the need to table this conflict between culture and free trade soon induced a shift to another forum - that of UNESCO.

3.1 Towards the UNESCO Convention

The United Nations Organization for Education, Science and Culture (UNESCO) was founded on 16 November 1945. Its purpose was to contribute to peace and security by facilitating international connections and exchange, promoting collaboration through education, science, and culture. UNESCO is convinced that no development may be sustainable without a strong cultural component. This conviction has doubled efforts around the millennium and led to the adoption of the following documents all in relation to the cultural field:

- The Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)
- The Convention for the Safeguarding of the Intangible Cultural Heritage (2003)
- The Universal Declaration on Cultural Diversity (2001)
- The Convention for the Protection of the Underwater Cultural Heritage (2001)[59]

To our field of study currently, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions is of particular interest, this being the latest multinational instrument accepted and ratified by a good

[57] See also Bruner, M. Christopher: Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products. In: N.Y.U. Journal of International Law and Politics, 2008/2., p. 388., Peng, Shin-yi: International Trade in Cultural Products: UNESCO's Commitment to Promoting Cultural Diversity and Its Relations with the WTO. In: International Trade and Business Law Review, 2008, volume 11 pp. 218-235.; Grab, Heather: Free Trade and Cultural Industry: Finding a Way to Sleep in the Same Bed. In: Alberta Law Review, 2007/2. pp. 432-434.

[58] Peng, Shin-yi op. cit. p. 222.

[59] See more at http://en.unesco.org/themes/protecting-our-heritage-and-fostering-creativity [17 October 2013]

number of countries. As far as its historical emergence is concerned, countries that felt particularly vulnerable to the USA's media domination have long before advocated for an international instrument. Among them, leading countries were Canada and France. As for Canada, two-thirds of its population was estimated to be living within 100 miles of the U.S. border. This geographical proximity coupled with the lack of language barrier made Canada an ideal market for American audio-visual products and explained its perceived vulnerability to U.S. domination.[60] On the other hand, in "the late 1980's the prevalence of U.S. media products on European television screens grew as European networks increasingly purchased far less expensive American programs… Indeed, by 1986, it cost $ 4 million to produce an hour-long drama in Europe, while the cost to produce such a program in the United States was just $ 350,000. And the same American program could be broadcast by a European media company for just $ 12,000."[61] The quoted figures support the economic pressure American media content puts on the European market.

It was around this time, in the late 1980's, that the first directive on broadcasting was negotiated in the EU. The Television without Frontiers Directive (TWF) was adopted in 1989 and incorporated, among other things, broadcasting quotas with the aim of protecting European culture and its background production economy. Parallel to this event, the GATS negotiations on the international scene were underway and the European Parliament – fearing for Europe's cultural sovereignty – called for the exemption of cultural products from liberalization. Instead, it urged the Commission to engage in the multilateral UNESCO Convention.

It was not until June 2005 that the first draft of the UNESCO Convention on Diversity of Cultural Expressions was formulated and it was on the 20 October 2005, that the 33rd UNESCO General Conference adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions by a majority of 148 votes to 2. The USA together with Israel voted against its adoption. However, it was not until 18 March 2007 that with the thirtieth ratification the Convention eventually became binding on its signatories.

The major objectives of the Convention may be summarized as the recognition of the dual nature of cultural expressions as objects of trade and artefacts of cultural value and the recognition of the sovereign right of governments to formulate and implement cultural policies and measures for the protection and promotion of cultural diversity.

The concept of culture and that of cultural identities remains undefined in this document too. Instead, as BRUNER observed, the key definitions are defined by reference, for example "cultural industries" is defined by

[60] See also the Canadian Periodical Dispute case above
[61] Bruner, M. Christopher op. cit. p. 391.

reference to “cultural goods or services”, which is defined by reference to “cultural expressions”, which is defined by reference to “cultural content”, which is defined by reference to things that “originate from or express cultural identities”.[62] But eventually, the final term remains undefined.

According to criticism, however, the weakest point of the Convention lies in its provisions on dispute settlement and its relationship to other instruments. The original idea was watered down; in an earlier draft the possibility to turn to the International Court of Justice was included, and there was also a draft version where the UNESCO Convention would have prevailed over existing international instruments (other than the ones on intellectual property).[63] Instead, Article 20.2 is precisely stating that “Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.” This wording leaves enough space for other binding WTO agreements affecting trading culture to be negotiated at a later point. Nevertheless, the principles laid down in the UNESCO Convention are likely to have an effect on multinational negotiations in this field. But, as we have pointed out earlier, multinational negotiations are currently on hold, while the number of preferential trade agreements, incorporating rules on trade in services, is on the rise.

3.2 Bilateral model agreements: the U.S. approach vs. the EU and Canadian approach

In her article, HANANIA[64] gives a good summary of the types of bilateral model agreements signed in the last decade. One type of "model" trade agreement she identifies has been designed by the United States with its trade partners. Among its characteristics, she identifies a clearly reduced capacity to adopt or maintain cultural policy measures. “Cultural goods and services were dealt with [in these agreements] as any other commercial product, reflecting the American “commodity conception” of those goods and services.” But, even this model foresees a general exception for state subsidies, she notes, in line with U.S. state subsidies in favour of artistic expressions (high culture) on one’s own territory.[65]

A different approach to that of the United States was adopted by Canada and the European Union, which is characterised by keeping the largest

[62] Ibid. p. 401.
[63] Voon, Tania: UNESCO and the WTO: a Clash of Cultures, In: International and Comparative Law Quarterly, Vol. 55 issue 3 (July 2006.), p. 640-641.
[64] Hanania, Lilian Richieriop. cit. pp. 423-456.
[65] Ibid. p. 430.

policy space possible, therefore, expressly excluding some cultural sectors from trade negotiations. Both Canada and the European Union have employed an "exception" mechanism in bilateral trade agreements, allowing for the complete exclusion of the concerned sectors from the trade liberalization provisions.[66] In the European approach it is mainly the audio-visual sector that is excluded from the trade agreements regarded as Europe's major strength and having great potential in the future.[67] The main criticisms raised in connection to these types of bilateral agreements have one argument in common: the subordination of culture to trade. It seems that culture is only a bargaining instrument in the negotiations.[68]

But let us take a step further back as we try to summarize what may be behind the differences in approach. What are the underlying principles that trigger the two types of approaches?

The U.S. type of approach is anchored in the belief that cultural diversity is flourishing in the current world. It builds on what WRIGHT[69] identifies as the "hybridity theory of globalization"; trusting that through globalization the different cultures around the world will mix together in a manner that reflects all of those cultures. I would rather argue that it is a perfect resonation of the "melting pot" metaphor. Americans tend to think of culture in terms of 'high culture', including fine arts, literature, opera, ballet, classical music that they too, subsidize. The USA has never had a publicly owned and publicly financed radio and television broadcasting system; on the contrary, broadcasting has historically been a field of private investment and making profit. Cultural content items are viewed as America's comparative advantage over its trading partners; it is most efficient in producing content items primarily as a result of its economy of scale, leading to its ability to export cultural goods at almost zero marginal cost, because production costs can easily be recouped within the domestic market. This in turn, also means that more expensive products can be created at a cost beyond the reach of producers elsewhere in the world. Some experts argue that in order to maximize global audience and to sell well across borders, American film stories "gravitate to lowest-common-denominator themes scrubbed of cultural specificity".[70] In other words, the strength of these products is in universality, i.e. simplifying stories, conjuring up worlds, avoiding cultural specificity with the aim to entertain. Therefore, viewed

[66] Ibid. p. 435.
[67] Ibid. p. 438.
[68] Ibid. p. 444.
[69] Wright, Claire: Reconciling Cultural Diversity and Free Trade in the Digital Age: a Cultural Analysis of the International Trade in Content Items, In: Akron Law Review, Volume 41, issue 2 (2008), pp. 399-507.
[70] Bruner, M. Christopher op. cit. p. 353.

from the American perspective any argument for maintaining cultural diversity or cultural specificity is interpreted as a barrier to free trade.

On the other hand, in the EU and Canada cultural content items are produced not only for entertainment, but are regarded as purveyors of cultural identity. Therefore, measures to protect this cultural identity are believed to pursue legitimate cultural and national goals. The notion of culture – apart from the American understanding of high culture – also incorporates movies, magazines, books, newspapers, video and music recordings, radio and television. Through a publicly owned and publicly financed radio and television broadcasting system the aim is to protect and foster differences, give floor to the plurality of voices. As far as cultural diversity is concerned, evidence points to the fact that diversity is diminishing in the world. This evidence is based on experts' common understanding that separate 'people', separate 'culture' is defined by a separate language. Since evidence points to diminishing linguistic diversity in the world, this provides ample proof that cultural diversity is evaporating too and strengthens the need for national protection measures in this regard. The aim is, therefore, not to limit access to foreign content items, but to maintain diversity and access to national and other international content items too or, in other words, to provide more choice. This inevitable hybridity of all national cultures is believed to lead to cultural contamination. This is why WRIGHT categorizes these countries to follow the "western hegemony theory of globalization", implying that powerful western nations will prevail economically and politically and then will be able to culturally dominate the other nations of the world. The means through which this domination may be effected is believed to be the mass media.

Studying the two approaches described above, I argue that they clearly echo the historical differences of nation building (i.e. "the melting pot" vs. "unity in diversity" approach, or conformity through melting in vs. acknowledging differences, but concentrating on what unites). Yet, the strong economic motif cannot be overlooked in either of the approaches.

The near future seems to hold two other challenges: one being the integration of China and Asia into the international trade agreements, specifically with regard to trading audio-visual goods and services. Will that develop a third type of approach or will it fit the two models described above? The United States made the first move as it brought a complaint against China for its discriminatory importation and distribution structure for foreign films before the WTO in 2007. The WTO Body found in 2009 that China violated its trade obligations and gave the country a two year deadline to restructure its distribution system, which China failed.[71]

[71] Sakona, Shalia: Frankly, My Dear America, We Don't Give a Damn: Comparing Chinese and European Trade Barriers to American Audiovisual Works and the

The other challenge is bringing together the world's biggest trade deal, the Transatlantic Trade and Investment Partnership (TTIP) between the USA and the EU, which potentially could shape global rules on trade.[72] Negotiations started in July 2013 with the aim of removing trade barriers in a number of economic sectors. Although, currently, the Commission does not have an agreed mandate in the audio-visual field, there remains a possibility to come back to the issue at a later stage. In other words, trade of audio-visuals may end up a bargaining instrument after all. Should an agreement be struck, that would definitely have a world impact.

4. Conclusion

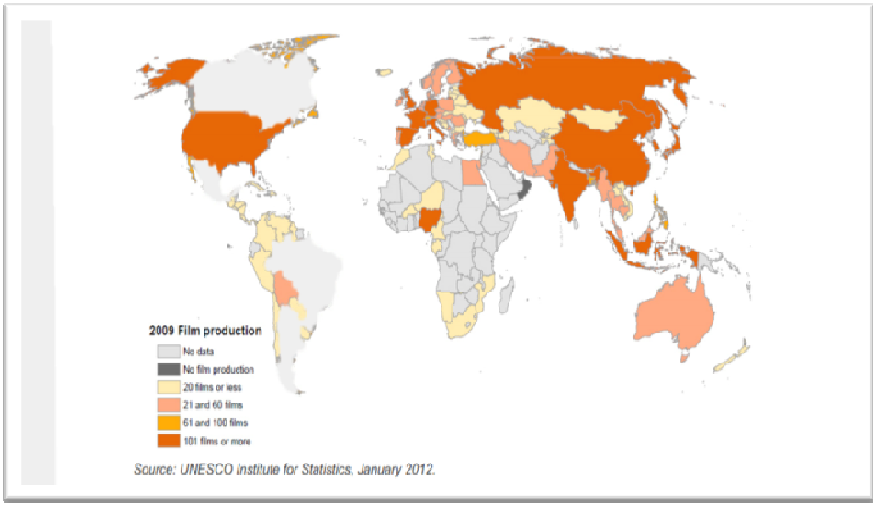
There is common agreement that there seems to be no universally accepted definition for culture. There are conceptions of culture viewed from different perspectives. "One views culture as it is expressed by a community or group through the arts and literature. The other conception of culture takes a "sociological and anthropological perspective" by considering "lifestyles, basic human rights, value systems, traditions, and beliefs"."[73] The lack of a universally accepted definition of culture in turn leads to misunderstandings on what needs to be protected in culture. The sociological and anthropological perspective leads us to believe that everything, to a degree, falls within the realm of culture. Consequently, protection of culture is presumed to mean protection of everything. From a trade perspective, however, only the exact scope of protection is what could lead to predictable and acceptable protectionist policy measures.

The other commonly agreed fact is that the United States is at the epicentre of the motion picture industry. It is the premier exporter of films worldwide and also one of the world's top five producers of motion pictures. The graph below taken from the UNESCO Institute of World Statistics serves to illustrate this fact:

American Response. In: Boston College International and Comparative Law Review, 2013/3. pp. 1385-1414.

[72] http://ec.europa.eu/trade/policy/in-focus/ttip/ [17.10.2013.]

[73] Chiang, Edmund H.: The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: a Look at the Convention and its Potential Impact on the American Movie Industry. In: Washington University Global Studies Law Review, 2007/2, p. 388.



Concentration of film production, 2009[74]

True though, looking at the above map also reveals that those countries – particularly Member States of the EU – strongly advocating for protection measures in the name of fighting American market dominance are themselves big producers in the film industry with strong economic interests too.

The EU as an entity itself has undergone tremendous change over the past decades. Historically, all aspects of the cultural domain and the cultural industry have been the sole regulatory responsibility and competence of the Member States. Today the EU's mandate covers important aspects of culture as well. Through competition policy, the EU does provide considerable control over state aid schemes in the film sector. The unique dual nature – economic and cultural – of the audio-visual industries has been recognized. There seems to be an understanding of the fact that a sound balance between contrasting priorities of trade and cultural values is required. While the logic of the Treaty dictates essentially economic instruments to balance these interests, a certain mutual understanding of protection has been achieved, which seems to be of great importance in the ever sharpening competition on the global market of audio-visual goods and services.

The examination of culture-related cases of the ECJ and the treatment of culture at the international economic fora has revealed that – although the dual nature of culture is now widely recognized and accepted – tools have remained primarily economic. While culture would require a qualitative analysis, trade and economy rely on highly quantitative data. Therefore, the

[74] http://www.uis.unesco.org/FactSheets/Documents/ib8-analysis-cinema-production-2012-en2.pdf [17.10.2013.]

risk of overemphasising economic values vis-a-vis cultural values internationally is high, and may in the long run lead to a clash of cultures. Countries seem to work around the matter by signing off bilateral trade agreements where the audio-visual sector could be part of the deal, leaving them in highly unbalanced negotiating positions. Should the foreseen TTIP between the USA and the EU cover trade of audio-visual content, it would definitely provide a major boost to multinational negotiations and shape global rules in the field.

It seems that much more study would be needed to explore possible ways of quantifying culture and to explore ways in which international economic law and international cultural law can best be reconciled and rendered complementary to the greatest extent possible.

FORMER VOLUMES OF STUDIA IURIDICA

1. *Halász* Pál: Az államfogalom meghatározásának néhány kérdése
2. *Kauser* Lipót: Hozzászólás a házassági vagyonközösség lényegesebb problémáihoz
3. *Rudolf* Lóránt: A pénzfizetési jogviszony fogalmi jegyeiről
4. *Szamel* Lajos: Az államigazgatási eljárási törvény jogorvoslati rendszere
5. *Bihari* Ottó: Az államhatalmi és államigazgatási szervek hatáskörének problémái
6. *Szotáczky* Mihály: A jogi akarat osztálytartalma
7. *Földvári* József: A visszaesés értékelése a büntetőjogban
8. *Benedek* Ferenc: A iusta causa traditionis a római jogban
9. *Losonczy* István: Adalékok a tartós és állapot-bűncselekmény kérdéséhez
10. *Kocsis* Mihály: A másodfokú büntetőbíróság ítélő hatalma
11. *Rudolf* Lóránt: A kollektív szerződés főbb elvi kérdései a szocializmusban
12. *Kovacsics* József: Községszervezetünk problémái Baranya megyében
13. *Csizmadia* Andor: A nemzeti bizottság létrejötte és jogállása 1944-45-ben
14. *Halász* Pál: Az államformatan néhány elméleti kérdése
15. *Szamel* Lajos: A szocialista demokrácia kialakulása és a polgári bürokrácia lebontása államigazgatásunkban
16. *Földvári* József: Az enyhítő és súlyosbító körülményekről
17. *Pap* Tibor: A bontás problematikája családjogunk felszabadulás utáni fejlődésének tükrében
18. *Páll* József: A családjogi törvény néhány kérdése
19. *Csizmadia* Andor: Feudális jogintézmények továbbélése a Horthy-korszakban
20. *Antalffy* György: Az állam szervezetéről a rabszolgatartó athéni demokráciában
21. *Szotáczky* Mihály: Az egyéni érdek és az osztályérdek viszonya a tárgyi jogban

22. *Kauser* Lipót: A jogügyletről
23. *Rudolf* Lóránt: A kötelem fogalmáról
24. *Csizmadia* Andor: Az egyházi mezővárosok jogi helyzete és küzdelmük a felszabadulásért a XVIII. században
25. *Halász* Pál: Állam- és jogrend a szocialista forradalomban
26. *Huszty* Lajos: A hozzátartozó a polgári jogban
27. *Vargyai* Gyula: Jobbágyfelszabadítás Esztergom megyei egyházi birtokon
28. *Benedek* Ferenc: Senatus Consultum Silanianum
29. *Bauer* Ilona: Az állammonopolista tulajdon fejlődése és osztályjellege a II. világháború után a Német Szövetségi Köztársaságban
30. *Földes* Iván: A termelőszövetkezetek üzemi-gazdasági igazgatásának néhány problémája
31. *Román* László: Az engedelmességi kötelezettség és a diszkrecionális jogkör problematikája a munkajogban
32. *Ádám* Antal: Az egyesületek a magyar társadalmi szervezetek rendszerében
33. Symposion (1963): Az államigazgatás-tudomány feladatai a szocialista országokban
34. *Rudolf* Lóránt: A szerződések megkötése
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