

ESSAYS OF FACULTY OF LAW UNIVERSITY
OF PÉCS
YEARBOOK OF 2011

Essays of Faculty of Law
University of Pécs
Yearbook of 2011

Published by University of Pécs, Faculty of Law
H-7622 Pécs, 48-as tér 1. Hungary

Responsible publisher

Berke, Gyula (dean)

Linguistic supervision

Chadwick, Clifford Shepherd

Advisory Board

Andrássy, György, University of Pécs, Faculty of Law
Ádám, Antal, University of Pécs, Faculty of Law
Fábián, Gyula, Babeş-Bolyai University (Cluj-Napoca), Faculty of Law
Faludi, Gábor, Eötvös Loránd University (Budapest), Faculty of Law and Political Sciences
Halmai, Gábor, Eötvös Loránd University (Budapest), Faculty of Social Sciences
Kecskés, László, University of Pécs, Faculty of Law
Kiss, György, University of Pécs, Faculty of Law
Lévay, Miklós, Eötvös Loránd University (Budapest), Faculty of Law and Political Sciences
Polčák, Radim, Masarik University (Brno), Faculty of Law
Wiebe, Andreas, Georg-August University of Göttingen, Faculty of Law

Editor-in-chief

Balogh, Zsolt György, University of Pécs, Faculty of Law

Editorial Board

Chronowski, Nóra, University of Pécs, Faculty of Law
Hornyák, Szabolcs, University of Pécs, Faculty of Law
Nemessányi, Zoltán, University of Pécs, Faculty of Law
Pánovics, Attila, University of Pécs, Faculty of Law
Peres, Zsuzsanna, University of Pécs, Faculty of Law
Szöke, Gergely László, University of Pécs, Faculty of Law

HU ISSN 0324 5934 (Studia Iuridica Auctoritate Universitatis Pécs Publicata)

HU ISSN 2061 8824 (Essays of Faculty of Law University of Pécs)

Printed by Kódex Nyomda Kft.

Responsible manager Simon, Béla

H-7627 Pécs, Rigóder u. 29. Hungary

AUTHORS

ANDRÁSSY, GYÖRGY – jurist and philosopher, Professor and Head of the Department of Political Science and Social Theory of the Law Faculty of the University of Pécs.

BORBÁS, BEATRIX – attends the Doctoral Programme of the Faculty of Law at the University of Pécs, Hungary as a doctoral candidate. The author's main line of research is the liability of the state.

ERCSEY, ZSOMBOR – assistant lecturer at the Department of Financial Law at the Faculty of Law of the University of Pécs, focusing primarily on the research area of fair tax systems, European tax law and international taxation.

FENYVESI, CSABA – PhD and habilitated associate professor of the Department of Criminal Procedure Law and Criminalistics of the Faculty of Law at the University of Pécs.

GELÁNYI, ANIKÓ – lawyer, working at the 10th and 17th District Public Prosecutor's Office in Budapest, and PhD Student at the Faculty of Law, University of Pécs.

GORNIG, GILBERT – dean of the Law Faculty of Philipps-Universität Marburg, and Professor and Head of the Department of Public Law, International Law and European Public Law; honorary doctor of the Law Faculty of University of Pécs.

JUSZTINGER, JÁNOS – senior lecturer in the Roman Law Department at the Faculty of Law, University of Pécs.

KÉRYNÉ KASZÁS, ÁGNES ROXÁN – working at the Economic Supply Directorate for Central Hungary of the Economic General Directorate of the Hungarian Police Captain's Office. She is also a PhD student at the Faculty of Law of the University of Pécs, and she researches aspects of Criminal and Competition Law relating to cartels.

KISS, MÓNICA DOROTA – PhD student at the Department of Constitutional Law in the Faculty of Law at the University of Pécs; research areas are the forms of direct participation in local government, with special regard to public hearings.

NÁTHON, NATALIE – PhD, Intellectual Property lawyer, currently working at the Court of Justice of the European Union.

NÉMETH, CSABA – PhD student at the Faculty of Law, University of Pécs, researching Kosovo from an international law perspective. He has worked almost three years as a junior lawyer in Budapest.

SCHVÉGER, JUDIT – PhD student at the University of Pécs, Faculty of Law. Currently she is a junior lawyer at a Budapest based law firm and specialised in IT-related legal regulation and contract management.

SERÁK, ISTVÁN – Legal Counsellor at the Ministry of Public Administration and Justice, Department of Economic Law Codification, an a PhD Student at University of Salzburg.

WALLAT, JUDITH MARIA – LLM, qualified German lawyer and German Academic Exchange Service lecturer at the Faculty of Law, University of Pécs.

ZÓDI, ZSOLT – doctor universitatis in the Philosophy of Law from the University of Miskolc, and Publishing Director of the Complex Publishing House, (Wolters Kluwer) Hungary.

CONTENTS

ANDRÁSSY, GYÖRGY Recognising Language Rights: the Slow and Intricate Progress towards Justice	9
BORBÁS, BEATRIX The responsibility of the courts for immaterial damages	25
ERCSEY, ZSOMBOR Hungarian VAT cases before the Court of Justice of the European Union	45
FENYVESI, CSABA Criminalistic and Criminal Procedural Lessons from an Armed Robbery	61
GELÁNYI, ANIKÓ The crime of harassment in the light of practice	79
GORNIG, GILBERT Twenty Years Ago: The Unification of Germany	93
JUSZTINGER, JÁNOS The principle of <i>laesio enormis</i> in sale and purchase contracts in Roman law	107
KÉRYNÉ KASZÁS, ÁGNES ROXÁN Criminal Law vs. Competition Law, or the interaction between branches of law in Hungarian and German cartel law	125
KISS, MÓNICA DOROTA New aspects of local government in Europe – what we can learn from each other	141
NÁTHON, NATALIE Position marks in the European Union	157
NÉMETH, CSABA The institutional system of positive discrimination and the prohibition of discrimination in Kosovo. The role of the EU concerning equality before the law in Kosovo	177

SCHVÉGER, JUDIT Legal and Organisational Framework for AAI Systems.....	197
SERÁK, ISTVÁN A comparison of the regulation of praedial servitude in Hungary, Germany and Austria.....	215
WALLAT, JUDITH MARIA Participation Rights of the Works Council before the Integration of Temporary Agency Workers – the German Model.....	229
ZÓDI, ZSOLT Search Engines and Legal Research.....	245
FORMER VOLUMES OF STUDIA IURIDICA	265

Recognising Language Rights: the Slow and Intricate Progress towards Justice*

ANDRÁSSY, György

ABSTRACT *The recognition of language rights is a sensitive and confusing issue which appears in various forms at different levels. This paper analyses three issues as illustrations. The first is the shift away from the minority protection system of the League of Nations to the Human Rights protection system of the United Nations. It is widely held that the underlying philosophies of these systems were quite different. The author challenges this view and claims that the more or less common philosophy of the two systems was likely to be applied more consistently in the recognition of language rights in the League's minority protection system than in the Human Rights system of the UN. The second issue which the paper analyses is a kind of moral inequality or double standard which repeats itself between states, from the League's system through that of the UN to the Copenhagen Criteria for Accession to the European Union. The third issue to be investigated is the relationship between official languages and language rights at national and European Union levels. In connection with this, the paper points out, inter alia, that language rights are recognised not only explicitly but also implicitly. The author demonstrates that all of the three major issues raise philosophical questions. He concludes, therefore, that political philosophy should play a more important role in the debates on language rights than it has played so far.*

1. The League of Nations and the United Nations

The minority protection régime of the League of Nations seems to be sinking into oblivion. This can be attributed, to a certain degree, to the prevailing view of the relationship between the minority protection régime of the League of Nations and the human rights protection régime of the United Nations. Accordingly, the two systems were based on two different philosophies. A study which was prepared by the United Nations in 1950 on the legal validity of the undertakings concerning minorities under the League's system expressed this view as follows: the whole minority protection system "was overthrown by

* This paper is a revised version of the paper which the author presented at the International Conference on Minority Languages held in Pécs in 2007. Proceedings of that conference have not been published.

the Second World War. All the international decisions reached since 1944 have been inspired by a different philosophy. The idea of a general and universal protection of human rights and fundamental freedoms is emerging. It is, therefore, no longer only the minorities in certain countries which receive protection, but all human beings in all countries who receive a certain measure of international protection. Within this system special provisions in favour of certain minorities are still conceivable, but the point of view from which the problem is approached is essentially different from that of 1919.¹

I share this view in that the League's system was devoted to the international protection of minorities or persons belonging to them, while the United Nations' system is devoted to the international protection of everyone.² However, I think the philosophy which inspired the drafters of the League's minority protection system and the philosophy which inspired those of the United Nations' Human Rights protection system were not as different as the prevailing view suggests. On the contrary, the philosophy which served as a theoretical basis for the recognition of language rights for the League's system was, in my opinion, very similar to that which served as a theoretical basis for the recognition of language rights for the United Nations' system.³ As for the outcome, it seems that the way of recognition of certain language rights in the League's system was more consistent with the nature of human rights than was that of the corresponding rights in the United Nations' system. Naturally, these assertions need to be demonstrated, and so I provide some arguments below.

Within the League's régime, the Treaty of Peace with Poland, the so-called Polish Minorities Treaty, served as a model. For this reason, I will quote from this Polish Treaty of 1919. Paragraph 3 of Article 7 laid down the following:

*"No restriction shall be imposed on the free use by any Polish national of any language in private intercourse, in commerce, in religion, in the press or in the publication of any kind, or at public meetings."*⁴

It is obvious that this provision protects a language right, and that it does not say anything about minorities or persons belonging to them. The language right

¹ Study on the Legal Validity of the Undertakings Concerning Minorities. UN-Doc. E/CN.4/367, 1950 p. 70.

² The reason why I refrain from using the expression of "objective(s) of the minority protection system" is that there were conflicting views on this issue. See e.g. Advisory Opinion on Minority Schools in Albania. Permanent Court of International Justice, Series A/B, No. 64, 3. 1935 p. 17.

³ In this respect my opinion is similar to what Fernand de Varennes wrote on the nature of the treaties under the guarantee of the League of Nations: to call these treaties 'minority treaties' is "something of a misnomer: human rights treaties would be more appropriate since many provisions were not minority-specific, but were for the benefit of all individuals". de Varennes, Fernand: Language, Minorities and Human Rights. Kluwer Law International, The Hague, 1996 p. 130.

⁴ See in Thornberry, Patrick: International Law and the Rights of Minorities. Clarendon Press, Oxford, 1991 p. 401.

in question is the right to the free use of any language in the specified private matters. This right can be conceived as a wording of the right to freedom of language (in the given private matters).

The subjects of this right are not minorities or persons belonging to them, but all Polish nationals. Therefore, this right is not a minority right, a right for some, but it is a right for all, or all citizens; in this sense it is not a particular, but a universal right. Thus, the conclusion we must draw here is that this provision of the League's minority protection system recognised and protected a universal language right, the right of all citizens to freedom of language in private intercourse, in commerce, in religion, in the press or in the publication of any kind, or at public meetings.

This result is completely the opposite of what we may expect. It is, because the prevailing view quoted above suggested that the League's system as a minority protection régime did not recognise universal rights. However, this suggestion, as we have seen, is misleading.

Let us turn now to the United Nations' Human Rights protection system. The cornerstone of this system is the Universal Declaration of Human Rights of 1948. This Declaration, as is well-known, sets out the principle of non-discrimination on the ground of language, but it does not recognise any language right; it is simply silent on the issue. As time passed, the attitude of the United Nations changed and the International Covenant on Civil and Political Rights of 1966 already recognised some language rights. The most important one is set out in Article 27 of the Covenant:

"In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their religion, or to use their own language."

This article recognises three rights, the right of certain persons to enjoy their own culture, the right of certain persons to profess and practise their own religion and the right of certain persons to use their own language. Subjects of these rights are persons belonging to ethnic, religious or linguistic minorities. Consequently, these rights are minority rights: they are not for all, or, at least, for all citizens, but they are for some, i.e. they are not universal or near-universal, but particular rights. This is, however, totally the opposite of what we may expect, for the philosophy that inspired the United Nations definitely prefers universal rights to particular rights.

The conclusion, therefore, is that, while the League's minority system recognised a near-universal language right, i.e. the right of all citizens to freedom of language, the United Nations originally rejected recognising any language right and, later, recognised only a particular language right, i.e. the right of persons belonging to minorities to use their own language. The irony of this is that the League, which protected minorities, recognised a language right for all, while the United Nations, which protects everyone, recognises only a language right for some. This means that, in the case of these language rights,

both international organisations did exactly the opposite of what they were supposed to do.⁵

We can also reproduce this result if we broaden our comparative analysis. If we return to the League's system, we can see that Article 8 of the Polish Minority Treaty reads:

"Polish nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Polish nationals. In particular they shall have an equal right to establish, manage and control at their own expense charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein."

Although this provision and its Albanian version were heavily debated in the Minority Schools in Albania case, it was clear that citizens belonging to minorities are entitled to enjoy the same treatment and security in law and in fact as citizens belonging to the majority.⁶ The explanation lies in the fact that the minority protection system declared a universal standard again, instead of a particular, a minority-specific principle. Then the provision continued and applied this standard to the issue of establishing, managing and controlling certain institutions. According to this application, both citizens belonging to minorities and citizens belonging to the majority shall have an equal right to establish, manage and control at their own expense charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.

If we turn, for comparison purposes, to the human rights system of the United Nations, we can find the right to freedom of association. Article 20 of the Universal Declaration of Human Rights declared this right as follows:

"Everyone has the right to freedom of peaceful assembly and association."

⁵ It is worth noting that Thornberry quotes Robinson and his collaborators who claim that in some instances the articles of the League's system are "almost verbatim extracts from the classical documents of individual and national emancipation, such as the English Bill of Rights, the American Declaration of Independence, the Preamble and Amendments 1, 4, 5, 14... and 15 of the United States Constitution, and the Declaration of the Rights of Man of the French Revolution", but he continues that "the difference between them is, of course, that the League's documents are not couched in universal terms; it is not so much a case of 'all men' as all 'inhabitants (or nationals) of Poland', etc." Thornberry, of course, is right in that it is not so much a case of "all men" as all "inhabitants (or nationals) of Poland" who are the subject of the Polish Minority Treaty and other documents of the League's system, but he forgets to compare the incomplete universality of the drafting of the right-holders with Article 27 of the International Covenant on Civil and Political Rights in which the case is about neither all human beings nor all citizens, but only persons belonging to minorities. C.f. Thornberry, Patrick op.cit. pp. 48 and 170.

⁶ Advisory Opinion on Minority Schools in Albania. Permanent Court of International Justice, Series A/B, No. 64, 3. 1935 pp. 15-25.

Eighteen years later, the International Covenant on Civil and Political Rights gave a more detailed description of this right in its Article 22:

"Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."

If we accept the view that the right to freedom of association is the right with which the quoted provision of the League's system can be compared, we suppose in practice that the provision of the League's system in question is a formulation of the right to freedom of association.⁷ What we can see in this way is that both the League and the United Nations recognised this right as a universal right, not as a right for some, but as a right for all.

However, while the League's system specified the right to freedom of association in relation to charitable, religious and educational institutions, the United Nations specified this right in relation to trade unions. Moreover, while the League's wording contains a derivative language right, i.e. the right of the persons concerned to use their language in the said institutions, the United Nations did not do so here.

This shift in the specification of the right to freedom of association shows that the United Nations turned from cultural, religious and linguistic interests to economic and social interests. More precisely, the United Nations turned to economic and social interests at the expense of the corresponding cultural, religious and linguistic interests. In fact, it is obvious that, for persons belonging to ethnic, religious or linguistic minorities, the right to form and manage cultural, religious and educational institutions, with the right to use their language within them, is much more important than the right to form and manage trade unions. This development was, therefore, clearly a serious drawback to persons belonging to ethnic, religious or linguistic minorities.

It would seem, therefore, that we can raise some fundamental questions in a relatively new way. We can argue, for example, that, if once the recognition of some universal language rights was acceptable for the international community, even within a minority protection régime, why are those rights not acceptable for the international community within a human rights protection system inspired precisely by the philosophy of universal rights? We can also question, focusing on the right to use one's own language, that what could be the reason to recognise this language right as a particular right in a universal human rights protection system, if a corresponding language right was once recognised as a universal language right in a minority protection system? Naturally, we can

⁷ In fact, this definition of the right was already drafted in 1953, but the Covenant itself was only adopted in 1966. C.f. Inis, Claude: National Minorities: An International Problem. Greenwood Press Publishers, New York, 1969 pp. 160-161.

⁸ Szalayné Sándor, Erzsébet: A kisebbségvédelem nemzetközi jogi nézetrendszeréről a 20. században. MTA Kisebbségkutató Intézet, Gondolat Kiadói Kör, Budapest, 2003 p. 93.

focus on the United Nations and we can raise these and other questions from a purely logical point of view also. For example, is it consistent not to recognise the right to use one's own language as a universal right but to recognise it as a particular right in a universal human rights system?

Moreover, according to the above comparisons, the philosophy that served as the theoretical basis for the League's minority protection system proved to be very similar indeed to that which served as the theoretical basis for the United Nations' human rights protection system. In principle, as we have seen, both philosophies recognise some fundamental rights, in particular, civil and political rights, and both philosophies recognise these as universal rights, as equal rights for all. There is a twofold difference between the two philosophies. One lies in the fact that, whilst the United Nations committed itself to a particular moral or political philosophy, i.e. to the philosophy of human rights, the League remained silent on the issue; it made no references to any moral or philosophical justification of the fundamental rights which it recognised. The second difference lies in the fact that, whilst the League recognised and defined civil and political rights mainly in respect of the language question, the United Nations originally refused to recognise and define any civil and political right in this connection and later recognised and defined only one such (non-derivative) right, but in an inconsistent way.

Nevertheless, to call the League of Nations' system a 'minority protection system' was, to a certain degree, reasonable. First, the system was devoted, as we have already pointed out, to the protection of minorities, and, second, the substantive law of the system contained not only general or universal provisions, but minority specific provisions also. Third, the nature of the procedural law of the system was, in accordance with what the whole system was devoted to, minority-specific.⁹

In general, I think that the League's system ought not to be neglected whilst discussing minority rights, language rights and human rights. Instead, a comparative analysis of the League's and the United Nations' systems would be useful, within which the philosophical approach ought to play a greater role than it has done so far.

⁹ According to Article 12 of the Polish Minorities Treaty "Poland agrees that the stipulations in the foregoing Articles, so far as they affect persons belonging to racial, religious or linguistic minorities, constitute obligations of international concern and shall be placed under the guarantee of the League of Nations... Poland agrees that any Member of the Council of the League of Nations shall have the right to bring to the attention of the Council any infraction, or any danger of infraction, of any of these obligations, and that the Council may thereupon take such action and give such direction as it may deem proper and effective in the circumstances." See in Thornberry, Patrick op. cit. pp. 402-403.

2. A kind of moral inequality which repeats itself

2.1 The minority protection system of the League of Nations

What we call the League's minority protection system was, in fact, created by the victorious Great Powers of the First World War. The system was then placed under the guarantee of the League of Nations. The standards of the system were imposed on, or undertaken by, several countries such as Poland, Czechoslovakia, Hungary, Romania, Bulgaria, Greece, Turkey, Iraq, Yugoslavia, Austria, Albania, Estonia, Latvia and Lithuania. On the other hand, however, the victorious Great Powers did not undertake to apply these standards in relation to their own minorities, nor did they bring pressure to bear upon any country from Western Europe to do so. Not even defeated Germany was obliged to be a party to the system.¹⁰

This was naturally an asymmetric and unequal arrangement in sharp contrast with the principle of the equality of sovereign states. The inequality of the member states of the League of Nations proved then a serious moral weakness which weakened the effectiveness of the minority protection régime. It is not surprising, therefore, that several proposals were made with the aim of eliminating this inequality. The issue was already raised at the Paris Peace Conference both by the Japanese delegate, Makino, and by the so-called successor states also - but with no success. Within the League, the representatives of Japan, China, Finland, the Baltic States, Poland, Czechoslovakia, Romania and Germany made or supported proposals aimed at finding an adequate solution to the problem. Even the French delegate, de Jouvenel, was willing to support setting up a Committee to study the issue in 1925. In addition to the League's member states, several international associations, NGOs, expressed the view that all countries in the world ought to adopt universal standards for protecting their minorities.¹¹

The initiatives taken by states and NGOs had little success. Perhaps the most important result was that, in 1922, the General Assembly of the League adopted a *vœu*, according to which "states not bound by minorities treaties should observe the same standards as those bound by such treaties"¹² Naturally, this solution did not satisfy some countries or the NGOs and so the League reiterated its *vœu* of 1922 in 1933, although "both *vœux* remained empty gestures".¹³ Under such circumstances, in 1934 Poland declared that it would

¹⁰ Andrassy, György: *Nyelvi jogok*. Pécsi Tudományegyetem, Pécs, 1998 pp. 57-66.

¹¹ Buza, László: *A kisebbségek jogi helyzete*. Magyar Tudományos Akadémia, Budapest, 1930 pp. 355-363.

¹² Schechtman, J. B.: *Decline of the International Protection of Minority Rights*. In: *The Western Political Quarterly* 1951/1. p. 1.

¹³ *Ibid.*

deny cooperation with international organs concerning existing minorities treaties until a general minority protection system came into force.¹⁴

It is worth noting that these offered two possible ways of eliminating the problem. The one was to extend the standards of the existing minority protection system guaranteed by the League of Nations to all states in the world, whilst the other was to elaborate and adopt some standards for ensuring the equality of all (autochthon) minorities living in the world.¹⁵

Unexpectedly, the problem was then solved in a third way after World War II. First, the new peace treaties included neither the old standards of minority protection nor any new standards for this purpose. Second, the League of Nations collapsed, and its successor, the United Nations Organisation did not acknowledge the legal validity of the minorities treaties concluded after World War I.¹⁶ Third, the UNO refused to include the concept of cultural genocide into its Convention on the Prevention and Punishment of the Crime of Genocide. Fourth, the UNO refused to include a minority protection clause into the Universal Declaration of Human Rights. Fifth, the United Nations declared that it could not remain indifferent to the fate of minorities, but it did not provide any protection for minorities either inside or outside its human rights protection régime.¹⁷

This solution, therefore, amounted to negative treatment of the problem of inequality: neither the states formerly bound by minorities treaties, nor those remaining had to apply any international standards for the protection of minorities. However, this system proved not to be long-lasting. In the 1950s, the United Nations started to set some modest standards for minority protection and

¹⁴ Szalayné Sándor, Erzsébet op. cit. pp. 137-138.

¹⁵ Búza, László op. cit. p. 355.

¹⁶ In general, the relating report prepared by the Secretary General of the United Nations referred to the principle of *clausula rebus sic stantibus*, in other words, that "between 1939 and 1947, circumstances as a whole changed to such an extent that, generally speaking, the system should be considered as having ceased to exist". However, the report concluded, as an exception, that "Finland's obligation towards Sweden still exists" concerning the Aland Islands. In: Study on the Legal Validity of the Undertakings Concerning Minorities. UN-Doc. E/CN.4/367, 1950 pp. 71. and 69.

¹⁷ "The favourite tactic in the United Nations has been neither to accept nor to reject proposals for minority rights, but to 'postpone' them. The classic example of this tactic occurred in 1948, when the USA led a group of states in deleting cultural genocide clauses from the draft Genocide Convention, on the grounds that the cultural rights of minorities should be safeguarded in the human rights documents, whilst simultaneously fighting to eliminate reference to those rights in the draft Declaration of Human Rights, on the grounds that they were out of place there. In general, this attitude has prevailed: wherever the issue is presented, it is out of place; whenever it is presented, it is premature." In: Inis, Claude op. cit. pp. 164-165. For more details in relation to the whole shift from the League's system to the United Nations' system, see *ibid.* pp. 51-177.

in the 1960s it recognised limited minority rights within its human rights system. This new system is still quite weak in comparison to the League's system, but, at the same time, it is practically universal - that is, most countries accept it without reservation.

2.2 The accession criteria for the Eastern enlargement of the European Union

After the collapse of "actually existing socialism" in Europe, most "post-communist" countries became associate countries of the European Union and applied for full membership. The European Union declared its elaborated standpoint in Copenhagen in 1993. Accordingly, as the European Council announced, the associate countries concerned would be admitted to the European Union if they satisfied certain criteria.

The first criterion specified political and legal conditions, *inter alia*, the "protection of minorities". However, this criterion seemed problematic, as the EU did not have (and does not have even today) a clear and explicit competence to protect the minorities of its member states. There is, of course, a form of language law of the European Union. This language law contains provisions concerning authentic languages of the treaties establishing the European Communities and the European Union, official and working languages of the European institutions and the language right of the citizens of the European Union. Also, the European Union faced some linguistic implications of economic integration and had to regulate, for example, the languages of product labelling, the language knowledge required for filling posts in relation to the free movement of workers and language education for migrant children.¹⁸

Furthermore, the Treaty of Maastricht provided an explicit legal basis for cultural and educational policies of the Community. However, these Community powers are complementary and so the Community can only support and supplement the actions of the Member States. It is also notable that the relevant Articles of the Treaty recognise, in a sense, the value of linguistic diversity even within the Member States. Nevertheless, these Articles do not provide a clear legal basis for a coherent minority policy.¹⁹ The EU Charter of Fundamental Rights confirms this in a way: Article 22 of the Charter declares that the Union shall respect cultural, religious and linguistic diversity, but it does not recognise any language right.

¹⁸ de Witte, Bruno: Language Law of the European Union. In: Rachael Craufurd Smith (ed.): Culture and European Union Law. Oxford University Press, Oxford, 2004 pp. 205-242. and Shuibhne, Niamh Nic: Labels, Locals, and the Free Movement of Goods. In: Rachael Craufurd Smith (ed.): Culture and European Union Law. Oxford University Press, Oxford, 2004 pp. 81-112.

¹⁹ de Witte *ibid.* pp. 234-236.

Finally the European Parliament did adopt resolutions on the minority question. Although these, and some support from the Commission, made it possible, for example, to finance the establishment and functioning of the European Bureau for Lesser Used Languages, the original intention of Parliament to develop an effective minority (language) policy has not yet been realised.²⁰

By way of summary, we can conclude that the EU had no minority protection régime at the time of the Eastern enlargement of the Union and that the Union has no such coherent policy even today.

Therefore, the principal difficulty with the accession criterion relating to minority protection specified in Copenhagen in 1993 was its moral weakness. Those who created it did not do so for themselves but exclusively for others – as the EU set the standard not for its Member States but exclusively for candidate countries. Obviously, this is very similar to the moral inequality which characterised the League's minority protection system. In addition, inequality emerged between more or less the same groups of countries, but, nonetheless, inequality on this occasion was much more acceptable to the countries concerned than it had been originally.

2.3 Values of the European Union

The issue of minority protection appeared again during the drafting of the Treaty establishing a Constitution for Europe. The initiators were some Hungarian members of the Convention: they objected to Article I, as it did not include the rights of national and ethnic minorities in the list of the values of the Union. The Hungarian representatives argued that, whilst setting the accession criteria for the candidate countries, the European Union considered minority protection a value. Therefore, they pointed out, it would be inconsistent on the part of the European Union not to include minority protection into the list of the values of the Union.

Although the Hungarian arguments were not accepted in the Convention, the Hungarian Government suggested, in the Intergovernmental Conference, that Article I-2 of the Constitution be supplemented with "the rights of national and ethnic minorities".²¹ In the end, the Hungarian proposal was accepted in a modified form and Article I-2 was completed as follows: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."

²⁰ Shuibhne, Niamh Nic: *EC Law and Minority Language Policy*. Kluwer Law International, The Hague, 2002 pp. 61-71. and 264-271.

²¹ Horváth, Zoltán and Ódor, Bálint: *Az Európai Unió alkotmánya*. HVG-ORAC Kiadó, Budapest, 2005 pp. 73-75.

Since the referendums in France and the Netherlands proved to be unsuccessful, i.e. the process of ratification of the Constitution was brought to a standstill, a new reform treaty, the Treaty of Lisbon has been drafted and, after some difficulties, adopted and this new treaty also contains the value of respecting minority rights.

This general recognition of minority rights may not be satisfactory for persons belonging to linguistic minorities, but it comprises an important step forward in the elimination of the inherited inequality between the old and the new member states. From this latter perspective, this recognition of the value of minority rights can be considered real progress towards the equality of certain Western European and East Central European countries through the elimination of historical double standards.

3. Official languages and minority language rights

There is hardly any country in the world which would not regulate linguistic diversity. In so doing the states always designate one, or more than one, official language, and usually it is the legislator who adopts some provisions concerning the issue and includes them into the national, federal or regional constitution(s) and/or some other Act(s), but it may also happen that the official language(s) is/are selected tacitly, by unwritten or customary law.

In any case, if the one (or more than one) official language of a given country is designated from languages which are spoken as mother tongues of the citizens and the number of official languages is less than the number of languages spoken as mother tongues in the country, the fact that the country has one or more than one official language implies inequality in linguistic rights. That is to say, those citizens, whose native language is identical with the/an official language in the country, do have the right to use their own native language as the/an official language of the country, whilst those citizens whose native language is not an official language in the same country do not have the right to use their own native language as the official language of the country. Obviously, this is serious inequality in language rights.

This inequality, as we have seen, does not follow from an explicit recognition of the right of some to use their native language as the/an official language of their country. Nor does it follow from an explicit rejection of the recognition of the right of others to use their own native language as the official language of the country. Both the right and its lack derive from the legal institution of the official language and the circumstances specified above. In other words, both the recognition of the right and its denial take place, in most cases at least, implicitly. For this reason, I call the right itself an implicit

language right, whilst at the same time considering the result of its denial an implicit, an unintended denial of the same language right.²²

If we examine national language law, we see that the language of the linguistic majority enjoys the legal status of official language in almost all countries in the world. Consequently, citizens belonging to the linguistic majority of a country always, or almost always, have the right to use their own language as the official language of the country, simply because their language is the/an official language there. In contrast, most minority languages are not designated to be official languages in their respective states. Therefore, citizens belonging to linguistic minorities do not, in most cases, have the right to use their language as the official language of their state. Therefore, inequality in language rights, especially in implicit language rights, exists, first and foremost, between citizens belonging to the linguistic majority and citizens belonging to linguistic minorities in most countries.

From this perspective, it is evident that minority language rights, i.e. particular rights of citizens belonging to linguistic minorities to use their own language in specific official (and non-official) contacts are not additional rights or privileges, and that these rights do not sharpen but, on the contrary, mitigate the inequality in language rights between citizens belonging to the linguistic majority and citizens belonging to linguistic minorities.²³

²² Andrassy, György op. cit. pp. 31-44. and Andrassy, György: Explicit and Implicit Language Rights. In: Genoveva Vrabie and Joseph-G. Turi (eds.): Law and Language. Proceedings of the Eighth International Conference of the International Academy of Linguistic Law. Editura Cugetarea, Jasi, 2003 pp. 120-121.

²³ The view that minority language rights are privileges - additional, special or exceptional rights - prevailed for more than fifty years after World War II. However, the debate over the language question challenged this view in several ways. The challenging arguments have ranged from raising theoretically important paradoxes (c.f. Kontra, Miklós and Szilágyi N., Sándor: A kisebbségeknek van anyanyelvük, de a többségnek nincs? In: Kontra, Miklós and Hattyán Helga (eds.): Magyarok és nyelvtörvények. Teleki László Alapítvány, Budapest, 2002 pp. 3-10.) and investigating the official language issue (Pool, Jonathan: The Official Language Problem. In: American Political Science Review 1991/2 pp. 495-498.), through arguing for the recognition of linguistic human rights (Phillipson, Robert: Linguistic Imperialism. Oxford University Press, Oxford, 1992 pp. 93-95. and Skutnabb-Kangas, Tove: Linguistic Genocide in Education or Worldwide Diversity and Human Rights? Lawrence Erlbaum Associates Publishers, London, 2000 pp. 502.), to revising the meaning of the right to equality and the prohibition of discrimination concerning the language question (de Varennes, Fernand op. cit. pp. 54-128.), and to develop a comprehensive theory of minority rights (Kymlicka, Will: Multicultural Citizenship. Clarendon Press, Oxford, 1995 pp. 1-195.). These and many other contributions proved to be strong enough to change the nature of the whole debate around the second millennium. A most influential version of these views may be the conception of political philosopher Will Kymlicka. In general, the point of the "new" approach, as Kymlicka put it in 2001, is "to view minority rights, not as a deviation from ethno-

It may be fruitful to look at countries which have more than one official language at federal/national and regional levels alike.²⁴ If we take Switzerland as an example, we see that not only the majority language, i.e. German, but some minority languages, in particular, French, Italian and, to some extent, Romansh are also official languages both at federal and cantonal levels.²⁵ As a result, both citizens belonging to the linguistic majority and citizens belonging to these linguistic minorities do have the right to use their own language as an official language of the country and, if they choose to live in a canton in which their language counts as the/an official language, they have the right to use their language as the/an official language of their canton of residence, too. In this way, linguistic inequality derived from the legal institution of official language has been almost totally eliminated between and among the citizens belonging to the linguistic majority and those belonging to the linguistic minorities concerned.

There are other countries in which only the majority language enjoys official language status at national level, although, at the same time, one (or more than one) minority language is an official language at regional level. This is the case, for example, in Spain, where Castilian Spanish is the only official language at national level, but Catalan and Basque are also official or "co-official" languages in their respective autonomous communities.²⁶ This form of regulation is not necessarily connected to regional or territorial autonomy. In Slovenia, for example, Italian and Hungarian are regional official languages in their respective non-autonomous municipalities.²⁷ The result in both countries is that citizens belonging to the said linguistic minorities do not have the right to use their language as the nationwide official language of their state, but they do have the right to use it as a regional official language in the respective region(s) of their country. Obviously, this kind of legislation on linguistic diversity does not eliminate, but clearly mitigates the linguistic inequality derived from the legal institution of official language between citizens belonging to the linguistic majority and those belonging to the linguistic minorities mentioned.

At present, the European Union has 23 official languages. Naturally, these official languages also imply language rights. Namely, European citizens whose

cultural neutrality, but as a response to majority nation-building" (Kymlicka, Will: Politics in the Vernacular. Oxford University Press, Oxford, 2001 pp. 38.). The author of this paper conceives explicit minority rights as counterparts of implicit majority language rights. C.f. Andrassy, György: Nyelvi jogok cit. pp. 45-48 and 164-173. and Andrassy, György: Explicit and Implicit cit. pp. 120-123.

²⁴ Blair, Philip: The Protection of Regional or Minority Languages in Europe. In: The Territorial Distribution of Power V. ISBN 2-940049-08-4, 1994 pp. 14-19. and 31-32.

²⁵ Ibid. pp. 14-19.

²⁶ Ibid. pp. 24-27.

²⁷ Article 11 of the Constitution sets out: "The official language of Slovenia is Slovene. In those municipalities where Italian or Hungarian national communities reside, Italian or Hungarian shall also be official languages."

native language is identical with one of the official languages of the European Union do have the right to use their mother tongue as an official language of the European Union.²⁸

Considering that the language of the linguistic majority of all member states is an official language of the Union, citizens belonging to these linguistic majorities have the right to use their native language as an official language of the European Union.²⁹ Therefore, citizens of all Member States belonging to the linguistic majority, enjoy an implicit language right, not only at Member State level, but at EU level also.

The legal position of citizens belonging to linguistic minorities is more complicated. It is so, even if we disregard, for the sake of simplicity, several details and focus only on the main characteristic features of some groups of minorities.

In the case of those Member States in which both the majority language and a minority language are official at national and regional levels, that is, in Member States where linguistic equality between citizens belonging to the linguistic majority and citizens belonging to the linguistic minority in question is almost complete, the official language régime of the European Union confirms or affirms this linguistic equality, if both languages are official languages of the Union. A good example is Finland, where both the Finnish and the Swedish languages are official languages on national and regional levels and both languages are official languages of the European Union also. Ireland came into this category on January 1 2007 when Irish became an official language of the Union.³⁰ Prior to this, however, the official language régime of the Union

²⁸ These implications were made, in a sense, explicit by Council Regulation 1/58 and the Treaty of Amsterdam. Article 2 of the Regulation set out: "Documents which a Member State or a person subject to the jurisdiction of a Member State sends to institutions of the Community may be drafted in any one of the official languages selected by the sender. The reply shall be drafted in the same language." Since the coming into force of the Treaty of Amsterdam, Article 21 of the consolidated version of the Treaty Establishing the European Community set out: "Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 7 in one of the languages mentioned in Article 314 and have an answer in the same language."

²⁹ There are some unusual cases. For example, in Ireland the Irish language is the national official language, but English is also an official language. However, due to some specific features of the Irish history, most Irish citizens have English as their native language instead of having the national language, the Irish language as their native language. Nevertheless, as Irish is one of the official languages in the European Union, citizens belonging to this Irish language minority do also have the right to use their native language at European level.

³⁰ Referring to the fact that "the Irish Government has requested that the Irish language be accorded the same status as that accorded to the national official languages of the other Member States", Council Regulation 920/2005 amended the Council Regulation 1/58 and made Irish an official language of the European Union.

had had the opposite effect in respect of Irish citizens. Ireland had, as it has today, two official languages, Irish and English, at national and, under special regulation, regional levels, which results, even under unique Irish conditions, in a kind of linguistic equality. However, the official language régime of the EU weakened this linguistic equality as English enjoyed official status in the Union, whilst Irish did not.

In the case of those Member States in which the language of the linguistic majority comprises the sole official language at national level but there is at least one minority language official at regional level, the official language régime of the European Union either sharpens or mitigates the linguistic inequality between citizens belonging to the linguistic majority and citizens belonging to the linguistic minority(ies) concerned. If the regional official language does not count as an official language of the European Union, linguistic inequality becomes more acute, as is the case is with the Catalan or the Basque languages which are regional official languages in Spain but not official languages of the EU. If the regional official language counts as one of the official languages of the European Union, linguistic inequality is mitigated, as is the case with German, which is both a regional official language in Italy and an official language of the EU also.

Due to the fact that linguistic borders and political borders do not always coincide within the EU, it is not unusual for a minority language not to be an official language in one Member State, but the majority language and, in consequence, the/an official language in another Member State. In such cases, the language in question is naturally one of the official languages of the European Union. Therefore, native speaker citizens of such a language do not have the right to use their native language as an official language of the Member State they live in, but they do have the right to use their native language as an official language of the European Union. This applies, for example, to citizens belonging to the Hungarian-speaking minority in Romania and Slovakia, and vice versa, to citizens belonging to the Romanian and Slovakian speaking minorities in Hungary, as well as to citizens belonging to the Finnish speaking minority in Sweden and citizens belonging to the German speaking minority in France or in Poland. Naturally, these citizens belonging to the above mentioned linguistic minorities may enjoy strong minority language rights in the Member State they live in, as is the case with the Romanian and the Slovakian linguistic minorities in Hungary, or they may not enjoy such strong minority language rights, as is the case, e.g. with the German speaking minority in France or the Hungarian speaking minority in Slovakia. Nevertheless, the official language régime of the European Union, in all such cases, mitigates the inequality in language rights between citizens belonging to the said linguistic minorities and their fellow-citizens belonging to the linguistic majorities in the Member State in which they live.

As we have seen, the official language régime of the European Union usually mitigates, but sometimes makes more acute the inequality in language rights between citizens belonging to the linguistic majority and citizens belonging to some linguistic minorities in the Member States. What we must emphasise however is that all of these effects were and have remained largely unintended, non-deliberate consequences, purely logical implications of legislation on languages, especially of official language legislation at national and European levels.

4. Conclusion

Recognition of language rights depends on various interests, considerations and calculations, but it also depends on the recognition of rights, especially of human rights as well as values, principles and, in particular, justice. In addition, recognition takes place, as we have seen, not only explicitly, but also implicitly. In the latter case, the legislators presumably do not even know the exact effect of their legislation on the distribution of language rights, and it does seem that the whole issue is much more complicated than an average issue within the field of the recognition of rights.

This paper analysed three different but interrelated issues. The analysis in all the three cases led us to some philosophical questions which ought to be answered and so we must conclude that the philosophical aspects of the recognition of language rights are important and that they ought to be taken seriously.

Our final conclusion, therefore, should be that political or moral philosophers ought to play a greater role in debate on language rights than they have done so far. It seems that their contribution to the efforts of international lawyers, linguists and to the representatives of other disciplines could also support approaching linguistic justice through the recognition of language rights.

The responsibility of the courts for immaterial damages

BORBÁS, Beatrix

ABSTRACT *The article – as the title indicates – covers the topic of the responsibility of the Law Courts for immaterial damages, concentrating only on the domain of civil law, and, specifically, on that of Hungary. The first part (section I) of the article gives a historical overview and the second part (sections II and III) analyses the current regulation whilst the third and final part (section IV) outlines the regime of legal instruments as contained in the draft of the new Hungarian Civil Code.*

The article starts with a presentation of the development of the responsibility for immaterial damages, showing the history of the legal institution protecting personality, as an invisible legal object, from the early regulations of King St. Stephen until the recent interpretations of the Hungarian Constitutional Court.

After this historical review, the study analyses the functions and instruments of the protection of personal rights as possible motivating factors for shaping the regulation in the field of civil law, focusing on the functions of compensation, prevention and punishment.

The third section of the essay concerns immaterial damages resulting from the violation of personal rights and an explanation of the reasons for the lack of regulation. The paper finally discusses the planned amendments in the new draft Civil Code concerning the consequences of such violations committed by the Law Courts.

1. The development of the responsibility for immaterial damages in Hungary

Personality, as an invisible legal object, needs to be protected. It is not only a basic principle of modern democracy, since the notion emerged at the same time as the state came into existence. Societies organised by the state have an inherent demand for the legal regulation of social coexistence, and the question never arose of whether these inherent rights needed protection against the state as much as against other persons.

In the early days the initial concept displayed a typical penal character, being the institution replacing the institution of private revenge (dominant when regulations were lacking) and, as such, fulfilling no other legal policy or aim than simple reprisal. A long period had to pass before the restoring-repairing

function which was the aim of "Civillistics" would appear. The Law of the Twelve Tables, based on, amongst others, the Solonian Constitution, is a good example of this. The *talio* principle in Table VIII establishes that "if one has harmed (another) and does not buy his peace, there be retaliation in kind" – *talio esto*.¹ Financial reparation, alongside reprisal in kind, was not used for injuries to freemen² and this legal consequence was applied only to injuries to slaves.

As the Hungarian Constitutional Court pointed out (in the light of international legal comparison and an examination of legal history) personal injuries, the so-called '*iniuriae*', led to a penalty estimated by a judge (at his own discretion) even in the days prior to modern law, when a clear distinction between punishment and indemnification was still lacking. Later, the classical liberal age reacted to personal injuries, together with the general concept of the protection of personal rights, by means of moral indemnification within civil law, and today it can be seen world-wide that non-pecuniary indemnification serves the protection of personal rights.³

In Hungary, King St. Stephen (r. 1000-1038) was ahead of his time in already valuing the freedom of men and declaring that "it is worthy of God and best for men that everyone should conduct his life in the vigour of liberty". Beyond personal freedom he took measures on the "abduction of girls" also, also imposing material reparations, although supplementing it with some moral element, requesting that the abductor "may afterwards make peace with the girl's parents".

In the age of feudalism, feudal status fundamentally determined the rights concerning each person, these rights being recorded in their charters. The notion of the feudal "finable injuries" survived in the legal category of *solatium* ('consolation fee') established by the Austrian Civil Code introduced in Hungary, although the existence of real material damage was a prerequisite for considering and weighing non-pecuniary loss.

It was characteristic of the codifications of the latter part of the 19th century to provide for non-pecuniary injuries and so several Acts had provisions concerning the topic. One can find actual circumstances transferred to the domain of criminal law⁴, and certain Acts imposed *solatium* or material reparation for damages in a wide-range of situations.⁵ It was the result of the socio-economic changes of this period that non-pecuniary injuries of the personality slowly migrated from the territory of criminal law to the domain of

¹ Si membrum rupit, ni cum eo pacit, talio esto.

² The health and life of a freeman cannot be estimated in terms of money – see: Digesta si quadrup. 9.1.

³ Decision 34/1992 (VI.1) AB of the Constitutional Court of Hungary, III. 3.2.

⁴ Provisions of Act V of 1878

⁵ Act LX of 1890 – on the *solatium* for an assaulted field-guard; or Act V of 1923 – including provisions on imitation and slander

civil law.⁶ Accordingly, the endeavour to protect affronts to basic human dignity and values and to cure them by civil law was evident from the Age of Enlightenment.⁷

This trend also reached Hungary, although national jurisprudence accepted the thesis only reluctantly. Grosschmid found the liability for damages acceptable only as reparation for material loss and regarded the cases where it was not so, as exceptions to the rule.⁸ Even if only in the form of exceptions, it started to take root in judicial practice,⁹ and legal practice was followed by the Bill of Civil Law of 1928 establishing the institution of redress as non-material compensation.¹⁰ Although the draft of the General Hungarian Civil Code ("Áptk.") prepared during the Civil Law Codification at the turn of the century included a certain form of catalogue of personal rights, the regulation continued to be divided among several Acts, meaning that there was no synthesized, systematized concept in existence.

The Bill of Civil Law of 1928 was a leap forward, establishing the protection of personal rights in general, declaring that everyone has the right to assert his own personality freely within the limits of the law and the right of others, and not to be disturbed in this exercise. It also formulated the limitation still known in Hungarian law, declaring that one cannot renounce his/her personal rights, or restrict the exercising of these rights in an indecent way.¹¹ Thus the notion of non-material damages already appeared in the Bill of Civil Law, and was present in living law until 1953, when the Civil Authoritative Ruling (PED) no. III eliminated it from legal practice.¹²

In the transformed political environment following World War II, the development of Hungarian law had to take a new direction. One of the events marking this was when the Presidential Council of the People's Republic, the collective head of the state of Hungary, suspended the legal institution of non-material damages with reference to the degradation of personality to commodity being a characteristic of capitalist ideology. Consequently, personal values could not be debased and turned into a commodity by determining a material value to an affront against them. The clearly political ideological standpoint of

⁶ Bónis, Gabriella: A nem vagyoni kár (*Non-pecuniary damage*). In: Felelősség és szankció a jogban (*Legal responsibility and sanction*), KJK, Budapest, 1980, p. 341.

⁷ Bárdos, Péter: Kárfelelősség a Ptk. rendszerében (*Damage liability in the Hungarian Civil Code*). HVG-Orac, Budapest, 2001 p.40.

⁸ Grosschmid, Béni: Fejezetek költelmi jogunk köréből (*Chapters from our contract law*), vol. I. Budapest, 1901, p. 765.

⁹ Authoritative Ruling no. 158 of the Curia in 1912 declared that if rape would have hindered the options of a girl to getting married, the person having caused the damage was obliged to pay the amount that would have increased the chances of the girl to get married by the same proportions as it had been reduced by the wrongful act.

¹⁰ Bill of Civil Law (Mjt.) 1114. §

¹¹ Bill of Civil Law (Mjt.) 107-108. §

¹² Bárdos, Péter: Kárfelelősség a Ptk. rendszerében p. 40.

the Supreme Court undoubtedly reflected a real dilemma in a sense that the degradation of human values is indeed implied in the community of commodity producers, but it is not the duty of civil law to resolve such dilemmas – although the inadequacy of the money considering the injustice suffered still raises difficulties.¹³

The abolition of the legal institute of indemnification for moral damages aimed to make it fully understood that a person and his/her abilities cannot be a means of profit. On the other hand, 'legal security in a political sense' was similarly important, a standpoint of the system being mistrust of the developed practice in applying the law over the centuries. If one takes into consideration that this (basically legal-political) decision was taken at a time when there was no Civil Code in Hungary, it is understandable that this mistrust started to ease only after the first Civil Code came into effect in 1959, which, although it did not recognise moral damages, established the institution of general damages, the latter bearing the marks of non-material compensation.¹⁴

Also there were some views supporting the need for the regulation of immaterial damages, raising three principal arguments. One was that, if, in socialist society, people had the greatest value, then how was it possible that there was a basis for repairing damages in objects whilst there was none for personal damages. Another was that, although money could not eliminate non-material damage, it was still able to mitigate it. A third argument denied that non-material compensation would degrade personality to a commodity.¹⁵

In 1953, Civil Authoritative Ruling (PED) no. III tried to fill the void created by the Presidential Council and established the legal category of general damages, making legally possible to claim non-material damages, although only and strictly along with material loss. In 1959 the Civil Code was born with the same content, but its fourth amendment in 1977 brought new regulation. According to the newly inserted Section 354, a person causing non-material damage to another person was liable for such damage and should indemnify the aggrieved party if the damage had aggravated the aggrieved person's participation in social life or otherwise his/her life permanently or seriously, or when the damaged party is a legal person if the damage influenced adversely its participation in commercial activities. This provision of the novel effective from 1 March 1978 left open a number of theoretical questions. For example it was questionable how (by which factors) could the categories of social life and life be separated. The provision also made a distinction between natural and legal

persons but did not address legal entities without legal personality.¹⁶ Also, the category of non-material damage had no meaning when the personal rights of a legal person were violated. The application of the criteria of permanence and seriousness caused a significant uncertainty in judicial practice, since the provision of the law and its ministerial explanation gave different guidance regarding the requirements of an alternate or conjunctive presence of these two criteria for deciding on an indemnification. (The provision stipulated alternative criteria whilst the ministerial explanation required joint satisfaction). Finally, judicial practice decided in favour of a strict interpretation of the law and did not treat the elements of permanence and seriousness as conjunctive criteria. To sum up, the 1977 amendment, although cautiously and with various qualifications, did re-establish the institutions of non-material damage and indemnification in Hungarian civil law.¹⁷

Judicial practice did a U-turn in 1981 when guiding principle 16 of the Supreme Court introduced the conjunctive evaluation of permanence and seriousness as a cogent rule, considering that "the scholars and practitioners of civil law – based also on international observations – announced their scruples and reservations due to the possible dangers of the limitless use of non-material compensation".¹⁸ When declaring that, the Supreme Court bore in mind the necessity of shaping a correct and uniform judicial practice concerning the claims for non-material damage in connection to bodily injuries and deterioration of health first of all. At the same time it eclipsed the category of psychical harm, because it is not at all characteristic of those to satisfy both criteria. Therefore, from then on it was not possible to claim these damages, and psychical harmony became only an extra colouring to provable material damages.¹⁹

Guiding Principle 16 was superseded by Guiding Principle 21 with reference to the necessity of facilitating the elaboration of judicial practice that would bear in mind the universal protection of personality and moral values, even without the modification of the provisions of the law, an endeavour already expressed in various decisions of the Supreme Court before issuing the Guiding Principle.

With the direction of Guiding Principle 21 showing itself in the decisions of the Supreme Court and other courts of law, the general protection of personality

¹³ Ibid. p. 41.

¹⁴ Bónis, Gabriella op. cit. p. 343.

¹⁵ Eörsi, Gyula: *Kötelmi jog (Law of contracts)*. Nemzeti Tankönyvkiadó, Budapest, 2007 p. 266.

¹⁶ According to Act VI of 1988 on Economic Associations there were two types of economic association without legal personality: general/unlimited partnerships and limited partnerships.

¹⁷ Bárdos, Péter: *Kárfelelősség a Ptk. rendszerében* p. 41.

¹⁸ Guiding principle no. 21 of the Supreme Court

¹⁹ Ács, Tamás: *A nem vagyoni kártérítés (Non-pecuniary compensation)*. Polgári Jogi Dolgozatok, 1993, p. 280.

became the 'living' norm of the institution of non-material damages – as the Constitutional Court put it.²⁰

The Civil Code section on non-material damage received the *coup de grâce* from the Constitutional Court, when it was annulled due to having been declared unconstitutional. The decision 34/1992 (VI.1) AB of the Constitutional Court abolished the rule of non-material compensation, but kept it alive as part of damages, since – as a consequence of the partial annulment – pursuant to Section 354 “a person causing non-material damage to another person” continued to be “liable for such damage and shall indemnify the aggrieved party for non-material damages”. According to the standpoint of the proposer of the motion, the provision of the law was unconstitutional because it regarded the damages to the personality as of less importance than material damages by laying down stricter requirements for claiming indemnification in case of the former. The petitioner raised another argument that the provision disqualified legal persons not participating in commercial activities from claiming non-material compensation.

The Constitutional Court argued in its decision that legal comparative analyses prove that civil law, as the primary law of civil autonomy, goes more and more beyond the regulation of pure pecuniary circumstances and, apart from their pecuniary rights, also brings under protection the personal rights of persons, reacting to their violation through the legal institution of non-pecuniary damages. It also emphasised that personal rights are inseparable from constitutional fundamental freedoms, and that the Constitutional Court departed from this close connection when judging the petition.

The Constitutional Court underlined in its decision more than once, that, in cases of violation of personal rights, the basis of the claim for damages is not independent unlawful conduct but the violation itself: “the condition for applying non-pecuniary compensation, the legal basis of the claim is the violation of a personal right”.

Personal rights as protected legal objects had appeared previously also, in the practice of the Constitutional Court. One decision had examined the prohibition of discrimination²¹ while others the ‘general personal right’ as the maternal right of all named and unnamed personal rights²². But the Court formulated only now its opinion that it would be an insult to equal dignity as a fundamental right and therefore unconstitutional, if civil law would prefer any layer or content of personality to another, or if it would have an essentially exclusive regulation regarding some personal rights. As for the motion in question, the Constitutional Court declared that the legal regulation contested by them does not provide protection of equal weight. In the opinion of the Court, civil law protects proprietary and other pecuniary rights with the principle of

full reparation by sanctioning all illegal damages, namely by pronouncing the general prohibition of causing damage; accordingly it does not discriminate between damages of major or insignificant value. As the institution of non-pecuniary damages does not entail material loss therefore neither full nor partial reparation has a meaning, so the Court drew the conclusion that the basis of the unlawfulness is not the damage but the violation of personal rights.

Taking all of that into consideration, the Constitutional Court pointed out that the regulation on the consequences of the violation of rights was not identical for non-pecuniary and for pecuniary damages, since the legislator limited non-material damages to cases with consequences of greater gravity, violating with this regulation the “ban on discrimination against equal dignity”, since it differentiated between persons protected by general personal rights, based on criteria which were not necessary conditions to personal rights violation.

The decision declared arbitrary the legal conditions of aggravating participation in social life or otherwise permanently or seriously aggravating life, regarding them as “inadequate criteria and unnecessary limitations of the protection of personal rights”. At the same time it declared that, if civil law recognised non-material damages as an instrument for the protection of personal rights, it should not make unnecessary and arbitrary stipulations, not even regarding the extent of the damage. Considering that personal damage is based on assessment that has no objective measure, it cannot therefore be adjusted to the consequences constitutionally through legal regulation; “in this regard only the common sense, the personal commitment and the moderation of the courts can have a defining role” – expressed Constitutional Court. In its decision labelled the “Abortion Decision”, the Court pointed out that the state’s obligation to respect and protect fundamental rights is not confined to the abstinence from the violation of these rights but also includes the obligation to guarantee the conditions necessary for their assertion.

Since the fundamental freedoms in the fundamental rights chapter of the Constitution comprehend the civil personal rights, the state has to shape the legal conditions necessary for the assertion and the protection of the fundamental rights so as to fulfil its primary obligation defined in Paragraph (1) of Article 8 of the Constitution, that is, to guarantee comprehensive, effective and institutional protection.²³ Let us see what instruments the Hungarian legal system provides at present to protect these fundamental rights.

²⁰ Decision 34/1992 (VI.1) AB of the Constitutional Court, 3.1.

²¹ Decision 9/1990 (V.25) AB of the Constitutional Court

²² Decisions 8/1990 (IV.23) AB and 23/1990 (X.31) AB of the Constitutional Court

²³ Decision 64/1991 (XII.17) AB of the Constitutional Court

2. The possible motivating factors for shaping the regulation: the functions and instruments of the protection of personal rights

The functions of the protection of rights in the field of civil law – apart from the early private revenge – were basically always centred on reparation of the damage, giving preference to safe-guarding the interests of the aggrieved person beside the partial appreciation of the interests of the person having caused the damage. Reparation of the loss can be achieved most simply and justly by the restoration of the original conditions – which must have also been the opinion of the creators of the Civil Code, as the Code clearly prefers the restoration of the original state to other modes of compensation.²⁴

It is easy to concede though, that the use of this function is nearly impossible in the domain of immaterial damages, and so the reparation function cannot be the primary one here. Reparation, if interpreted as having the aim to restore the normal social opinion about the aggrieved party, have a slight penal character from the perspective of the person causing the damage and so cannot be regarded as a primary civil law sanction.

When it concerns moral damages, prevention – i.e. the preventive and educative effect – can have a significant role mainly as a right protection function, though only in liability systems based on actionability, since, in the domain of objective liability, the educational effect is uninterpretable. Scholars examining the dogmatics of liability law, today just as much as before,²⁵ attribute great importance to this question.

Maybe the only valid counter-argument for considering preventive function as a primary aspect when shaping or assessing the regulations, can be that it is so easily muddled with the legal consequences of a repressive purpose, since the punitive functions and the realization of the punishment bear in themselves both special (regarding the punished person) and general (regarding the rest of society) prevention.

Nevertheless, the difference between punishment with a repressive and preventive purpose and the civil law sanction with an entirely preventive purpose is that, while in civil law the legal consequences can never exceed the extent of the damage, criminal law does not regard the damage but the degree of culpability as the determining factor for the amount of punishment. Consequently, civil law sanction sets the legal consequences primarily according to the damage caused and the degree of actionability, while criminal

²⁴ Paragraph (1) of Section 355 of the Civil Code

²⁵ See in: Marton, Géza: *A polgári jogi felelősség (The civil liability)*. Triorg, Budapest, 1992 p. 79.; and Eörsi, Gyula: *A polgári jogi felelősség kézikönyve (Manual of the civil liability)*. KJK, Budapest, 1966 p. 16.

law sanction does so according to the protected legal objects, social interest and the individual culpability.

As for the civil law sanction, it results in difficulties when it concerns non-material damages, since the legal consequence – i.e. the measure of the compensation – has to be established based on a damage the value of which cannot be determined as an amount. Objective criteria regarding the value of the damage cannot be set up, its extent is basically determined by the gravity of the injustice, but the manner, the effect and the results of the injurious conduct, the degree of actionability and the contribution of the aggrieved party also have to be assessed and weighed by the court of law. It is therefore left to the discretion of the court to decide what amount to grant as reparation, what amount would compensate for the harm suffered. As for the causality between the conduct having caused the damage and the damage itself, that can usually be proved only indirectly in case of moral damages.

Compensation for non-material damages usually means financial indemnification, but restitution in kind can also be granted based on Point c) of Paragraph (1) of Section 84 of the Civil Code, although it does not occur often in practice. Likewise, it is not typical but it is possible according to the law, to grant an annuity. The limitations derive from the redress character, among others, loss sharing, is not possible²⁶ and only the person himself whose personal rights were infringed is entitled to assert his/her claim; in case of death the legal successor can replace him/her only if the aggrieved person died after the commencement of the legal proceedings, i.e. the claim had already been submitted.

In the field of personal rights, violation one of the most important legal political features might be that, while breaching the rules of other branches of law would inevitably lead to sanctions as legal conclusions, civil law is at liberty to leave the aggrieved person to decide on enforcing (or not) compensation for the damages in the individual field of personal rights through the instruments of civil law, based on the individual characteristics of the harm.

The assertion of the civil law consequences in connection to the violation of personal rights stands on an objective basis – as opposed to liability formulas – and so it does not require actionability. Consequently civil law claims can be enforced without the element of 'culpability', which, in practice, makes demonstration (of proofs) notably simpler and shorter.

When determining the amount of non-pecuniary compensation it can be an important aspect that the legal basis for claiming damages does not depend on the extent of the injustice (i.e. the extent and gravity of the violation of personal rights), but the amount of the indemnity has to be adjusted to the gravity of the injustice and to subjective elements such as the manner and the results of the injurious conduct, the degree of actionability and the occasional contribution of the aggrieved party. Section 75 of the Civil Code provides protection of a

²⁶ Case decision of the Supreme Court: Pf. III. 20 199/1982

general character, declaring that "inherent rights shall be honoured and respected by everyone" and so everyone can demand that others respect his/her inherent/personal rights, which "are protected by law". Therefore any legal instruments in the Civil Code can be invoked in order to protect the personal rights either named or unnamed in the Code.

Based on Point e) Paragraph (1) of Section 84 of the Civil Code, a person whose personal rights have been violated is entitled to claim damages; moreover, depending on the circumstances of the case, he/she shall have the option to demand a court declaration of the occurrence of the infringement, to demand to have the infringement discontinued and the perpetrator restrained from further infringement, or to demand that the perpetrator make restitution in a statement or by some other suitable means (usually in the form of moral redress); furthermore he/she can demand the termination of the injurious situation and the restoration of the previous state by and at the expense of the perpetrator and to have the effects of the infringement nullified or deprived of their injurious nature. If the amount of the damages that can be imposed is insufficient to mitigate the gravity of the actionable conduct, the court is also entitled to penalise the perpetrator by ordering him to pay a fine to be used for public purposes.

Apart from compensatory damages, the instruments for personal rights protection can be invoked on an objective basis, and so they can be claimed if there is a causal relation between the violation of the personal right and the unlawful conduct. Actionability is not a condition here, while compensatory damages can be granted only for damages caused by actionable conduct. A further important difference between objective sanction and compensatory damages is that a claim to objective legal consequences does not expire – although when establishing the legal consequences the lapse of time should be taken into consideration –, whilst damage claim expires in five years, similarly to other contract-law relations.

As for the non-material damages, there is a major regulation deficit which we have to face: Guiding Principle 16 of the Supreme Court, the regulation having governed judicial practice and having given orientation on granting and evaluating non-pecuniary damages was superseded by Guiding Principle. 21, and, after Section 354 of the Civil Code, having given a kind of conceptual definition of immaterial damages, was also annulled, there was not much of a guideline left for the administrators of the law to hang on to. At present, the only regulation in this respect is that provided by Paragraph (1) and (4) of Section 355 of the Civil code.

Beside the uncertainty resulting from the regulation deficit, Hungarian legal practice stands on the theoretical basis that, in the field of non-pecuniary damages, in view of the premises of liability, the basis of the unlawfulness is not the damage but the violation of personal rights²⁷, and consequently the

claim for compensation can be grounded without having proven any harm. Although in the case of the violation of unnamed rights there are considerations to demand the demonstration of a non-pecuniary loss, this is unambiguous also for the outside world.²⁸

In our view, it is impossible to expect proof from the aggrieved person of immaterial damage, just as much as it is impossible to repair the damage. We believe that both the occurrence and the amount of the damage can only be estimated, and that any other solution could easily create an unforeseeable practice of the law.

Another frequent error in the practice of the law is when the range of personal rights is identified with the catalogue of fundamental rights in the Constitution, although the two are sharply separated, based on the closeness of their connection to the individual personality and on the distinctly immaterial character of a disadvantage or its lack. It would be advantageous for the clarification of the concept to extend the catalogue of the named personal rights in the Civil Code (as is planned by those preparing the re-codification), although it would be also important to communicate through the rule of law that, not only these rights receive legal protection, but legal protection is provided to named and unnamed rights equally.

3. Concerning immaterial damages resulting from personal rights violations and the explication of the lack of regulation

The main characteristic of non-pecuniary losses is that they cannot be assessed in pecuniary terms, and so compensation as a method of civil law protection is, in reality, inadequate in relation to the damage. Strictly speaking, non-material damages have no equivalent in money, and so restoration by paying for the damage is not really possible. The institution having penal roots historically also contributes to the contradiction.

From the civil law liability point of view, non-pecuniary compensation is a fictional case of pecuniary damages, at most, with the legislator having been granted considerable liberty for determining the form of liability. The only constitutional limitation to this liberty is that the rules of liability cannot result in discrimination between persons; the expediency of the equity or the professional-technical solutions staying within this limit do not raise constitutional questions.

²⁷ Decision 34/1992 (VI.1) AB of the Constitutional Court, III. 4.2.

²⁸ Rogers, W. V. Horton: Damages for non-pecuniary loss in a comparative perspective. Springer, New York 2001 p. 130.

After the annulment of the provision concerning non-pecuniary compensation²⁹ the administration of justice could only depend on judicial practice³⁰. In this way, non-pecuniary compensation was left without regulation, creating an even more problematic situation, though, even along legal norms, it had already been difficult to quantify and demonstrate non-material damages.

However, the regulation left open the possibility to compensate non-pecuniary damages: even though the legal institution no longer had a paragraph of its own, the Civil Code mentioning non-pecuniary loss amongst the general provisions on the forms of liability and the measure of damages in Paragraphs (1) and (4) of Section 355. According to these provisions, the person responsible for the damage shall be liable for restoring the original state, or, if this is not possible, or the aggrieved party refuses restoration for a substantiated reason, he/she shall indemnify the aggrieved party for material and non-material damages.

Section 355 of the Civil Code established a certain order of the methods of compensation for damages. The primary one is restoration of the original state, but, as in some cases it can happen that it is physically not possible or the aggrieved party refuses restoration for a substantiated reason or it would result in disproportionate expense for the person causing the damage, the second and third methods are indemnification in cash and compensation in kind. Thus, the regulation, instead of restoration, orders the replacement, substitution or reparation of the object damaged, but only if compensation in kind is justified by circumstances, particularly if the object of indemnification is produced by the person responsible for the damage or is otherwise at his/her disposal.

In a given case, it is the right of the court to decide on the method of compensation, to such an extent that it can even choose a method objected to by both the aggrieved and the responsible person, but which, in the opinion of the court, would be most suitable to eliminate the damage, satisfying the principle of reparation in full.

Among the rules of compensation, there is one more of great importance concerning non-pecuniary loss: establishing that, on the grounds of indemnification, compensation must be made for any depreciation in value of the property of the aggrieved person and any pecuniary advantage lost due to the damage as well as the indemnity or costs necessary for the attenuation or elimination of the material and non-material losses sustained by the aggrieved person. With that, the provision determined the four components of damage, non-pecuniary loss being the fourth component. According to this, violation of a personal right results in non-pecuniary damages, irrespective of the right being named by the Civil Code or not. When judging a claim, other factors are of

²⁹ Through placing its rules in Paragraphs (1) and (4) of Section 355 of the Civil Code, the legislator defined non-pecuniary damages as a form of liability, functioning as the instrument of general personality protection.

³⁰ Decision 34/1992 (VI.1) AB of the Constitutional Court

more importance than that of the right being named or unnamed – for example, whether only natural persons are entitled to the personal right, or it also lies with legal persons, or whether the claim for damages was submitted by the authorised person (which can only be the aggrieved person).

Personal rights are protected by the provisions of various branches of law concurrently. The Constitution collects the most important fundamental rights, and the Criminal Code also contains actual circumstances of violation of personal rights; and of course, civil law also protects them. That is why the Civil Code contained and still contains a whole chapter discussing personal rights.

Although the Civil Code also names many of the constitutional fundamental rights, there is a basic difference between the fundamental rights of the Constitution and the inherent/personal rights mentioned in the Civil Code by name. While the assertion of fundamental rights must be guaranteed by the state, in the case of the violation of personal rights, the Civil Code calls the Civil Law to its aid, placing the Civil Law instruments at the disposal of the individual to assert his/her claim, instruments having to have a restoring, repairing effect to achieve their legal political purpose.

The lack of regulation has a negative influence on the significance of non-pecuniary damages, and maybe also on the judicial practice, the latter meeting difficulties when trying to secure its position in this field; on the other hand we must remember that the colourful palette of non-pecuniary damages requires a complex judgement which is also adjusted to the given circumstances, and, therefore, has to consider individual characteristics, all that making it nearly impossible to formulate legal provisions for general and typical situations.

The new Civil Code removes the 'ill-fated' institution of non-pecuniary liability from the domain of torts and, creating a clean situation, establishes the institution of the 'injury fee' in its place, as the legal consequence of personal rights violation, as an indirect compensation and/or a penalty under private law, a pecuniary remedy for the infringement of personal rights.³¹

4. Concerning the planned amendments to the new Civil Code concerning the consequences of personal rights violations committed by the courts

As for the place of the instruments of personal rights protection in the new Civil Code, since non-pecuniary damages result from the violation of personal rights and so can be regarded as general instruments of personal rights protection, the re-creators of the regulations had to deal with the taxonomic

³¹ Bárdos, Péter (ed.): *Kézikönyv az új Polgári Törvénykönyvhöz (Manual for the new Civil Code)*. Complex Kiadó, Budapest, 2009 p. 845.

question of whether to put it among the rules of personality protection or place it with the rules of damages.

The Civil Code originally discussed (and does so even now) non-pecuniary liability – or at least what is left of it – among other forms of liability. The new Civil Code wishes to change that, and, as opposed to the connection to the legal technical form of enforcing liability, it regards the connection to the basis of the claim for damages as the primary relation. Consequently it regulates the sanctions for the violation of personal rights – among those the reparative non-pecuniary compensation and the punitive injury fee – together with the other rules concerning personal rights.

As for personal rights, the provisions of the new Civil Code repeat the content of the former regulation, declaring that everyone shall respect the personal rights of others and that legal persons are also entitled to personal rights – apart from those which, by virtue of their character, can only lie with natural persons. The new regulation defines as disqualifying circumstance the consent of the aggrieved person, with the reasonable stipulation that the consent cannot interfere with, or jeopardize, social interests,³² the rules of further causes precluding unlawfulness and therefore liability – as for example the permission of the law, lawful defence or emergency – are to be found in other parts of the Civil Code.

The new regulation provides general protection against the infringement of inherent rights with a general clause, by the strength of which all personal rights are under legal protection, either named or unnamed by the Civil Code. Apart from the set of rights mentioned by name, the new regulation differs from the previous one also in the range of legal consequences to be used. The fine (to be used for public purposes) is not among the sanctions any more, since this public authority sanction does not fit in the mentality of civil law and was rarely used in judicial practice in any case. The new law also introduces new institutions: the injury fee, a new civil claim can be enforced as an indirect compensation, a pecuniary remedy for personal rights violation, where the court does not have to examine (and require proof) whether the infringement has given rise to a detriment to the aggrieved party. Another new feature is the objective sanction that gives the aggrieved person the right to demand from the perpetrator the pecuniary advantage (if there were any) realised by the injurious conduct. Other sanctions of an objective nature already present in the Civil Code currently in effect have, for the most part, remained. The new Civil Code separates the sanctions applicable based on only the fact of the infraction of the law

³² The Expert Proposal summarizing the works of over 10 years of the High Commission for Codification removed this condition from the regulation as it considers that the institution of invalidity is regulated well enough in the Civil Code and provides enough protection for the social interest – see in detail in: Vékás, Lajos: Szakértői Javaslát az új Polgári Törvénykönyv tervezetéhez (*Expert Proposal for the draft of the new Civil Code*). Complex Kiadó, Budapest, 2008 p. 161.

(sanctions of objective nature) from the sanctions that require actionability (sanctions of subjective nature) and regulates them in separate sections, though it is possible to use them simultaneously for the enforcement of various claims at the same time.³³

The regulation would change significantly regarding the contracts or unilateral statements limiting inherent rights, since, according to the regulation in effect, apart from the above disqualification, they are regarded as null and void, meaning that one does not even dispose freely of his/her own personal rights. However, starting from the principle that the provisions regarding contracts should also be applied for unilateral statements, the new regulation would order the rules of the validity of contractual statements for the statements or documents containing arrangements (including renouncement) to apply in respect of personal rights. In this way, renouncing a personal right would be possible, but this right of disposal would be limited by the validity requirements of the contractual relations. Therefore, the causes of invalidity would be of the same significance as in the contractual relations regarding either voidability or nullity.

Following the general provisions, Sections 75-83 of the Civil Code contained provisions concerning a certain group of inherent rights. The new regulation would embrace these rights under a separate title “Named inherent rights” – on the one hand highlighting and separating them from the general group of personal rights, whilst, on the other hand, emphasising the existence of other personal rights to be exercised by means of the law, even if these do not cover situations of life so typical as to justify their listing, considering that the regulation cannot recite the whole list of possible personal rights. These unnamed personal rights originate in the Constitution and are entitled to protection, and so the instruments of right protection are applicable to them also, and their protection is ensured by the general clause mentioned above.

To sum up, both the recent and the planned, future regulation describes the inherent rights of special importance and significance mentioned in the Constitution by name, in an exemplificative manner: they mention the right to human dignity, to life, to physical and mental health, the requirement of equal treatment, the violation of the freedom of conscience and any unlawful deprivation of personal freedom.

Among the personal rights mentioned by name, the right to a fair trial before a legal tribunal has a distinguished significance, since the new regulation would highlight it, mentioning it by name, as an innovation.³⁴ The new regulation would remedy an old deficiency by including a right – already mentioned in the Code of Civil Procedure – among the rules of substantive law, where it belongs

³³ Sáriné dr. Simkó, Ágnes: Az új Polgári Törvénykönyv megalkotásának jelenlegi helyzete Magyarországon (*The current status of the new Hungarian Civil Code*). In: Romániai Jogtudományi Közlöny, pp. 87-91.

³⁴ Paragraph (1) of Section 88 of the ‘new’ Civil Code

dogmatically. In the wording of the Code of Civil Procedure: it is the duty of the court to enforce the right of the parties to a fair trial and their right to be tried within a reasonable time; if the court fails to do so, the aggrieved person – with reference to the damages in his/her fundamental rights – is entitled to claim compensation that ensures fair redress, provided that the injury is not remediable in the procedure of legal remedy.³⁵

It would correspond to the redress referred to in the procedural law, and would not disrupt the logic of legal regulation if the civil code, by installing this right among the personal rights, would make the simultaneous application of the injury fee and compensation possible.

Apart from that, the regulation is perfectly in accord with the content of the provisions of the Code of Civil Procedure,³⁶ although Title 3 discussing the sanctions for personal rights violation, establishes that the party whose right to a fair trial and whose right to be tried within a reasonable time was violated by the court cannot claim the application of legal consequences independent of actionability, but is entitled to claim injury fee and compensation, provided that the injury is not remediable in the procedure for legal remedy.

The Civil Code, similarly to the previous regulation, provides several possibilities for the person injured in his/her inherent rights to repair the consequences of the injuries,³⁷ among which we can find the ceding of the pecuniary advantage realised with the injurious conduct, a new feature that proceeds from the change in the concept of regulation. From a reparatory point of view, the importance of this sanction lies in the fact that, while the actionability of the perpetrator is necessary to both pecuniary and non-

³⁵ Section 2 of the Code of Civil Procedure

³⁶ "When determining the reasonable time for concluding the trial the subject and the nature of the litigation as well as the individual circumstances of the procedure have to be taken into consideration." and "The party who contributed to the protraction of the litigation by his/her own action or default shall not cite and assert his/her right for concluding the trial in a reasonable time."

³⁷ Based on the provisions of the Civil Code the following civil law claims can be asserted:

- a) to demand a court declaration of the occurrence of the infringement – a civil law claim that can be asserted in itself but naturally constitutes a basis for all further measures, a legal action qualified as condemning action instead of a declaratory one, as its aim is the declaration of an infringement;
- b) to demand to have the infringement discontinued and the perpetrator restrained from further infringement – practically resulting in the elimination of future infringements;
- c) to demand that the perpetrator make restitution and, if necessary, that the perpetrator, at his own expense, make an appropriate public disclosure for restitution – the form of the restitution (as a moral redress) being decided by the court of law;
- d) to demand the termination of the injurious situation and the restoration of the previous state by and at the expense of the perpetrator and, furthermore, to have the effects of the infringement nullified or deprived of their injurious nature;
- e) to have the pecuniary advantage realized with the injurious situation given over.

pecuniary damages just as much as to the entitlement to injury fee, the ceding of pecuniary advantage ensures the reparatory function on an objective basis.

Eventually, the regulation establishes a structure that draws the violation of the right to a fair trial and to be tried within a reasonable time under the protection of personal rights, which does not open the door to civil law claims independent of actionability, but provides an extra element beside the possibility of tort compensation, another form of subjective liability: the institution of injury fee, which the legislator considers an institution conforming with the regulation of the Code of Civil Procedure, and a regulation adequate to the legal concept of redress.

As we can see, the legislator gives with one hand and takes with the other. However, in the last section he takes an uncertain step towards objective liability, when he does not bar the possibility of granting an injury fee and/or compensation even if the injury is not directly ascribable to the person having acted on behalf of the court of law.

It is a condition of the compensation, similarly to pecuniary damages, that the damage must be in a causal relation with the unlawful conduct violating the personal right. Although there are characteristics of the conditions that are in relation to the non-pecuniary nature of the damages: in many instances the relation of cause and effect is indirect and the basis of the unlawfulness is not the damage but the violation of personal rights,³⁸ and – considering the immaterial character of the injury – it is left to the judge's discretion to decide whether any damage had occurred at all.³⁹

The legal category of the injury fee regarding non-pecuniary damages constitutes an alteration to the rules of the Civil Code, since the previous regulation⁴⁰ has known only four types of damages: depreciation in value of the property, the pecuniary advantage lost due to the damage, the non-pecuniary damages and the costs necessary for the attenuation or elimination of the material losses. The new regulation eliminates the provisions regarding non-pecuniary loss from the general rules of damages, classifies only three components of damages omitting immaterial losses,⁴¹ and introduces injury fee as a form of compensation for the violations of personal rights. According to the explanation attached to the restructured and conceptually transformed regulations, the old regulation basically requested the demonstration of material loss from the aggrieved party, leading to irresolvable problems in several

³⁸ Decision 34/1992 (VI.1) AB of the Constitutional Court, III. 4.2.

³⁹ As in the decision of the Constitutional Court. Nevertheless, the judicial practice followed by the Supreme Court demands the examination of the occurrence of the non-pecuniary loss, which entails the assessment of whether the physical or psychical life quality or the autonomy of the aggrieved person has changed adversely.

⁴⁰ Paragraph (4) of Section 355 of the 'old' Civil Code

⁴¹ Section 503 of the 'new' Civil Code – the components of the damage

instances and causing a great deal of uncertainty in judicial practice.⁴² When adjudicating an injury fee, in order to apply this sanction – a sanction depending on the actionability of the injustice – the court should examine two elements: whether any injustice occurred and whether the injustice is ascribable to the person having caused the damage. The essence of the change – in comparison to the old regulation – lies in not requiring the demonstration of damages or pecuniary loss from the aggrieved party, as opposed to what was required before.

As we could see, in cases of personal rights violation the aggrieved person is entitled to an injury fee for immaterial damages, applying the rules of damage liability and without having to prove any damage beyond the violation of personal rights.

As for the amount of the injury fee, the court takes into consideration the gravity of the injustice, the degree of actionability and the effect of the injustice on the aggrieved person when evaluating the circumstances. The law determines the link between the injury fee and the aggrieved person when it declares that the claim cannot be transferred or inherited – although if the aggrieved person had already submitted a legal action his/her successor is entitled to demand the injury fee.⁴³ Lastly, the law entitles the creators of intellectual products to claim the injury fee by extending the regulation to certain personal rights of the creators of intellectual products and property, rights which are defined in a separate law.

Concerning the way in which personal rights are enforced, the new regulation would retain the well-established solution that – unless there is any legal provision to the contrary – they may only be enforced personally, with the addition that a person with limited capacity may take action himself/herself in the protection of his/her personal rights.

The provision, according to which if the injurious conduct is committed by a person acting in discharging public authority, the aggrieved person can exercise his/her rights against the legal person responsible for exercising the public authority brings employee liability into the system of the Civil Code, sharing the dogmatic basis with a former theory interpreting and evaluating liability for damages caused while exercising administrative duties as a special case of employee liability.

To summarise: there are various claims which can be submitted in cases of the violations of personal rights; in certain cases the pecuniary advantage realised by injurious conduct has to be ceded even if it was realised without actionable conduct, but for the reparation of pecuniary damages, i.e. for the determination of liability, actionability is necessary.⁴⁴ The regulation in effect

⁴² Bárdos, Péter (ed.): *Kézikönyv az új Polgári Törvénykönyvhöz* p. 161.

⁴³ *Ibid.* p. 162.

⁴⁴ As opposed to the former regulation the legislator does not regulate liability here. According to the new concept, injury fee serves as the instrument to compensate non-

places the liability for the violation of personal rights with the general provisions of liability,⁴⁵ and the legal institution of the injury fee, given life and born in order to compensate for immaterial damages also stands on the basis of objective liability.

pecuniary damages; and liability is regulated in a separate section, fitting its importance – see Section 92 of the 'new' Civil Code.

⁴⁵ Section 92 of the 'new' Civil Code: A person who suffers damages as a consequence of the violation of his/her personal rights shall be entitled to demand compensation for damages therefrom, in accordance with the regulations relevant to the liability of the person having caused the damage.

Hungarian VAT cases before the Court of Justice of the European Union

ERCSEY, Zsombor

ABSTRACT *This paper examines a number of cases decided by - and pending before - the Court of Justice of the European Union and relating to the Hungarian VAT scheme. The most problematic matters are scrutinised, such as the deduction of input VAT and the conditions for tax refunds.*

The right to deduct input VAT in the case of an error in an invoice and regarding a reverse charge regime, and the application for a refund as per the corresponding Hungarian law and according to Council Directive 2006/112/EC, are discussed in detail regarding two very recent related judgements of the Court of Justice and an application filed by the European Commission.

The decisions and arguments of these cases affirm that the right to deduct should not be limited, and, within certain discretionary limits, it is provided that member states should decide whether excess VAT should be carried forward to the following tax year or refunded instead. the principles of the common system of VAT and, in, particular, the principle of tax neutrality, should be taken into account when the applicable national rules are determined. The withholding of VAT repayment should not cause serious liquidity problems and financial risk for the taxpayer and should, therefore, be refunded during the next fiscal year.

Taking into account the cases and their consequences, the Hungarian VAT regime and the provisions thereof should be reviewed, reconsidered, and, if necessary, amended.

1. Introduction

Indirect taxation has become more and more important over recent years and, accordingly, value added tax (VAT) has become a revenue-producing mainstay and the main source of government finance in more than 120 countries on five continents,¹ both in the developed and developing countries.

VAT, in my opinion, is one of the most effective, fair and simple measures of increasing government revenue. It has, therefore, spread to most countries of the world and has become the major sources for government finances in many of them. It is generally accepted that VAT can be even more efficient than

¹ Graetz, Michael J.: 100 Million Unnecessary Returns: A Fresh Start for the U.S. Tax System. In: Yale Law Journal 2002/11. p. 283.

income taxes and affects the savings decisions of individuals and the whole system of consumption. Further, this is the type of tax which was chosen half a century ago as the preferred consumption tax for the European Economic Community (EEC) in part due to the perceived advantage in dealing with cross-border sales within a single economic community.² Accordingly, the European Union wanted potential new members to charge at least a minimum VAT rate as a condition of accession.³ Thus a neutral and transparent turnover tax system has been established and the standard VAT rate must be at least 15%, with a reduced rate⁴ of at least 5%.⁵

Additionally, for instance, in the United States 'a new federal consumption tax, imposed at a rate of 10% to 15%, would finance the costs of eliminating more than 100 million American families – almost 90% of all filers – from the income tax rolls'.⁶

When any type of tax, including VAT is introduced, the pros and cons are also taken into account regarding compliance. It is obvious that there are various taxpaying motivations, and there are different reasons why people pay taxes. Many, taking into account audits and the related fines, pay only when the cost of noncompliance⁷ outweighs its benefits; others want to avoid feelings of guilt or shame, or want to comply with the provisions as in all situations.⁸ Tax fraud and related corruption, however, regarding VAT and especially VAT refunds is much more difficult to recognise and investigate, and, further, it is much more significant from the fiscal point of view.⁹ Besides, the effectiveness of any type of tax, including VAT, depends upon an efficient administrative audit to ensure compliance.¹⁰

In most tax regimes the two most important tax bases, direct taxes on income and value added taxes on consumption, are simultaneously in force, although their operation differs significantly. Income tax imposes tax on income

² Krever, Richard: Value Added Tax and Direct Taxation: Similarities and Differences. In: *British Tax Review* 2010/4. pp. 393–394.

³ McGee, Robert W.: *The Philosophy of Taxation and Public Finance*. Kluwer Academic Publishers, Boston/Dordrecht/London, 2004 p. 105.

⁴ Only for supplies of goods and services referred to in an exhaustive list.

⁵ The actual rates applied vary between member states and between certain types of product. In addition, the member states have retained separate rules regarding specific areas.

⁶ Graetz, Michael J. op. cit. p. 286.

⁷ The cost of tax compliance, on the other hand, includes the costs of tax record keeping, reporting, filing the tax return, and planning along with other costs.

⁸ Raskolnikov, Alex: *Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*. In: *Columbia Law Review* 2009/5. p. 689.

⁹ Szilovics, Csaba: *Csalás és jogkövetés az adójogban*. Gondolat Kiadó, Budapest, 2003 pp. 185–187.

¹⁰ Schenk, Alan – Oldman, Oliver: *Value Added Tax: A Comparative Approach*. Cambridge University Press, New York, 2007 p. 17.

transactions, while VAT is collected on a transaction basis. Therefore, the VAT hidden from the man-in-the-street, since the ultimate consumer does not know what proportion of the paid purchase price is tax,¹¹ and the consumer may blame the seller or service provider for charging a huge amount (even if the portion of tax is high). Additionally, many experts (e.g. Ballerini, Marc, Lehmkuhl) believe that VAT, as an indirect tax, is purely penal.¹²

In case a higher tax burden is levied on consumption (for instance, higher VAT rates are enacted), taxation of savings might be reduced and the taxpayers have wider discretion for their own decisions.

VAT in the European Union is a general, broadly based consumption tax¹³ assessed on the value added to goods and services.¹⁴ It applies more or less to all goods and services that are bought and sold for use or consumption in the European Union.

Regarding the introduction of VAT regimes, certain major issues arise, such as the VAT refund and the related conditions concerning the application for a refund and, in addition, the right to deduct input VAT. Let us review these matters according to Hungarian regulations and related EU perspectives.

2. Deduction of input VAT

According to the basic mechanism, the collected amount of VAT may be reduced by the taxed persons (i.e. VAT-registered enterprises) by the sum of tax paid to other taxable persons on purchases for their business activities. In other words, the VAT due on any sale as per the percentage of the sale price may be reduced by the total tax already paid at the preceding stage. Therefore, double taxation is avoided and tax is paid only on the added value at each stage of production and distribution.

The right to deduct input VAT and the related conditions set out by Hungarian law have been disputed since the current effective Hungarian VAT regulation¹⁵ (the Law on VAT) was introduced in 2007. This new piece of legislation, replacing the former Act on VAT,¹⁶ was enacted in order to harmonise with the corresponding EU legislation¹⁷.

¹¹ McGee, Robert W. op. cit. p. 180. et seq and p. 192.

¹² Crowe, Martin T.: *The Moral Obligation of Paying Just Taxes*. The Catholic University of America Press, Washington, D.C., 1944 pp. 72–77.

¹³ It is borne ultimately by the final consumer, and not charged on enterprises.

¹⁴ Accordingly, charged as a percentage of price.

¹⁵ Act CXXXVII of 2007 on Value Added Tax

¹⁶ Act LXXXIV of 1992 on Value Added Tax, which had been passed by Hungarian legislation before Hungary joined the EU and has been amended several times after it had entered into force.

¹⁷ The cornerstone of EU VAT legislation is Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax since 1 January 2007. This

2.1 The right to deduct input VAT in the case of an invoice error

A judgement was recently passed by the Court of Justice of the EU¹⁸ (the Court of Justice) in this regard: *Pannon Gép Centrum Kft* (the applicant) v *APEH Központi Hivatal Hatósági Főosztály Dél-dunántúli Kihelyezett Hatósági Osztály* (the tax authority).¹⁹ In this judgement, the Third Chamber of the Court of Justice ruled on 15 July 2010 that 'Articles 167, 178(a), 220(1) and 226 of Directive 2006/112/EC must be interpreted as precluding national legislation or practice whereby the national authorities deny to a taxable person the right to deduct from the VAT which he is liable to pay the VAT due or paid in respect of services supplied to him on the grounds that the initial invoice, in the possession of the taxable person when the deduction is made, contained an incorrect completion date for the supply of services and the numbering of the subsequently corrected invoice and the credit note cancelling the initial invoice were not sequential, if the material conditions governing deduction are satisfied and, before the tax authority concerned has made a decision, the taxable person has submitted to the tax authority a corrected invoice stating the correct date on which that supply of services was completed, even though the numbering of that invoice and the credit note cancelling the initial invoice are not sequential'.²⁰

The facts were the following. On 2 May 2007 the applicant entered into a contract with *Betonút Szolgáltató és Építő Zrt* (hereinafter *Betonút*), whereby the applicant undertook to carry out repairs to a bridge. The applicant entrusted the referred work to a sub-contractor, *J és B Pannon-Bau Kft* (the sub-contractor).

On 20 November 2007 the applicant issued to *Betonút* the invoices relating to the execution of the contracted work stating the date of completion was the date of issue of the invoice, 20 November 2007.²¹ At the same time the sub-contractor presented to the applicant two invoices related to the work, stating that the completion date would be 14 December 2007.

On 3 October 2007 the applicant entered into a contract with *Gebrüder Haider Építipari Kft* (Haider), whereby the applicant undertook to carry out storm sewer construction work. For the performance of that contract, the applicant entrusted the work to the same sub-contractor. Haider issued a certificate of completion of that work stating the date of completion to be 11 December 2007, and the final invoice which was issued by the applicant to Haider also specified that date as the date of completion of the work. The sub-contractor, for its part, issued an invoice to the applicant stating 18 December 2007 as the date of completion of that work.

The applicant, in its tax return for the fourth quarter of 2007, recorded these three invoices from the sub-contractor and exercised its right to deduct VAT.²² However, the tax authority²³ inspected this tax return and found that the completion dates contained in the work completion certificates issued by *Betonút* and Haider on the one hand and in the invoices issued by the applicant to those companies on the other hand, preceded the dates appearing in the invoices issued by the sub-contractor and used by the applicant to carry out a deduction of VAT. The applicant and the sub-contractor informed the tax authority that the completion dates stated in the invoices issued by the latter were incorrect.²⁴

On 29 September 2008 the sub-contractor cancelled the three incorrect invoices and replaced them with new ones. The work completion date stated in the new invoices was the same as that appearing in the invoices issued by the applicant.

However, by a decision of 21 January 2009, the first level tax authority ordered the applicant to pay the VAT relating to the services supplied by the subcontractor, which the applicant had deducted from the tax payable by him in the fourth quarter of 2007. Additionally, both a late payment penalty and a fine were imposed due to the non-fulfilment of tax obligations.²⁵

They argued that the applicant could not use the invoices initially issued by the sub-contractor for the purposes of deduction of VAT, since those invoices did not contain the correct date of completion of the work by the subcontractor.

directive is effectively a replacement of the Sixth VAT Directive of 1977 (Directive 77/388/EEC), which was amended many times over the years. The Directive contains a correlation table providing a bridge between the provisions of the Sixth and the new Directives.

¹⁸ The name of the European Court of Justice was changed by the Treaty of Lisbon in 2009.

¹⁹ See Case C-368/09 (*Pannon Gép Centrum Kft v APEH Központi Hivatal Hatósági Főosztály Dél-dunántúli Kihelyezett Hatósági Osztály*)

²⁰ *Ibid.*

²¹ Please note that it is common in Hungary for enterprises, to simplify the issuing of an invoice, take the date of issue of the invoice as the completion date, irrespective of the real date of performing their contractual obligations.

²² As per Section 119 of Act CXXVII of 2007 on Value Added Tax

²³ The competent tax office, the Hungarian Tax and Financial Control Administration (APEH and its territorial bodies) merged with the Hungarian Customs and Finance Guard, thus on 1 January, 2011 the National Tax and Customs Administration (NAV) has been established.

²⁴ According to Section 169 of Act CXXVII of 2007 on Value Added Tax, invoices shall contain, inter alia, the date of issue; a sequential number, which uniquely identifies the invoice; the date of supply, if other than the date of issue of the invoice.

²⁵ According to Sections 165-167 and 170-172 of Act XCII of 2003 on the Rules of Taxation.

Furthermore the new corrected invoices could not be used either as the basis for deduction of VAT, because the numbering had not been sequential.²⁶

By a decision of 29 April 2009 the tax authority upheld the decision of the first level tax authority of 21 January 2009.

In order to seek remedy, the applicant brought an action before the Baranya county court, which decided to refer the following questions to the Court for a preliminary ruling:²⁷

'(1) Do the provisions of national law contained in Article 13(1)(16) of the Law on VAT in force at the material time when the disputed invoices were issued and in Article 1/E(1) of Order 24/1995 of the Hungarian Ministry of Finance, specifically the provision in Article 13(1)(16)(f) of the Law on VAT, comply with the features of invoices, and the concept of an invoice, laid down in Article 2[(2)] of Council Directive 2001/115/EC?

In the event that the first question is answered in the affirmative:

(2) Is a member state's practice which consists of penalising formal defects in invoices intended to be used as a basis for the right to deduct by denying that right contrary to Article 17(1), Article 18(1)(a) and Article 22(3)(a) and (b) of the Sixth Directive?

(3) In order to be able to exercise the right to deduct, is it sufficient to fulfil the obligations laid down in Article 22(3)(b) of the Sixth Directive, or is it possible to exercise the right to deduct and accept the invoice as an authentic document only if, at the same time, all the details required under Directive 2001/115/EC are provided and all the obligations laid down in Directive 2001/115/EC are fulfilled?²⁸

The Court of Justice stated that, since all the facts of the main proceedings post-date 1 January 2007, only the interpretation of the provisions of Directive 2006/112/EC is relevant to the main proceedings. The fact that the national court has, formally speaking, worded the questions with reference solely to provisions of the Sixth Directive does not preclude the Court of Justice from providing to the national court a complete interpretation regarding the corresponding EU law. Accordingly, the Court provided the interpretation of Articles 167, 178(a), 220(1) and 226 of Directive 2006/112/EC.

The Court of Justice pointed out that the right to deduct provided in Article 167 et seq. of Directive 2006/112/EC is an integral part of the VAT scheme and

²⁶ There are two ways of issuing an invoice in Hungary. The most common is to filling out a form in the block of blank invoices. The other method is using an official certified invoice program. In the latter case, all issued invoices are numbered automatically, and no change can be made at all, furthermore no mistake can theoretically occur regarding the numbering. However, in case of the invoices filled out manually from a printed block, it can also happen that due to an administrative error, more pages are turned when issuing the next invoice. The challenged unfair and unlawful practice of the Hungarian tax authorities would be applicable in such cases as well accordingly.

²⁷ According to Section 155/A of Act III of 1952 on the Rules of Civil Procedure.

²⁸ Case C-368/09.. at [26]

in principle may not be limited. The right to deduct is exercisable immediately in respect of all the taxes charged on transactions relating to inputs.²⁹

The challenged services were in fact used for the purposes of taxed transactions, carried out by the taxable person in the member state concerned. It was stated that it is not open to member states to make the exercise of the right to deduct VAT dependent on compliance with conditions relating to the content of invoices which are not expressly laid down by the provisions of Directive 2006/112/EC.

Since the tax authority was already in possession of invoices corrected by the subcontractor when the first level tax authority denied the applicant the right to deduct the VAT, and the invoices contained all the details required by the Directive 2006/112/EC, all the conditions for deducting the VAT relating to the supply of services by the sub-contractor were satisfied.

Therefore, the Court of Justice declared in its ruling that national legislation or practice cannot deny to a taxable person the right to deduct input VAT due to an incorrect completion date for the supply of services and the numbering of the subsequently corrected invoice.

Accordingly, despite an error regarding the completion date indicated on the invoice, the invoice itself is appropriate for the taxation procedure. The only matter that shall be taken into account is that the taxpayer may exercise its right to deduct input VAT relating to the correct date of performance, and the invoice shall be corrected prior to the issue of the related decree of the revenue office.

In fact, 'an invoice performs three basic functions: (1) it contains the information needed to determine which VAT regime is applicable to a particular transaction, (2) it enables tax authorities to carry out enforcement controls, and (3) it allows the purchaser to prove their right to deduction'.³⁰ Accordingly, the invoice was referred to as 'the ticket of admission to right to deduct' (AG Sir Gordon Slynn).³¹

This judgment will definitely be referred to in similar cases, and the Hungarian revenue office should take it into account when deciding on the deduction of input VAT.

²⁹ See Case C-62/93. (BP Soupergaz) [1995] ECR I1883; Joined Cases C-110/98. to C-147/98. (Gabalfria and Others) [2000] ECR I1577, and Joined Cases C-439/04 and C-440/04 (Kittel and Recolta Recycling) [2006] ECR I6161.

³⁰ Case C-123/87. (Lea Jorion, nee Jeunehomme v Belgian State) [1988] ECR 4517.

³¹ Famously said by AG Sir Gordon Slynn. Cited in Ainsworth, Richard Thompson: *Biometrics: Solving the Regressivity of VATs and RSTs with "Smart Card" Technology*

2.2 Deduction regarding a reverse charge regime³²

In a judgement passed on 30 September 2010,³³ the Court of Justice declared that 'Articles 167, 168 and 178 of Directive 2006/112/EC must be interpreted as precluding the retroactive application of national legislation which, in the context of a reverse charge regime, makes the deduction of VAT relating to construction works conditional upon the amendment of invoices for those services and the submission of a supplementary, amending tax declaration'.³⁴ The competent tax authority definitely has all the information necessary to establish that the taxable person is liable to VAT, and to ascertain the amount of tax deductible.³⁵

The facts regarding the main proceedings were the following. On 9 June 2006, the applicant in the main proceedings (Uszodaépítő Kft., hereinafter, the taxpayer) concluded a contract for construction works with NÁS MPS-4 Kft, the developer (hereinafter the developer). The taxpayer carried out the works with the participation of various subcontractors. The construction work began in the spring of 2007 but came to a halt in the summer of 2007 due to financial problems. The invoices related to the work completed at that point were all issued. Both the taxpayer and its subcontractors complied with their obligations as regards the declaration and payment of VAT under the previous VAT law.³⁶

On 14 February 2008, following the entry into force of the new VAT law,³⁷ the applicant in the main proceedings, the developer and the subcontractors, by a joint decision and in accordance with Subsection 269(1) of that law,³⁸

³² A reverse charge is a self-assessment obligation imposed on businesses purchasing taxable supplies.

³³ Case C-392/09.

³⁴ C-392/09., paragraph 46.

³⁵ The wording of the ruling is almost just the same as this 46th point of the reasoning.

³⁶ Act LXXIV of 1992 on value added tax

³⁷ According to Article 70/A of Act CXXVII of 2007 on Value Added Tax entered into force on 1 January, 2008, the provisions of the previous Hungarian VAT regime contained harmonised provisions with the Sixth Council Directive and the amendments thereof adopted before 1 January, 2005.

³⁸ 'In the event if this Act [the Law on VAT] and the [former] VAT Act both contain provisions affecting the same party or parties and concerning the same rights and obligations relating to self-assessment based on the same facts, the rights and obligations relating to self-assessment shall remain to be governed after the time of this Act entering into force exclusively by the provisions of the VAT Act, unless this Act contains provisions to abolish the obligations (...), or provides for less stringent obligations, or introduces new rights or additional entitlements. In the latter case, the rights and obligations may be established and applied - upon the mutual consent and decision of all parties concerned - under the relevant provisions of this Act, even if they originate from any period before the time of this Act entering into force (...), provided that all parties concerned supply a written statement on this decision in advance,

requested that the provisions of the new VAT Law be applied to the work carried out under both the contract between the applicant in the main proceedings and the developer, as well as the contract between the applicant and its subcontractors.

Following an examination by the tax authority³⁹ of the VAT declaration made by the taxpayer for the financial year 2007, by a decision of 23 May 2008 the authority pointed out a VAT debt of HUF 52 822 000 in respect of the period from April to September 2007.⁴⁰ The revenue office stated that the invoices issued by the subcontractors did not provide a basis for the applicant's right to deduct, since those invoices did not comply with the provisions of the Law on VAT, and because of the declaration of 14 February 2008, the new VAT law's provisions relating to the reverse charge procedure were applicable retroactively to the invoices issued during the financial year of 2007. Accordingly, the taxpayer could have exercised its right to deduct if it had amended its VAT declaration, and its subcontractors had amended their issued invoices as well. This decision of the Hungarian revenue office was upheld by a decision made on 5 September 2008.

The taxpayer filed a lawsuit against the Hungarian revenue office in the Baranya county court (hereinafter, the national court) for the annulment of the referred decision. The national court considered that Subsection 269(1) of the new VAT law infringes Articles 17 and 20 of the Sixth Directive and various general principles of EU law, since it retroactively cancelled the taxpayer's right to deduct lawfully exercised thereby in accordance with the previous VAT law.

Therefore the national court suspended the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:⁴¹

conveying their mutual understanding, to the state tax authority, where these statements must reach the competent branch of the state tax authority by 15 February 2008. (...)'

³⁹ According to Subsection 86(1) of the Act XCII of 2003 on the Rules of Taxation, 'In order to combat attempts to evade taxes and any unlawful activity for claiming central subsidies and tax refunds, the tax authority shall conduct regular audits of taxpayers and other persons involved in the taxation system. The objective of audits is to enforce the provisions of tax laws and other relevant legislation and detect any violation or infringement of these regulations. The tax authority shall investigate the facts and circumstances of any alleged violation or infringement of tax regulations and gather data and information as evidence to support such allegations in the ensuing proceedings.'

⁴⁰ As per Subsection 170(2) of Act XCII of 2003 on the Rules of Taxation, 'A tax difference established to the debit of a taxpayer shall be considered tax arrears; in the case of self-assessment, it shall be regarded as such only if the tax difference has not been paid up to the due date or if central subsidies have been claimed'.

⁴¹ According to Section 155/A of Act III of 1952 on the Code of Civil Procedure, the court may request the Court of Justice to provide a preliminary opinion in accordance with the Treaty establishing the European Community. The court shall request the European Court of Justice to provide a preliminary opinion by way of a ruling, and shall

'(1) Is a provision of a law of a member state, which entered into force on 1 January 2008, after the right to deduct had arisen, and which, for the purposes of the deduction of VAT paid and declared in relation to supplies of goods or services made in the 2007 financial year, requires the amendment of the content of invoices and the submission of a supplementary declaration, compatible with Articles 17 and 20 of the Sixth Directive?

(2) Is the measure laid down by Paragraph 269(1) of the new VAT Law, according to which, if the conditions set out in that paragraph are met, rights and obligations must be determined and applied in accordance with the provisions of that Law, even where they arose before the entry into force thereof, subject to limitation, compatible with the general principles of [European Union] law, and, in particular, is it objectively justifiable, reasonable, proportionate and consistent with the principle of legal certainty?'⁴²

The Hungarian government argued that proceedings raised a question of the interpretation of national law, not European Union law, since the retroactive application of the provisions of the new VAT law is based exclusively on the common decision of the taxpayer and the other involved parties as per the declaration referred to above, and the main proceedings at the national court arose from the misinterpretation by the taxpayer of the transitional provisions of the Law on VAT.

The Court of Justice stated that despite the national court's reference concerns, the interpretation of Articles 17 and 20 of the Sixth Directive, the Court of Justice shall provide to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, irrespectively of the exact wording of the asked questions. Furthermore, only the interpretation of the provisions of Directive 2006/112/EC is relevant to the present case, since in accordance with Articles 411 and 413 of Directive 2006/112/EC, that directive repealed and replaced the Sixth Directive from 1 January 2007, and the relevant facts in the main proceedings post-date 1 January 2007. Thus, it must be held that the first question referred concerns the interpretation of Articles 167 and 168 of Directive 2006/112/EC, which correspond to the provisions of the Sixth Directive mentioned in the order for reference, and, furthermore, that it also concerns the interpretation of Article 178 of Directive 2006/112/EC.

Thus, the national court asks whether Articles 167, 168 and 178 of Directive 2006/112/EC preclude national legislation, which, in the context of the retroactive application of new provisions relating to the reverse charge procedure, makes the deduction of VAT conditional upon the amendment of

simultaneously suspend the proceedings. The court shall define the matter for which the preliminary opinion of the Court of Justice is required, and shall outline the facts - to the extent required - and the pertinent passages of the Hungarian legal system.

⁴² Case C-392/09., paragraph 20.

invoices for the services provided before the new law entered into force and the submission of a supplementary tax declaration.⁴³

'[T]he right to deduct provided for in Articles 167 and 168 of Directive 2006/112/EC is an integral part of the VAT scheme and in principle may not be limited',⁴⁴ as stated by the Court of Justice.⁴⁵ Therefore the fact that the new VAT law was applied instead of the previous one due to the sole decision of the taxpayer can not affect the right to deduct the input VAT paid, which arises directly from Articles 167 and 168 of Directive 2006/112/EC.

Furthermore, taking into account that the issue is related to a reverse charge procedure, the Court of Justice argued that only Article 178(f) is applicable regarding the procedures for exercising the right to deduct VAT. Thus, only the formalities laid down by the member state within the options determined by the referred Article have to be fulfilled by the taxpayer in question, in order to be able to exercise his right to deduct. Additionally, due to the principle of fiscal neutrality, deduction of input tax has to be allowed 'if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements'.⁴⁶

The European Commission pointed out that, the formal requirements imposed in the main proceedings could make the taxpayer unable to exercise the right to deduct thereof, although the revenue office was in possession of all the information necessary to establish that the taxpayer was liable to VAT, so no additional conditions should have been introduced.

Taking into account all the facts, arguments and circumstances, the Court ruled as stated above,⁴⁷ and declared that, due to the answer to the first question, there was no need to answer the second question asked by the national court.

3. Application for VAT refund

3.1 Application for the refund of excess value added tax

The eligibility for refunds shall be determined according to the domestic rules of the member states for VAT deductions, although certain expenditures may be excluded or certain conditions imposed.

According to Hungarian law, at the end of the tax year, taxable persons may apply for the refund of excess VAT only insofar as that excess exceeds the amount of the VAT payable on transactions which have not yet actually been

⁴³ Ibid. paragraph 33.

⁴⁴ Point 34 of the referred judgement.

⁴⁵ See Case C-29/08. (Skatteverket v AB SKF), Case C-4/94. (BLP Group Plc v CC&E), Case C-408/98. (Abbey National Plc v CC&E)

⁴⁶ Case C-392/09. paragraph 39.

⁴⁷ The Operative part of the judgment can be read also in the Official Journal of the European Union, C 317/10, 20.11.2010

paid for.⁴⁸ However, this provision as per the standpoint of the European Commission is not in compliance with Directive 2006/112/EC. Therefore an action was brought by the European Commission against Hungary on 1 June 2010.⁴⁹

In this particular case the European Commission declared that the Republic of Hungary has failed to fulfil its obligations under Directive 2006/112/EC by requiring taxable persons, whose tax declaration for a given tax period records an excess,⁵⁰ to carry forward that excess or a part of it to the following tax year where the taxable person has not paid the supplier the full amount for the purchase in question. As a result of that obligation, certain taxable persons whose tax declarations regularly record an excess may be required more than once to carry forward the excess to the following tax year.

As per this provision, a taxable person may not apply for a refund of the part of the excess corresponding to the VAT chargeable on purchases which have not been paid for, but must carry it forward to the following tax year. If, at the end of the tax year, the amount of the excess VAT is less than or equal to the amount of the VAT chargeable on purchases not paid for, the taxable person must carry forward the whole of excess VAT to the following tax year. Thus, input VAT may be deducted only via offsetting against output VAT, and any reclaimable excess VAT that is higher than the VAT due to the authority, must be carried forward. The same procedure shall be followed at the end of the following tax year: the legislation places no temporal limit on the procedure with the result that it is possible for a taxable person to be required to carry forward excess VAT indefinitely.

If, at the end of the tax year, taxable persons have a credit of VAT, they may apply for the refund of this excess VAT. However, the refund will only be made insofar as this credit exceeds the amount of the VAT payable on transactions, which have not yet actually been paid for.

The Commission does not dispute that Article 183 of Directive 2006/112/EC grants the member states discretion whether to carry forward or refund excess VAT. However, the member states may only exercise that discretion in accordance with the principles of the common system of VAT as a whole and in particular the principle of tax neutrality.⁵¹ As a provision which impedes the full

⁴⁸ According to Section 131 of Law on VAT, a domestic taxable person may make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same or previous period or periods, the right of deduction has arisen. If the margin calculated accordingly is negative, the taxable person established in the domestic territory may reclaim the difference from the state tax authority under the conditions and method set out in Section 186.

⁴⁹ Case C-274/10 (Commission v Hungary)

⁵⁰ As per Article 183 of Directive 2006/112/EC.

⁵¹ The Court of Justice passed judgements regarding the principle of fiscal neutrality, stating that deduction of input tax shall be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal

application of the principle of tax neutrality, Article 183 of the directive, which allows member states to carry forward a VAT excess to the following year once, must be interpreted narrowly and may not serve as a basis for the adoption of national provisions contrary to the principle of tax neutrality or the purpose of the deduction mechanism.⁵²

Accordingly, as indicated on the homepage of the European Commission, '[a] taxable person whose input VAT exceeds his output VAT is entitled to a refund of the excess from his national treasury. However, member states may decide to carry forward the excess to the next taxable period and offset it against tax due in that period'.⁵³

The withholding of the VAT excess as per the contested Hungarian provision has such negative effects on the taxpayer for, inter alia, the following reasons: A surplus of deductible VAT over VAT to be paid is an amount due to the taxable person. The postponement of payment of that amount reduces the profitability and/or liquidity of the taxpayer and increases his commercial risk. The VAT due on the goods or services supplied by the taxpayer shall be paid, even if the counter-value thereof has not been paid. In this regard, the Court of Justice ruled that the 'method of refund adopted must not entail any financial risk for the taxable person'.⁵⁴

Furthermore, the withholding of the VAT excess constitutes a burden not only for the taxpayer in the position of seeking a refund, but also on the taxable person who is the other party to the taxable transaction (so the seller). The decrease in the buyer's liquidity leads to an increasing risk that the seller will not receive the consideration for the goods or services supplied or will receive it late, while, regardless of whether he does or not, the seller is required to hand over the VAT on his supply of goods or services.

In the view of the Commission, the fact that the legislation places a burden on taxable persons cannot be offset by the imposition of further burdens on taxable persons. The balance which the legislation seeks to attain can only be achieved if, to offset the burden falling on the taxable person in the position of debtor, that is to say, to offset the obligation to pay the tax, it provides for the

requirements (see Joined Cases C-95/07. and C-96/07. (Ecotrade) [2008] ECR I-3457, paragraph 63., referred to also in point 39 of Case C-392/09., as it was detailed above).

⁵² In accordance with the principle of neutrality, the purpose of the deduction mechanism is to free a trader entirely from the burden of VAT which he has to pay or has paid in the course of any of his business transactions. That principle precludes the member states from imposing requirements for the refund of excess VAT which entail a burden on the taxable person and affect that person's financial position or liquidity or commercial decisions.

⁵³ http://ec.europa.eu/taxation_customs/taxation/vat/traders/vat_refunds/index_en.htm [2011.02.22.]

⁵⁴ Case C-78/00. (Commission of the European Communities v Italian Republic). Cited by Schenk, Alan – Oldman, Oliver: *Value Added Tax: A Comparative Approach*. Cambridge University Press, New York, 2007 p. 170.

possibility for the taxable person in the position of creditor to obtain a refund of the VAT paid when he was in the position of debtor.

Finally, given that Article 183 of the directive only provides for the excess VAT to be carried forward once 'to the following tax year', the contested Hungarian legislation breaches that article in that it does not provide for the taxable person to obtain a refund of the excess at the latest by the end of the second tax year. Moreover, the Hungarian legislation, essentially, by reducing the buyer's liquidity, is in its turn reducing the likelihood of the refund being made and does not guarantee that the taxable person will ever recover the excess. If the taxable person ceases activity without paying for all purchases made because he is insolvent, there is no means of recovering the VAT chargeable on transactions which were not paid for, as the State will ultimately retain it.

Having regard to the arguments mentioned above, the Commission takes the view that the Hungarian legislature has exceeded the discretion granted to it, and has infringed Article 183 of the Directive 112/2006/EC by adopting legislation on the requirements to be met for the refund of excess VAT which infringes the principle of tax neutrality and allows the excess to be carried forward year after year.

4. Concluding comments

The VAT regime is one of the most harmonised types of tax in the European Union. The rules, operation, exemption methods and exempt goods and persons are very similar. However, there are still certain open issues which are regulated differently by member states, for instance the number and level of tax rates⁵⁵, standard and preferential rates, administrative measures⁵⁶, conditions of tax refund⁵⁶ and the right to deduct input VAT – and, further, the detailed provisions regarding the formal elements of the invoice. Accordingly, despite the schema that Hungarian VAT legislation is harmonised with EU regulations, the applicable directives, and the corresponding provisions, certain problems regarding practice and enforcement occur.

I do believe that, in order to guarantee the four freedoms of the Single Market⁵⁷, the same VAT obligations should be enacted at national level regarding the same types of enterprise in all member states of the EU. This goal, however, cannot be achieved without the related pieces of EU legislation, and so standardised, detailed provisions should be put in place and generally

⁵⁵ The standard VAT rate, as discussed must be at least 15%, and the reduced rate at least 5%, otherwise the member states have wide discretion to determine the exact rate.

⁵⁶ The exact rules shall be determined by the domestic rules of the member states.

⁵⁷ The Single Market or Internal Market of the European Union (formerly the Common Market) aims to guarantee the free movement of goods, capital, services, and people within the 27 member states thereof.

implemented in addition to the interpretation work of the Court of Justice ensuring the equal application of EU law across all member states.

It is obvious that, according to the judgements of the Court of Justice, the right to deduct provided as per Directive 2006/112/EC may not be limited, and cannot be refused from a taxpayer due to a formal error in an invoice when it is corrected before an audit by the tax authorities. The invoice allows the purchaser to prove his right to deduct and from that point of view cannot be challenged or dismissed due to an error, even if it is related to the date of completion.

Furthermore, despite certain discretion being allowed to member states to decide whether excess VAT should be carried forward to the following tax year or refunded, it should be exercised in accordance with the principles of the common system of VAT and in particular the principle of tax neutrality. However, the withholding of the VAT excess as in a contested Hungarian provision may cause the taxpayer serious problems of liquidity and financial risk, since the postponement of payment may last for more than a year and the VAT to be refunded may be carried forward through more than one fiscal year.

Taking into account the cases and their consequences discussed in this paper, the Hungarian VAT regime and its provisions, despite their being harmonised with the corresponding EU provisions, should be reviewed, reconsidered, and, if necessary, amended.

Criminalistic and Criminal Procedural Lessons from an Armed Robbery

FENYVESI, Csaba

ABSTRACT Once in a while, amongst the daily, routine and commonplace cases in the life of law enforcement officers working on criminal procedures, comes an unexpected encounter with 'a gem' which remains in the memory for a lifetime: for the police, for the prosecutors conducting the investigation and for the court which finally delivers the verdict - as well as for the defendant and his lawyer!

The brightness and radiance of the 'gem' goes beyond the narrow circle of participants. Given the opportunity to establish certain facts and to reach conclusions, it might well serve as a guiding light for other 'treasure-seekers'. Both from a criminalistic and a criminological perspective, it conveys messages well worth examining, recognising and communicating. The present study attempts to do so, aiming at a variety of goals:

- *Firstly, it may provide criminal investigators with useful data to avoid similar, future 'faux pas';*
- *Secondly, it clearly highlights the differences between forensic science and legal evaluations – a very necessary distinction;*
- *Finally, we can contribute to the avoidance of 'judicial murder', the eternal desire of all active participants in a constitutional state.*

1. Introduction

Once in a while, amongst the daily, routine and commonplace cases in the life of law enforcement officers working on criminal procedures, comes an unexpected encounter with 'a gem' which remains in the memory for a lifetime: for the police, for the prosecutors conducting the investigation and for the court which finally delivers the verdict - as well as for the defendant and his lawyer!

The brightness and radiance of the 'gem' goes beyond the narrow circle of participants. Given the opportunity to establish certain facts and to reach conclusions, it might well serve as a guiding light for other 'treasure-seekers'. Both from a criminalistic and a criminological perspective, it conveys messages well worth examining, recognising and communicating. The present study attempts to do so, aiming at a variety of goals:

- Firstly, it may provide criminal investigators with useful data to avoid similar, future 'faux pas';

- Secondly, it clearly highlights the differences between forensic science and legal evaluations – a very necessary distinction;
- Finally, we can contribute to the avoidance of ‘judicial murder’, the eternal desire of all active participants in a constitutional state.

2. Case description

We consider the armed robbery in Alkotmány Street, Pécs, to be such a ‘gem’ and we propose to refer to it as ‘the BS case’

On a nice, warm summer day (July 19th) in 2005 - at about 8:15 in the morning - the main police station was informed of an armed robbery at the Lottery Shop facing the Spar Supermarket in Alkotmány Street. The duty officer performed the usual, correct procedures and informed the patrol cars cruising around the city. They arrived on the scene within a couple of minutes. Whilst collecting data they learnt that the robber had driven away from the scene in a wine-coloured Renault Thalia. From that point on the patrols paid close attention to this type of car, but the immediate search produced no trace of the culprit.

The investigation started very intensively with the shop’s only employee (TJSz, a lady in her 20s) being closely questioned. At the time of the crime, only the takings of the previous day and of the morning in question were in the shop, said the victim – some ft 130,000. The employee opened the shop at 0755, by which time there were already two customers outside waiting for her to open: an elegant lady (30-40 years of age) and ‘Söprös Jóska’ [Jóska the sweep] the caretaker of the house behind the shop, who must have arrived and left immediately before the robber. Soon afterwards a man entered the shop with both a cap and a jacket-hood over his head. His mouth was also covered by the zip of his three-quarter length cotton/down-filled jacket pulled up to his mouth. He entered the shop alone and closed the door. Then he demanded that the lady hand over the money and produced a gun-like object. Placing it into his left palm, he showed it to her and again demanded the money, saying: ‘I am a heroin addict; I will maim you for life’. The victim took the money, a total of ft 70,957, out of the cash-desk and put it into the plastic bag brought by the robber. At this point he opened the door and left, having repeated several times ‘I’ll maim you’ and ‘Don’t call the police, or I’ll come back’. A couple of minutes later the victim opened the door and ran to the ball-bearing sales outlet next door, where she recounted the events to the two men there. One of them, KZ, the shop-owner, ran after the robber, whilst the other, FL, telephoned the police.

K.Z. could not catch the robber, who had parked his car behind the Spar Supermarket facing the lottery shop, and who had left, heading north. Another witness, TL, actually saw a piece of cloth hanging out of the boot of the car, so hiding the number-plate.

3. The order of the investigation

3.1 The beginning

An immediate examination of the crime scene produced traces of odour and 5 part-footprints in front of the counter where the robber had stood. The investigating officers also took away the door handle which had been touched and forwarded it to the Institute for Forensic Science for further (most likely DNA) analysis.

Soon afterwards, a check on all Renault owners in Baranya County was started. Based on car registration files, the police - according to their report – excluded almost all owners ‘with absolute certainty’ from this list of possibilities. Only 3 remained, one of whom was BS (subsequently charged) who resembled the descriptions given by the victim and witnesses.

3.2 Personal background and statements of BS

BS, aged 51 at the time of the crime, had lived in Pécs all his life and had been educated at a vocational school for the catering trade. Having failed to enter higher education, he obtained a certificate as *shop assistant/waiter/shop manager*. Following the change of regime, he repeatedly started different businesses and had several jobs, mainly in catering and the food trade. Finally, he worked as a waiter, although, being unwilling to travel out of town and unable and unwilling to take heavy manual labour, when arrested he was unemployed.

Divorced and with no criminal record, he was living with his parents. He kept regular contact with his daughter, born in 2003, who was being raised by her mother. Apart from a monthly payment of ft 12,000 as child support, he also had to pay ft 25,000 per month for the lease of his Renault Thalia car.

He came under suspicion due to the car, a Renault Thalia produced in 2001. On the morning of the offence, the 19th of July 2005, his car was booked to be serviced. He claimed to have left his parents’ flat, situated no more than a few minutes away from the lottery shop, at around 7:40. He had an appointment for 8:00 at the service station belonging to Renault Nyitrai, the official Renault distributor for Pécs and situated on the eastern edge of the town. He knew, however, that he would be somewhat late due to the morning rush-hour traffic. At about 8:00 he was only on the Zsolnay Domb [Zsolnay Hill], according to his account, still 3-4 km away from his destination. He also remembered listening to the radio in his car which gave him the exact time.

The route which he took was along Kodály Street, Aradi Vértanúk Street, through the tunnel, down Kalvária Street, across Ágoston Square and Búza Square and along Zsolnay Vilmos Road to the Budai Vám crossing. He arrived some time after 8:00 at the service-station, where vehicles approaching the

entrance can only enter the site through a gate. At the time of his arrival the barrier was down, closing the entrance, and so the defendant had to ask an employee to let him in. He subsequently drove to the back towards the garage, where he eventually parked in front of the workshop. Here he spent some time talking to an employee, GF, and to a body-shop mechanic, BS, the latter being an acquaintance following an earlier repair to the car. He filled in an order-form and handed over the car to MP.

After this he walked to the Post Office on Pushkin Square, where, it was confirmed, he had posted a cheque for ft 320. From here he took the local bus N° 21 towards the city centre.

As regards clothing, on the 19th of July BS wore dark brown trousers, dark brown shoes, a white T-shirt and a thin, black, so-called waiters' jacket with long sleeves. He declared that he had never owned either a cotton/down-filled jacket or a cap; neither had he worn anything similar.

He also said that, on the 18th of July 2005, the day before the robbery, he had visited the lottery shop in Alkotmány Street between 4 and 5 p.m. That day the 'Dunántúli Napló' (the local daily newspaper) had failed to print the winning numbers of the Scandinavian lottery and so, wishing to check his ticket, he had dropped into the lottery shop near his flat.

At the time of the crime he was 1.73m tall with fair or auburn hair and blue eyes; he weighed some 104 kg. His left leg was 2 cm shorter due to complications from an old traffic accident – which, he claims, restricts his movement and prevents him from being able to run.

3.3 Anonymous letters

On the 25th of July 2005 an unknown person sent an envelope to the Central Police Station in Pécs with the following: 'Robbery at lottery HPM 540 GK' [where GK is short for motor-car]. As BS's car had the registration number HPM 554, investigators concluded that the writer of the letter must have seen the culprit's car being driven away and had probably mistaken the number due to the speed of the vehicle.

On the 6th of January 2006, after the investigation had been closed, another anonymous letter was delivered to the Police HQ in Pécs, this time accusing JSz a Pécs resident who, according to the note, drove his father's Renault Thalia (also wine-coloured) and was said to have boasted about committing the robbery at the lottery shop. In the course of checking the data, the police excluded this person from the list of possible suspects, mostly on account of a mismatch in descriptions.

3.4 Personal Descriptions

The descriptions given by the victim and the eye-witnesses resembled BS. According to the testimony of the victim, SzTJ, she had seen the robber's eyes in spite of the fact that most of his face was covered by his jacket collar (the zip pulled up to his chin) and his eyebrows were hidden under his cap – 3-4 cm of one side of an eye were still visible. She thought that his eyes were probably grey-green – but certainly not brown. She had been sure of that. His eyes seemed to be wrinkled and suggested to her that he could be about 40-45 years old. His skin was white and he did not wear gloves. She did not notice any trademarks – either on his jacket or on his cap and did not see rings on his hands, any other jewellery or anything especially distinctive. She recalled his trousers as dark, but could not tell their colour, nor had she noticed his shoes. As for his build, the victim estimated him to be 170-175 cm tall, with a potbelly and a neglected look. She described his movements as cumbersome, bear-like, 'just like the movements of a fat man'.

The employee in the next-door ball-bearing shop, LF, thought that the robber had not been among the people waiting for the shop to open at around 8 a.m. Along with his employer, ZK, they only saw him from the back. As they said, a strongly built, 'sluggish' man was around 170-180 cm tall (165-170 cm in ZK's estimation), was wearing a black or very dark coat, dark trousers and a hood over his head. However, they could not see the type of trousers or the colour of his shoes.

Witness ZsGy, on his way to the Spar Supermarket, noticed a man standing 8-10 metres ahead of him at the corner of the lottery shop who caught his eye. The man was shifting nervously from one foot to another. His behaviour attracted ZGy's attention, but he did not think that he was about to commit a crime. The witness saw his face for only a moment and unfortunately could not recall it clearly, although he described him as a man over 40 years of age, 175-180 cm tall, with broad shoulders. He did not find his skin dark or light but described the man's hair as greyish or light brown. He confirmed the testimony of the victim in that the robber gave an impression of being unkempt.

Witness GJ met the culprit on his way home from work. He too estimated him as being around 170-180 cm tall and spoke of him as having 'quite a strong frame'. According to his statement, the culprit was wearing black trousers, a black coat, a white shirt and had black hair. He did not notice anything in his hand, nor could he observe his face. According to JT's testimony, the personal description should include a round head and chubby face, although he could not estimate his age.

3.5 Searches

During the investigation, BS's car was searched, and on the 25th of July 2005 a house-search was carried out at the residence of the accused, i.e. his

parents' apartment. Nothing was found which could have been connected with the crime, such as the black jacket, the black cap, the gun (a means of committing the crime) or a yellow (or grey) piece of cloth (noticed by several witnesses) covering the registration plate. Nothing was found in the car of the accused apart from a bucket for car-cleaning, a piece of sponge, a blanket to cover his daughter, table-cloths, menus, cutlery, glasses, bills, rags/cloths for cleaning the car, waiter's napkins and some old newspapers in front of the rear seat.

The police confiscated the blanket, but it was returned to the owner shortly afterwards. As it could not be identified by witnesses, the cloth was simply ruled out due to the differences of colour and material.

The employees of the Renault service station (GF, MP and BS) in their testimonies indicated that on the day of the event they saw nothing connected to the crime (e.g. a long coat), nor did they notice anything suspicious or odd in his behaviour.

3.6 Attempts to produce proof

At 3 o'clock on the afternoon of July 25th, 2005, the investigating officers carried out a test to establish how long it would have taken to reach, under average traffic conditions, the Renault service workshop on the east side of town from the lottery-shop. They found that, keeping to the Highway Code, the journey took 10 minutes and 14 seconds. This test was repeated several months later at 8:10 a.m. (on October 11th, 2005) during the morning rush hour. The journey on this occasion took 10 minutes and 51 seconds.

Based on these results, the investigating officers concluded that B.S. could have committed the robbery at 5-10 minutes past 8 in the morning (or even between 8:15 and 8:24) as it would have taken him approximately 10 minutes to get to the car dealer's premises.

3.7 Identity parades

The police held a photo identity parade on the 27th of September 2005 in the presence of the victim, showing six pictures to her with only the subject's eyes visible, and not the rest of the head. On this occasion the victim recognised BS with 80% certainty.

On the 25th of October 2005 a further identity parade was carried out. On this occasion BS was subsequently interrogated as a suspect and taken into custody. This time the victim had to look at four people to ascertain whether she could recognise the culprit's movements. On this occasion she recognised BS with a 70-80% certainty factor.

In the course of a voice recognition process, all those in line spoke the following sentence: 'I am a heroin addict, I will lame you for life!'. The victim could not recognise the voice of anyone taking part, including BS.

It also emerged from the police reports in the investigation files that SzTJ, the victim had been shown two full-length photographs (and one half-length) of SB, the defendant, before the official recognition process. On looking at the photos the victim said that she thought that she recognized him but was not absolutely sure.

On 25 October, 2005 the criminal investigation authority carried out an identity parade with the participation of witness GyZs in addition to the victim, during which GyZs picked out SB from four people but said that it was only a '60%' possibility. Photographs of the defendant only had been shown to GyZs prior to the identity parade when he said: 'it could be the person' although he was not totally suret'.

3.8 Odour identification

As mentioned earlier, on the day of the crime the police found odour traces in front of the counter in the lottery shop. Whilst examining BS they also took odour samples from him. On the 3rd and 4th of August investigating officers carried out odour identification with the help of dogs, during which both dogs indicated 5-5 times that the odour sample taken from the tiles in front of the counter was identical to that of BS'.

3.9 Opinion of the expert graphologist

To establish the truth of BS's statement, the police officers employed a graphologist who examined the accused with a so-called 'graphometric' test. This is a special lie-detection tool, developed by the same expert who carried out the test, during which the truthfulness of answers can be evaluated by analysing the time needed to answer the questions of the forensic handwriting expert. During the whole examination BS answered all the questions perfectly calmly and behaved coolly.

In the expert's view, a definite opinion based on the answers given to the questions could not be given. The reason for this – according to him – is that during the test BS's basic stress level was higher than normal due to kidney problems and his use of tranquillizers. The expert also asserted that, during the test, BS did not give adequate answers, and so 'cannot be exonerated beyond doubt from the charges'.

3.10 Opinion of the hemo-genetic expert

An expert from Budapest took DNA sweat samples from the door handle – which had been touched by the accused when he closed the door – and compared them to a sample of BS's DNA. The mitochondrial examination revealed a DNA mixture of more, but at least two people in the *corpus delicti*. The expert established that, in the mitochondrial DNA feature 'BS's mitochondrial haplotype 'cannot be excluded', and also in the criminalistics data base BS's haplotype can be observed with a frequency of 1%.

4. The Trial Procedure

On the 11th of January 2006 the public prosecutor laid a charge of armed robbery against BS, based on the above evidence (police reports, video camera recordings, testimonies of the victim and witnesses, odour identification minutes, the expert opinions of a judicial graphologist and of a hemogenetic expert, presentations for recognition and so on).

From this point the Municipal Court of Pécs heard the case with both the defence and the prosecution given full hearings in the course of five consecutive sessions: 14th of March 2006, 18th of April 2006, 16th and 24th of May 2006 and 6th of June 2006.

The Defence was of the opinion – in contrast to the Prosecution – that some contents of the investigation records and the relevant arguments and conclusions drawn from them are wholly or partly mutually exclusive, whilst others raise doubts regarding the possibility of BS having committed the offence.

4.1 The Time of the Offence

First, the defence drew attention to the fact that the time when the offence was committed could be deduced exactly from the documents and evidence at certain investigations and court trials. The crime was committed between 8:12 and 8:15 on the morning of July 19th 2005.

The defence then pointed out that the approximate time of 8:05, when the crime was committed - indicated in the indictment, and taken from the investigation summary report - is inconsistent with the report, as it contradicted both the evidence of eyewitnesses and also the time when the police were notified (by phone). At the beginning of the investigation (until July 25th) the approximate time of 8:05 did not arise. All witnesses questioned, police reports and presentations and the call for emergency action mentioned a later time, about 8:15 am.

- From the evidence given by the witness 'Söprűs Jóska' on the day after the crime, it emerged that he had been in the shop between 8:10 and 8:15, when no-one else was there.
- In his testimony witness ZsGy spoke of a time of approximately 8:14a.m. This was when the culprit was standing outside the shop and the time when the witness looked at his watch. He also confirmed this at the trial.
- According to the consistent testimony of the victim and of witness SzTJ, 'Söprűs Jóska' had been in the shop immediately before the robber himself. She also recounted that the robber had not reached the pedestrian crossing when she ran out of the shop and entered the neighbouring shop. (The two shops adjoin each other, the distance between the doors being 10 metres.) Only after this did ZK, the owner of the ball-bearing shop, chase the offender and this was when LF, the employee, rang the police. According to the testimony of the victim, the crime lasted about 3 minutes. During her interrogation on the first day of the trial she also confirmed that at the time of the phone-call the offender was still running away.

The estimated time of the offence, based on witnesses' testimonies, or, more precisely, the time estimated for the offence to have ended started to 'change to earlier ones' in the investigation reports when BS came to the attention of the police from July 25, and when it emerges that he arrived at the Renault garage at 8:24 am on July 19th. By the time the graphologist and, later, the hemogenic expert were appointed, the time of the offence was declared as about 8:10 am. The prosecution's propositions regarding personal freedom and the final summary report of the investigation had already mentioned 8:05, whereas neither time was consistent with the data of the investigation to date. The exact time of the phone call to the police was only requested just before the end of the investigation, on January 5 2006., which makes it absolutely clear that LF called the police 15m 36s after 8:00 a.m. The witness also stated at the hearing that the phone was answered rapidly - after a few short rings.

During the phone call, at the beginning of the conversation, the culprit was running towards his car. Besides LF, this was confirmed by his colleague, ZK. Therefore, the crime happened before 8:15 am and the victim clearly stated that the attack lasted about 3 minutes.

As the culprit was running to his car parked on the northern side of the Spar Supermarket at 8:10 am – and the timing of the walking and running shows that it takes about 1-1.5 minutes to reach the car from the shop – it is absolutely certain that he could not have driven away before 15m 36s after 8:00 am.

During trials, the police (and the defence separately) timed how long it took from leaving the Supermarket to the north-west to reach the Renault garage behind the 'Budai Vám' crossing. Each trial took from 10 to 11 minutes, neither under 10 minutes. This means that no-one could drive from the starting point at the time (more likely to have been 8:16 rather than 8:15) to the Renault dealer's site by 8:24 am. For this 8 or 9 minutes would not have been sufficient.

Moreover, the defence emphasised, based on their own data collection carried out on the spot, the camera at the Renault garage which recorded the defendant's vehicle was not situated at the barrier but beyond, inside the site, and was fixed to the north-eastern edge of the main building – a fact shown less than clearly in the investigation records, and a fact to which no one had paid any attention until the trial. Consequently, BS – as all other customers – had had to stop in front of the barrier or in the parking lot in front of the barrier. Then he had had to get out and ask someone to let him in or take the car inside. According to the testimony and self-testimony of the defendant – as quoted above – he called to an employee who then had to enter the reception booth and raise the barrier from there. Then the defendant (as everyone else) had to get back into his car and drive under the raised barrier. After this, he was recorded 25 meters farther inside by camera N° 7. At that time the local clock showed 8:24 a.m. and so BS must have arrived at the garage at least one minute before the time indicated by the camera as the barrier had been closed. These facts had been consistently stated by the defendant from the very beginning. The perfectly normal nature of his arrival was confirmed by the workers questioned and by the foremen at the Renault dealer's site.

Based on all of this, the time allotted by the prosecution for committing the offence was reduced by a further minute, and so BS could not have driven from the car park behind the Spar Supermarket in Alkotmány Street during the morning rush hour within 7–8 minutes to Renault Nyitrai in such a fashion that, on the way he could have hidden – in warm summer weather quite strange – a 3/4 length hooded black cotton/down-filled jacket, the blue or black cap he had been wearing on his head, the blanket or piece of rag or fabric that had covered the number plate, the plastic bag containing the stolen money of ft 70,000 and the gun with the help of which the crime had been committed. In the garage neither the foreman nor any other employee saw anything of the sort – either in the possession of the accused (who left on foot soon afterwards) or in his car. (Such articles – as already mentioned – were also not found by the police a week later during a thorough inspection of the car and of the accused's flat.)

4.2 Checking potential suspects

The defence pointed out that, although the police had not made an serious check of Renault Thalia owners in Baranya County, emphasising at the same time that it had not ruled out the possibility that the offender could have been from another county, no data whatsoever confirmed this. Nor were similar vehicles checked nationally, and still less in the surrounding countries (primarily Croatia). It should also be noted that investigating authorities cannot be called to account for this, although, given the lack of verification, no criminal investigation could reasonably claim that BS alone of all these car-owners gave cause for suspicion.

4.3 Identity parades and testimonies

During the hearings the defence pointed out the fact – not to be ignored – that it was revealed in the investigation reports, from the evidence given on the first day of the trial and from court records, that BS's photograph had been shown to both 'witnesses for visual identification', SzTJ and ZsGy, prior to the identity parade. At that point the photograph was shown alone, with nothing next to it. (As a reminder, ZsGy only said: 'it could have been that person; I am not entirely sure'. SzTJ gave a similar statement. 'It might be him; I am not absolutely sure'.) Moreover, none of the witnesses claimed with certainty at the trial to have recognized the accused as the culprit. All talked only of a resemblance. As for the eyes of the accused, the victim, SzTJ, said only: 'similar eyes; I am not sure'.

Neither during the investigation nor the long trial did any witness talk about limping or hobbling; they only said that the offender was not able to run because of his heavy physique. According to witness ZK, the robber 'was walking smoothly but slowly with no disorder or defect in his walk; he walked steadily, but slowly'. He also added that the reason why he had not recognized the accused during the investigation was that he moved. Moreover, he chose a totally different person on the basis of his movement. Witness LF also declared that he had not seen the offender limp or hobble; neither had the victim: 'no limping; the robber was running slowly, clumsily'. Witness LT, who saw the culprit from a window of one of the houses, stated at the trial that the real offender 'was running'. LT did not see him limp; the way in which the offender moved was 'slow, bear-like'.

Based on the principles of directness and contradiction, during the evidence given in court by witnesses under cross-examination, more information emerged which also indicated that the accused was not guilty. The victim claimed that the offender's voice had no 'special characteristics'. She believed the voice to be entirely normal, although BS had a clearly hoarse voice recognisable by all. The voice of the accused had not changed at all since July 19 2005. This was confirmed by absolutely neutral, outsider witnesses, who already knew the offender. These witnesses, all three of whom worked at the Renault garage, confirmed this to the court. Also, the victim did not recognise the accused by his voice during the voice identification procedure.

In addition, the victim talked of someone with wrinkles and 'crow's feet' and yet BS did not have such features – neither during the crime nor during the trial. The victim saw the hand of the robber but did not notice anything special, although BS's hand is as white as snow – easily noticed by everyone. There are several brown freckles on his skin, but the witness did not mention these either during the investigation or at the trial. She did not notice such features on the culprit, the real offender. In connection with the car which was used in the crime, witness ZK said that he saw the culprit's car from the side, and yet he

did not even notice the sticker – some 8 cm diameter – which was displayed on the Thalia owned by BS. Nor did the witness see the baby-seat in the back of the car. He definitely mentioned a piece of yellow rag or cloth which had covered the registration plate. Nothing like this was found in the alleged offender's car by the police nor seen in the garage. At the trial, when shown the blanket on a photograph, he could not identify with certainty the piece of fabric which had covered the registration plate. (The blanket, as mentioned above, was ruled inadmissible evidence and returned to the owner)

During the investigation another witness, LT, mentioned 'a piece of cloth for mopping the floor' or 'Vileda cloth'. At the trial he clearly spoke of 'a grey, rag-like, colourless, unstriking piece of cloth'. When shown the photograph of the colourful blanket, he admitted that he would have recognized this, had it covered the registration plate of the car.

4.4 Contradictory examination of further evidence

In respect of the opinion of the hemogenetic expert, the defence drew attention to the testimony of SzTJ. During questioning the victim emphasized that 'generally no-one touched the door'. The expression 'generally' meant that it was not impossible for BS, who was in the lottery shop on July 18, to have touched the door handle, as he had already recounted on March 4, on the first day of the trial.

Moreover, it is also possible for other people to have similar *locus*. Even among the population of Pécs, some 1,500 people will have similar DNA counts.

One further fact also made it questionable whether BS could have been the culprit, namely, that the real offender held the gun in his left hand and a bright object – indicated by ZsGy – also in his left hand, whereas BS is clearly right-handed, a fact not raised by anyone.

BS had not previously owned a 3/4 length, hooded, black, down-filled cotton jacket, which – in the evidence of several people – was worn by the offender, nor a black cap. Neither were such things found during the 5-month investigation. Further, the witnesses working in the Renault garage, as far as B.S. was concerned, noticed no anxiety or stress at all when he was in the garage on the morning of July 19th 2005. As MP recounted, B.S. was wearing 'waiter-type clothes', with no such jacket. The accused could not access his car during the following week until the police had examined the vehicle.

At the beginning of the investigation both the witnesses and the police were talking about an offender with black hair. One of the witnesses, JG, emphasised that he was able to differentiate between black hair and a black hood. The accused, in fact, is rather a red- or reddish-haired man, 51 years of age, as opposed to a man of 40 years of age mentioned by the witnesses. According to

witness ZsGy, the culprit's skin was not dark but 'was not white either'. On the contrary, BS is distinctively white-skinned.

5. Court orders

5.1 The Verdict of the Court of First Instance

The Municipal Court of Pécs examined all items of evidence available, both individually and as a whole, and declared that the evidence only made it probable – but did not prove beyond all reasonable doubt that the armed robbery at the lottery shop in Alkotmány Street had been committed by BS. Therefore, as each piece of evidence and all data used as evidence is disputed and the accusation must be proved by the accuser, the accused was acquitted of the charge of armed robbery. (At the same time the pre-trial detention of the accused, which had lasted for some 8 months was terminated.)

In our further thoughts we would like to discuss how and why the court had doubted the credibility of the 'damning' evidence and had ruled much inadmissible.

Firstly, we need to analyse the time when the armed robbery was committed and BS's alibi. As for the time of the offence, the court accepted the argument of the defence in its entirety, and this says that, if the armed robbery at the lottery shop in Alkotmány Street had been committed by BS, it would have been impossible for him, due to the limited time available to arrive at the dealer's site before 8:24 am, the time recorded by the security camera at Nyitrai.

As already mentioned on several occasions, the police thoroughly searched the accused's car and carried out trials attempting to produce evidence to establish how much time the accused needed to reach the Renault garage from the Spar Supermarket car-park in Alkotmány Street.

As we know, the car and house searches had no result. The police found neither the offending tool (the gun-like object) nor the grey-coloured rag used to cover the registration plate. Although a patterned blanket was found in BS's car, it was – as stated before – returned to him as it was not identified by witnesses ZK and LT. If the incriminating piece of fabric had belonged to BS, then the boot, presumably, could have been closed only in such a way that it would have made holes in the blanket or the blanket would have been damaged (traces would have been left). The blanket, however, was intact and undamaged, and the police did not notice any such damage to the material.

In respect of the identity parades, the court agreed with the defence that such thing as a 60–80% level of identification did not exist. None of the witnesses stated that they recognised the accused with absolute certainty; all talked only of similarity, and so, from the witnesses' testimonies, selected by the prosecution, one could not draw any conclusion with absolute certainty – that is, beyond all reasonable doubt as to who committed the crime. Therefore

the court did not and could not regard this as evidence confirming the accused as guilty. On the other hand, we must emphasise the fact that the important feature of an identity parade, if it is to be successful as evidentiary procedure, is that it must be carried out within the shortest possible time, under no influence and only on one occasion. Since, as time passes, the likelihood of success diminishes, the witnesses become uncertain, and offenders change.¹

The court considered the expert evidence of the graphologist – counted as damning evidences by the prosecution – and declared that such expert evidence cannot be regarded as evidence from which one can draw a clear conclusion about the criminal liability of the accused. The product of expert evidence is only one probable cause, the *indicium*, which helps the work of the investigating authorities and points the investigation in the right direction. It can by no means serve as a ground to determine BS's criminal liability, especially not in the (already cited) final conclusion of this case.

In its verdict, the court, true to Hungarian law enforcement practice, established that the odour identification in itself cannot be considered as satisfactory evidence of criminal liability on the part of the accused. It is merely one piece of information which helps the investigating authorities to pursue well-founded suspicion, but it is not sufficient to determine whether somebody is guilty or not. A dog can make a mistake and the order of the procedure is not clear, since only the dog handler is with the dog.²

In respect of the DNS count of the substance trace taken from the door handle of the lottery shop, the court gave its view in the following terms:

¹ Tremmel, Flórián – Fenyvesi, Csaba – Herke, Csongor: *Kriminalisztika Tankönyv és Atlasz*. (Criminalistics Textbook and Atlas). Dialog Campus, Budapest – Pécs, 2005 pp. 334-335.

² National judicial practice (rightly) does not regard the result of scent identification in itself as credible evidence from the point of view of judging the defendant's guilt. The evidence taken by a dog trained for picking out scents and by using indirect methods can be used in a criminal procedure, but merely for directing the investigation towards a certain person. Therefore the investigation can proceed with further detection and evidentiary procedures whilst already in possession of specific information. Although defining the weight of evidence of scent identification by mathematical methods will yield an extraordinarily high level of probability, the use of a dog that can be an autonomous bio-detector at any time – contrary to its training – does not mean that it can give evidence beyond any doubt in terms of a crime committed, since the dog as a living creature is not infallible. Accordingly, any judgement of the defendant's guilt – after the identification of scents – should be made on the basis of evidence gained expeditiously. (See in detail: Tremmel, Flórián – Fenyvesi, Csaba – Herke, Csongor op. cit. pp 244-245. and Böcz, Endre (ed.): *Criminalistics 2*. BM Publisher 2004. pp 689-690. and finally for a possible solution model: Fenyvesi, Csaba: *Elméleti modellek 'kriminalisztikai Nobel díjak' megszerzésére*. (Theoretical Models to Obtain Nobel Prize for Criminalistics). In: *Belügyi Szemle*, 2007/1. pp 99-106.

'At this point the police started from the testimony of SzTJ, according to which the door handle could have only been touched by the offender apart from herself. During her interrogation the victim stated that, besides herself 'nobody generally touched the door'. The word 'enerally' suggests that it is not impossible that BS, who had been to the lottery in the afternoon of July 18th 2005, touched the door handle.

The expert evidence of the hemogenetic expert is also not categorical, as it stated that the detected, mixed mitochondrial DNS from the sample was the product of the DNS mixture of at least two people, which also includes a 1% possibility of deviation. This means a total of 1,500 people in Pécs alone or 100,000 in Hungary, and in this, according to the expert, the existence of the mitochondrial haplotype of BS cannot be totally ruled out. Based on the chart made according to the sequence analysis of the DNS sample of the accused and those of the substance traces fixed on the door-handle, it clearly deviates in 5 of the 11 segments. Consequently one cannot determine with absolute certainty whether the substance trace which was found on the scene was identical to BS's DNS sample, nor when it originated. In a sense the expert cannot determine when the substance trace came into being, since this could have done so the day before the crime from possible contact by the accused.

Finally, the anonymous letters received cannot be regarded as evidence, since their origin has no legal source; it is not known by whom the letters were written and sent – that is, we do not know by whom the information was given.³

5.2 The Prosecution's Appeal and the Ruling of the Court of Appeal

The prosecution appealed the against the verdict of the *Court of First Instance* citing a lack of grounds for the court's decision. They held that:

- the court did not fulfil its obligation to explain its decision;
- the case stated (by the court) was contrary to the contents of the documents;
- further, pieces of evidence were taken out of context and evaluated individually, rather than as a whole and certain evidence was ignored;
- from the facts established by the court incorrect conclusions were drawn.

The attorney general proposed to repeal the verdict of the *Court of First Instance* and requested the *Court of First Instance* to start new proceedings,

³ Data do not exist without data sources. In criminal proceedings only the data source – together with the data which refers to relevant criminalistic facts comprise evidence. See in detail: Tremmel, Flórián: *Bizonyítékok a büntető eljárásban* (Evidences in the Criminal Procedure). – Dialog Campus, Budapest – Pécs, 2005. pp. 78-82. Although the author of the cited letter remained unknown, what was written in it only confirmed doubt, since the given registration number HPM 540 belonged to a brown Opel Astra Caravan, a vehicle which was not owned by the accused.

since they believed that the lack of grounds for the decision was so serious that it could only be dealt with by a re-trial. At the open session of the Baranya County Court on November 16th 2006 – the verdict of the Court of First Instance was confirmed.

According to a summary of their reasoning, the case established by the *Court of First Instance* is consistent with the contents of the available documents. It is devoid of errors deriving from a lack of grounds and is based on a serious consideration of the evidence. The Trial Court had examined all the evidence, which was important for the court to make a decision, whilst maintaining the rules of the court. The conclusions and decisions of the court were thoroughly justified. As a reaction to the arguments of the prosecution, they said that, although the prosecution could bring a charge on presumptive facts, the validity of any piece of evidences would be decided during the court proceedings. An appeal from the prosecutor's office will not succeed if it simply blames the *Court of First Instance* for drawing conclusions which differ from those of someone in the prosecutor's office after having weighed the evidence.

6. Conclusions and Lessons of Criminalistics and Criminological Procedures

1. Of the main criminalistic questions (who, what, when, where, why) the question 'when?' can be decisive both during the investigation and court proceedings to maintain the direction of the investigation and for the question of responsibility regarding potential and real culprits. Therefore, a thorough, overall and undistorted examination is essential in order to give a successful reduces, objective picture (reflecting reality) from the point of view of the investigation and detection.

2. A perseverant criminalistic approach – the term is self-explanatory – which focuses narrowly on any data such as the time of the offence, can be harmful to the outcome of the entire proceedings. This approach – in our view – cannot be restricted to investigators only but may even be seen in the work of law enforcement bodies including representatives of the Defence. It significantly reduces the advantages of argument and can even promote mistakes in the direction of investigation or defence, regardless of the reasons for suspicion.

3. 'Bio-detection' odour identification (by dogs) can be useful in detection during the investigative period (e.g. in creating scenarios, check-backs or in possible exclusions). However, in court it carries little, if any, basic weight and has none whatsoever by itself – as might be stated as a matter of principle.

4. The unavoidable, irreversible consequences of breaking the criminal-tactical rules of the identity parade might affect even the legality of evidence, as is true of other procedures in presenting proof also. Such errors might – must – invalidate evidence from both the initial and final verdicts.

5. One can assert as a matter of principle that identification as a percentage value simply does not exist. There is either recognition or there is none, where, for example, the identifier cannot recognise a person, object, part of the body etc. to be identified. Similarity is indeed possible, although, again, it cannot be measured as a percentage, and so, in our opinion, it cannot be evaluated in any phase of criminal proceedings.

6. In criminalistics the evaluation of 'negative traces' (traces which do not exist, did not emerge, or do not match - e.g. in this case where the victim fails to recognize the distinctively hoarse voice of the rather talkative real offender) are frequently more valuable than some existing, perceptible 'positive' ones.

7. DNS, 'the star' of 21st century criminalistics is not a 'magic weapon' at all times, and in all cases. It has its limitations in which the quality of trace residues, the possibility and time of their formation or the frequency of their occurrence can play a decisive role.

8. However useful graphometric methods – as far as we know, not yet scientifically validated – might be in detection, they still raise concerns similar to those regarding the polygraph: a lack of understanding of the real reasons why the examinee should not be honest.

9. Only legitimate pieces of evidence can establish incriminating data to judge guilt – and, even then, provided that they are compatible with court rules.

Finally, as a 10th point and by way of a summary of this present study, we might emphasize that our main objective must always be to apply the ultimate principle of the presumption of innocence to prevent and avoid 'judicial murders' (i.e., mistaken verdicts). To achieve this goal – based on rational and legitimate doubt – one must insist on consistently adopting the '*in dubio pro reo*' principle in investigative and court procedures alike, it being a cornerstone of all constitutional states.

The crime of harassment in the light of practice

GELÁNYI, Anikó

ABSTRACT The reasons behind my choice of topic are the newness of this crime in Hungarian law – harassment has existed in the Hungarian Criminal Code only since 1st January 2008 – and the few publications on the topic. This study introduces the problems of interpretation and practice and the elements of uncertainty in connection with this crime, by analysing criminal investigations launched in 2008 and 2009 by the 10th and 17th District Public Prosecutor's Office in Budapest. After a short analysis of the Hungarian regulation the paper shows – on the basis of statistical data – how it works in practice in the District Public Prosecutor's Office. In the last chapter, as a conclusion, some possible trends will be sketched out in the areas of both legislation and practice.

Title III on crimes against freedom and human dignity of Chapter XII on crimes against the person of the Hungarian Criminal Code was amended in January 2008 with a new crime named "harassment" although its actual existence has generated theoretical and professional questions amongst practitioners. The aim of the study is to introduce the interpretational and practical problems, and the elements of uncertainty, which surround this crime, by analysing criminal investigations launched in 2008 and 2009. The research is based on the author's practice as a prosecutor, as she has paid close attention to these problems since this modification to the criminal code came into force. This, of course, now means more than two years of research. During this period all 341 criminal cases of harassment registered at the 10th and 17th District Public Prosecutor's Office in Budapest¹ and launched in 2008 and 2009 were examined. In order to analyse this crime in a wider context involving criminal politics and legal sociology, not only criminal procedural data were collected (e.g., the reasons for termination, the results of proceedings), but also criminological data (e.g. personal articles, methods and tools of perpetration) from 70 of these cases.

¹ Hereinafter the District Prosecutor's Office or DPO.

1. Hungarian provisions – in brief

1.1 The history of the Hungarian regulation

The Hungarian Constitutional Court determined the citizen's right to a private sphere, including the freedom of private life,² and so laid down the state's obligation to reduce the harassing behaviour of citizens towards each other.³ To fulfil this obligation, the Hungarian Parliament passed the necessary modification on the 10th of December as Act CLXII of 2007.

The table below shows that legislation describes harassment partly based on Act LXIX of 1999, effective until January 1st 2008, in which 151§ (1) speaks of *assault* and partly on the criminalisation of conduct involving pestering, intrusion and misdemeanour.

	Offence of dangerous threatening	The Crime of Harrasment
intention	- with the aim of inducing fear	- intended to intimidate another person - intended to unduly interfere with the privacy and everyday life of another person
behaviour of perpetration	- threat of committing a crime against the health of a person - serious threat of making a defamatory statement widely known	- frequently making unsolicited - effort to make contact - threat to commit a criminal act which is violent or causes public danger
relative as a special circumstance	- is included in both facts	- the acts of stalking, or the attempt to establish contact in spite of the refusal on the part of the other person may only be directed against the victim

In respect of the above, the law has been amended and now only threat limited to defamation is classified as an infringement.

A year after the Criminal Act was amended, it frequently occurred both elsewhere and in Hungary that some individuals wished to take revenge for real or perceived harm by sending a postal consignment (eg. Anthrax bacteria) which was harmful or perceived as harmful. Such acts were already criminal

² The right to privacy is beyond doubt a fundamental right, protecting the individuals' autonomy, which is derived from the congenital right of human dignity.

³ Resolution of Constitutional Court 56/1994. (dated: 11.10.1994.)

even before 1st February 2009. The sender of consignments which did not prove to be harmful were guilty of a minor misdemeanour. From the 1st of February 2009 the law enables the criminal prosecution of any person who, for the purpose of intimidation, conveys the threat of force or public endangerment intended to inflict harm upon another person, or upon a relative of this person or, purports to make believe another person, or a relative of this person is imminent, is guilty of a misdemeanour.⁴

1.2 Criticism of the Hungarian regulation

The act of harassment was not precisely defined, and this poses difficulties for law makers. There are no clear guidelines as to regularity, permanence, forms of disturbance, intimidation, unwanted intervention into another person's privacy and everyday life which can be assumed as the purpose of an act.

Regularity or permanence. The legislator's explanatory memorandum to the Act provides that *regularity* involves acts committed within a short period of time and *permanence* involves acts committed over a longer period of time, although there are no clear definitions of these terms. From a study of individual crimes, it seems that, on occasion, real estate agents who receive two calls on the same day arising from the same dispute as harassment and ask for the caller to be prosecuted criminally. However, nothing was clear-cut, since neither regularity nor permanence was involved. There is some disagreement, not only between authorities and individuals, but also among officials. The interpretation of terms shows variations between Courts and prosecutors, the

⁴ Harassment Section 176/A.

(1) Any person who engages in conduct intended to intimidate another person, to disturb the privacy of or to upset, or cause emotional distress to another person, or who is engaged in the pestering of another person on a regular basis, such as frequently making unsolicited calls to another person by way of telecommunications equipment or actually harassing another person is guilty of a misdemeanour punishable by imprisonment for up to one year, if such act does not result in a criminal act of greater gravity.

(2) Any person who, for the purpose of intimidation: a) conveys the threat of force or public endangerment intended to inflict harm upon another person, or upon a relative of this person, or b) purports to make believe another person, or a relative of this person to put that person in fear that any threat to his life or health, or to the life or health of a relative of this person is imminent, is guilty of a misdemeanour punishable by imprisonment for up to two years.

(3) Any person who commits the act of harassment: a) against his/her former spouse or registered partner, or former domestic partner, b) against a person under his/her care, custody, supervision or treatment, shall be punishable by imprisonment for up to two years in the cases described in Subsection (1), or by imprisonment for up to three years for the felony offence described under Subsection (2).

former considering these crimes more broadly, even based on one single threat, whilst the latter view things more literally.

Disturbance. The ministerial explanation interprets this very broadly by declaring that bothering and harassment are quite different and that this is defined as disturbance by the law. It is also important that the minimum level of disturbance is doubtful due to its subjective nature, although the maximum can be defined explicitly as an act or acts of disturbance constituting harassment in cases where behaviour does not involve acts of extreme gravity (e.g. mayhem, violation of personal freedom, domestic insult, and truculence).

Intimidation, unwanted intervention into another person's privacy and everyday life for the purpose of an act (purpose of act described in section (2) is a threat of force). The Ministerial explanation does not mention this; nor is it defined by criminal law, although, besides describing the threat in Criminal Act 138§ (threat of serious injury which may arouse fear in the intimidated person), the intimidation should also be defined. Our standpoint is that intimidation must cover a period involving several threats to produce intimidation. The DPO has abandoned several investigations where it has been found that the suspect, during a discussion between the two parties, made highly emotional statements (albeit with no intention to intimidate) which could not have been so regarded, even subjectively.

Finally, it should also be mentioned that legitimate or morally acceptable unwanted intervention is not factual, and it is not a crime when intimidation is perceived only by the subjective feelings of the aggrieved party.

2. Practice in the 10th and 17th District Public Prosecutor's Office in Budapest

2.1 Briefly concerning the 10th and 17th District Public Prosecutor's Office

The author believes that it would be useful to offer a brief introduction of the competent area of the DPO office, the better to understand the background to the criminal procedures referred to. The areas covered by these prosecutor's offices are the 10th (Kőbánya) district and 17th district in Budapest. The 10th district with housing estates, a market, a shopping centre and offices is in a busier part of the capital, whilst the 17th district is mostly residential. These circumstances produce significant differences in both the perpetrators and methods. My subjective opinion – although unconfirmed by statistical data from research – is that people living in suburban houses and with more space more often notify the police of harassment than do people living on the housing estates of Kőbánya. In other words, one inhabitant of a street will constantly make life difficult for others by making accusations against his neighbours or by having some dispute which provokes others into making a complaint against

him. It is frequently impossible to determine the truth since the prosecutor senses from the conflicting confessions and documents summarising the cases launched against each other (or obtained from the local authority on request) that both sides had broken the general rules of good-neighbour behaviour and peaceful coexistence. At present the register of the DPO (for both closed or open cases) contains 6 cases in which the same two people are, by turn, complainant and accused – in cases which started with a complaint of harassment. This shows that many people regard denunciation as a way to “train” a neighbour who lives in a way which they find unacceptable, and they exercise their right with no regard to its justification.

2.2 Analysing the statistical data of the research

We are now at the crucial point for a complete view of harassment as a crime: listing and analysing the data of the criminal procedures started in 2008 and 2009 in the DPP'S office.

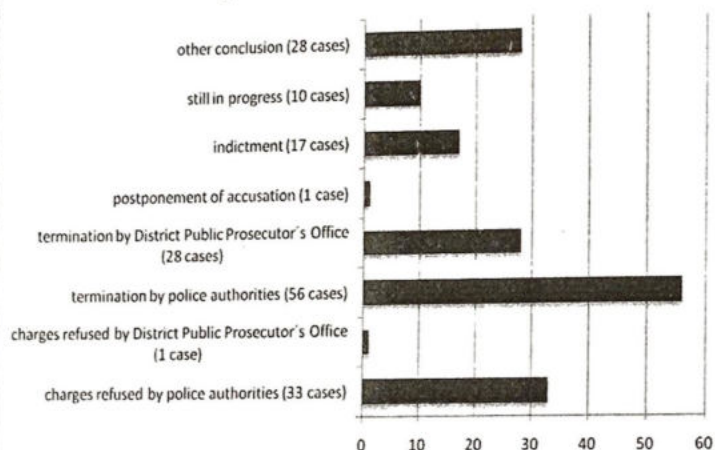
2.2.1 Year 2008

174 processes were started in 2008.⁵ 33 complaints (19%) were rejected by the police and one charge (0.5%) was refused by the DPO. 56 criminal processes (3) were terminated by the police and 28 cases (16%) by the DPO. In one case (0.5%) the case was postponed. The DPO issued an indictment in 17 cases (10%) and in 7 of these the court has already given its verdict. Ten cases (6%) are still in progress. 28 cases (16%) were concluded in different ways.

It is obvious that in 20% of cases no crime took place. In a further 48% of cases the investigation showed either no crime committed or provable – or the DPO had not proceeded for some other reason. An indictment has been brought in just 10 % of the cases.

⁵ 2 % of the total number of cases in 2008

Statistical data from year 2008 (174 criminal procedures altogether)

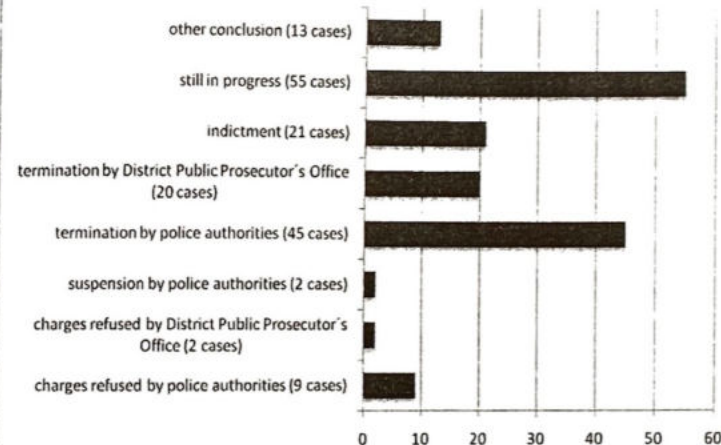


2.2.2 Year 2009

167⁶ processes were started in 2009, which is a little less than in the previous year. 9 charges (4%) were rejected by the police and two (1%) were refused by the DPO. Two (1%) were suspended by the police since the perpetrator could not be identified. 45 cases (25%) were terminated by the police and 20 (18%) by the DPO. The DPO, however, did indict in 21 cases (12%), in 3 of which the court has already given its verdict. 55 cases (32%) are still in progress and 13 (7%) had other conclusions.

In 2009 we can see an improving trend compared to 2008 in the numbers of successful charges and in the ratio of indictments and terminations.

Statistical data from year 2009 (167 criminal procedures altogether)



2.2.3 Criminological correspondence in 70 of 341 cases started in 2008 and 2009

70 cases of the 341 started in 2008 and 2009 were analysed not only in terms of the process but also from a criminological perspective. These enable us to put forward several points:

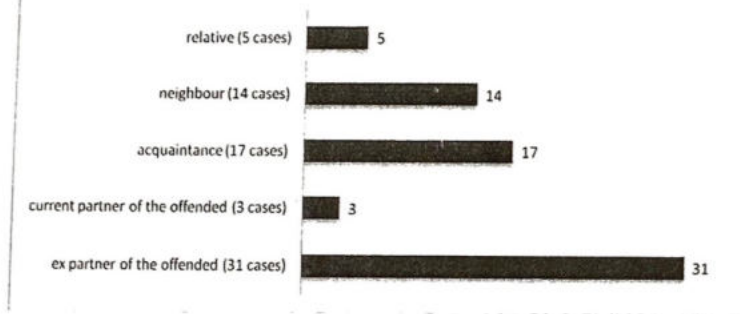
In 12 cases (17%) the offender was female and in the remaining 58 (87%) male. This offence is committed five times more often by men than by women. This rate accords with the gender rate for all crimes (i.e., not only for harassment) according to which, in 80-90% of crimes men play a role, while women take part in only 10-20%.⁷

The complainant was, typically, the perpetrator (31 cases/45%) and the actual – platonic – lover (3 cases/4%). In 17 cases (24%) the harassers disturbed or threatened their own or their friends' acquaintances and one disturbed a well-known person in the media. In some cases (14/20%) the complainant was a neighbour, in 5 (7%) a relative was disturbed (in 3 cases the harasser's mother, once his sibling and once another relative). Usually, the relationship between perpetrator and complainant is one of love and rarely of acquaintanceship, and so harassment involving strangers can be ignored.

⁶ Again, 2 % of the total number of cases in 2009.

⁷ Fehér, Lenke: Bűnözés és prostitúció. <http://www.tarki.hu/adatbank-h/nok/szerepvalto/Feherlenke-97.html> [26th August 2010]

Ring of the offended



Remarkably, in connection with the method of perpetration, the harassment is usually verbal, although in 5 cases (7%) there was also physical abuse.

In the case of verbal harassment, proof is usually difficult, as has been seen many times in the DPO. Harassment according to the (2) paragraph⁸ only can be committed orally and only intentionally. This means that proof can only be based on statements by the complainant(s) and accidental witnesses; otherwise an examination of the perpetrator's mental state is increasingly justified. According to the law, in the case of new "dangerous intimidation" the perpetrator not only has to understand that his behaviour can threaten the complainant, but the exact *aim* of his communication should be this. In this case VIDA MIHÁLY⁹ gives the following guideline for helping the interpretation of the law: "Purposing the illusion of intimidation is actually the disguised achievement of intimidation, which gives the complaint the impression of endangerment." It mentions easy evidence-providing behaviour as examples, such as placing some ineffective explosive device or blood-covered animal carcass in front of the complainant's home, which, of course, does not usually

⁸ Criminal Code Section 176/A. §

(2) Any person who, for the purpose of intimidation

a) conveys the threat of force or public endangerment intended to inflict harm upon another person, or upon a relative of this person, or

b) purports to make believe another person, or a relative of this person to put that person in fear that any threat to his life or health, or to the life or health of a relative of this person is imminent,

is guilty of a misdemeanor punishable by imprisonment for up to two years.

⁹ Juhász, Zsuzsanna – Karsai, Krisztina – Maráz, Vilmosné – Nagy, Ferenc – Szomora, Zsolt – Vida, Mihály: A Magyar Büntetőjog Különös Része. HVG Orac, Budapest, 2009 p. 160.

cause difficulty for the public prosecutor. However it is more difficult to make a judgment on the question of intimidation involving carrying out an alleged or real, personally aggressive or publicly dangerous indictable offence, which is carried out verbally and so based on statements by witnesses at some time (shorter or longer) after the act and depending on the ability to remember and current mental states. Therefore such perceptions are very subjective - especially in cases when hesitation, inaccuracy and inconsistency on the part of the complainant are not noticed by the police officer during a poorly conducted interrogation, or, if he does notice, are not taken into account. Considering such factors, the prosecutor supervising the investigation has a great responsibility to insist on the collection of adequately detailed statements.

Moreover further practical problems can emerge due to the fact that this crime can be committed intentionally and tendentiously (motivation, on the other hand, being irrelevant). Someone may consider the regular appearance of an excessively social neighbour who intrudes - who crosses the border of privacy uninvited - as constituting disturbance or harassment. He, however, by his own standards has no such intention and does not see this as intrusion. Here the source of the conflict lies in the contrasting or characters of the two people concerned - their different origin, education or habits. This brings us back to the previous topic of subjectivity and I would stress that, not only should the regularity and long-term nature be proved, but also intent to intrude and intimidate for a crime to be committed.¹⁰

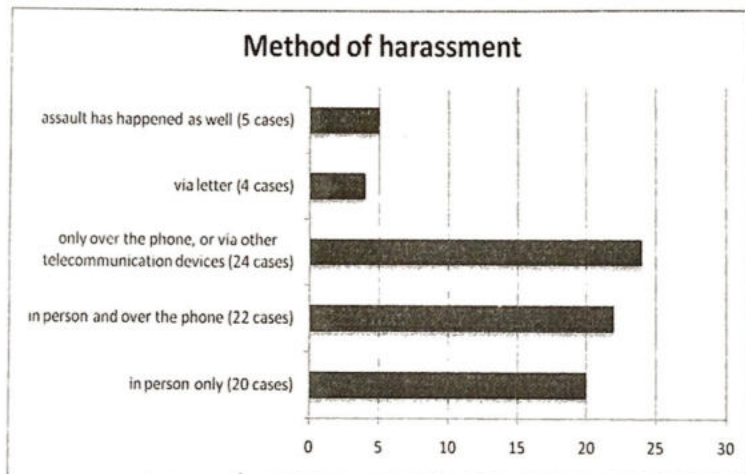
Concerning the method or means of perpetration, it was shown that in 43 (61%) of 70 cases the perpetrator used the telephone (21 disturbed the given person by both 'phone calls and SMS.); only in one case did the complainant receive an e-mail, its content being tantamount to crime. In the DPOs, the perpetrators typically (42 cases/60%) and usually by phone [22/31% cases of 42] rarely commit harassment through the use of a telecommunications instrument; they do not make personal contact. (In the remaining 4 cases the messages containing threats arrived by post). It can also be stressed that the crimes are rather committed by mobile phone than by e-mail. The most typical way of telephone harassment is the perpetrator calls the complainant for months, several times daily, usually late in the evening or early in the morning. In some cases the caller does not speak or the call is curtailed before answering since the aim is to waken the person called, disturb him in his daily routine or frighten him.

A further difficulty is that the communication service provider's system does not notice these short calls in case of harassment with "phone ringing" and it is not registered in the CDR.¹¹ According to information given by Pannon GSM

¹⁰ Szathmáry Zoltán is telling about similar proving difficulties from his practice at the Public Prosecutor's Office of Miskolc in his study: Szathmáry, Zoltán: Az információs társadalom devianciái. In: Infokommunikáció és Jog 2009/4. pp. 115-116.

¹¹ Call Detail Record

Távközlési Zrt., the mobile company, in cases of reported harassment committed by calls lasting only a few seconds tries to reach the caller to clarify the circumstances of the calls. In the given cases it was not successful because "these short calls are likely to arrive through an automatic system or could be due to transmitter failure."



The places where the crimes were committed were the complainant's workplace (12 cases, 17%), school in one case, and complainant's current spot without any characteristic feature in the other cases.

In connection with the states the picture is more unsophisticated: in the practice of District Public Prosecutor's Office only in case of accomplished crimes happened criminal prosecution, in such questions the investigator authority neither asked legal standpoint. According to the legal literature the disturbing act and the intimidation are committed at the moment of having listened/realized the threat and the attempt of this act is excluded immediately, which is originated from the criminal committing behavior. In practice it is not unimaginable that the behaviour described in the (2) paragraph stays in attempt phase, if the threatener intimidates by letter and it has not been delivered to the complainant, therefore its content was not revealed for him - similar to the libel attempts committed with letters containing libel. In case of perpetration method described in the (1) paragraph the attempt is really excluded from the view of concept, as the regularity, permanence as condition excludes the statement of the criminal attempt, for example if the given sms or email did not arrive to the complainant due to external reasons.

In none of the recorded cases in the District Public Prosecutors' Office there is a coactor, but this can not be excluded. (E.g. encouraging the left lover to intimidate the ex-boyfriend or girlfriend on phone, personally or confirming his intention with presentation or assisting him in the implementation.)

The act counts more seriously if the harassment was committed to the injury of ex-spouse, present or ex-partner and a person, who is - as in cases of crimes against sexual morality - under his upbringing, supervision, care or treatment. It is unambiguous what was in the background of the legislative body's direction, when these aggravated cases were enacted into legal code, since, as mentioned, the perpetrator is motivated by anger or despair caused by the break-up of a love-affair or a desire to mentally terrorise family members living together. Although the law writes "ex-spouse" and does not specify husband/wife not divorced but separated, the course book considers them as the complainants of an aggravated case. In practice, the prosecutor and court interpreting the law literally do not determine the presence of aggravated circumstance in the case of a spouse living separated but not divorced. According to this, the DPO decided to determine 21 cases as aggravated cases of the 31 in which the perpetrator had harassed his ex-lover.

The number of counts depends on the number of complainants/passive individuals, This is an important issue to focus on during investigation, as the cases reveal that the policemen usually ask only one person whether he or she wishes to report anything and they miss reports of harassed family members frightened by threatening glance. (For example, in some cases the perpetrator regularly calls a number belonging to a land-line in a block of flat, and on such occasions the perpetrator's aim should be thoroughly investigated.)

In many cases the perpetrator seemingly commits both intimidation and coercion, when he tries to persuade his lover to return to him, and on such occasions what has to be examined is whether the intimidation or violence took place during the harassment and the threatening act to this was aimed at influencing the passive person's behaviour. (The crime of coercion is not committed if the perpetrator's behaviour fulfils the first paragraph of the harassment fact or the second paragraph of the coercion fact.) In none of the cases examined did circumstances exist which would have brought the criminal intent of the behaviour into question.

In 16 (23%) cases the DPO proposed probation and in 2 cases the court has already pronounced sentence accordingly. (The other proceedings are in progress in the court phase.) The DPP proposed a financial penalty in 7 cases (10%) and more serious types of punishment - community service work, suspended imprisonment - were proposed in 4. In 2 (3%) there were no proposals since the perpetrator's *compos mentis* was restricted, and a sentence will be passed depending on the outcome of the trial.

Finally, we would summarise the reasons for terminating proceedings. It appears, on the basis of these results, that this decision - originating from the nature of the harassment - was usually (in 9 cases - 13%) made due to a lack of

proof. The termination judgment referred to the Criminal Proceedings, Section 190 (1) paragraph a) point in 6 cases and to the same paragraph c) point in 1 case. In 10% of the cases (7) the DPP reprimanded the perpetrator and terminated 1 case after taking into consideration the effectiveness of an agreed compromise, as the perpetrator had fulfilled his obligation not to try to contact the complainant in any way. In 1 case the reason for termination was the perpetrator's insanity (schizophrenia).

It was mentioned often that certain persons with a "more sensitive" personality immediately complain if they feel that they have suffered an insult. The opposite of this is seen, when the complainant does not want a criminal process to be conducted for some reason. Unfortunately, we have no data on the incidence of crimes committed with a harassing attitude but which are not reported to the investigating authorities, although it is likely that latent rate would be high - especially in the case of harassment by telephone. The reason for this is, on one side, that the complainants - just as the perpetrators - do not know that this behaviour is a crime, or if they do know this, do not consider it so serious (see one of our cases where the complainant said that "there is no real base for his threats; he just threatens, but he would not do what he threatens because he is just a coward" and the complainant did not report it), or on many occasions complainants say nothing since they have no faith in the investigating authorities or in the effectiveness of the procedure - or they simply forgive the perpetrator and do not want them to be punished.

3. Conclusions

The nature of harassment is such that it is usually the beginning or the middle of a process, which often ends up as a more serious crime or tragedy. KRISZTINA MORVAI's book¹², entitled "Terror in the family" is still the most remarkable analysis of the subject. The book discusses many cases where the psychological terror was followed by physical assault and rape. Thus, it is highly important to have legal instruments to prevent and penalise the less serious forms of criminal behaviour, which still have a highly negative effect on the life of the victims. Unfortunately, the law-maker wished to regulate such behaviour with more enthusiasm than foresight and the Statement of Fact created and included in the Hungarian Criminal Code is too general and subjective and makes the life of the lawyers difficult. ERZSÉBET TAMÁSI unfolded the reason for that also in her book entitled "Guilty victims" of 2005, when, in its last sentence, it states that, without targeted, deep and throughout research, "it is very difficult to regulate something which we do not understand".¹³

¹² Morvai, Krisztina: *Terror a családban*. Kossuth Kiadó, Budapest, 2003 pp. 5-75.

¹³ Tamási, Erzsébet: *Bűnös áldozatok. A családon belüli erőszak férfi szereplői*. BM Kiadó, 2005 p.189.

So definitions (such as: regular basis, frequently, pester, intimidate) as listed in the chapter on the Hungarian provisions, must have a clear description, either by legislation or by standardising practice in courts.

The legislator ought also to consider further the possibility of making another distinction among certain instances of harassment (as the misdemeanour of simple battery and the felony of aggravated battery) by applying the provisions of private prosecution to this crime.

The practice of the district court shows that prosecutors (and also judges) avoid the frequent application of supervision by probation officer or restraining orders.

I think that the reason for these circumstances would be worth analysing so that, armed with the results of the analysis, prosecution practice or regulations binding the appropriate institutions could be rationally settled. For example, and in my opinion, for a harasser, a fine or some single, simple penalty is quite inadequate, since this cannot produce any mental or psychological change which would lead him to admit the impropriety of his earlier thinking or behaviour - nor to be able to handle the earlier unacceptable situation in a civilized manner.

In accordance with statistics - parallel with the newness of the regulation - it is hard to make a well-grounded forecast, although there may be a glimmer of hope that, in respect of harassment, slightly fewer criminal investigations were launched in 2009 compared with 2008. The reason (over and above those mentioned in the last section) might be that the fever caused by this new crime calmed down after one year, specifically for the reason that the grounds for denunciations are no longer revenge and people are not making a mountain out of a molehill. Criminal investigations are started in order to impeach the perpetrators of genuine harassment.

Twenty Years Ago: The Unification of Germany

GORNIG, Gilbert

ABSTRACT *The study examines Germany's legal situation after World War II, the effect of the emergence of the Federal Republic of Germany and the German Democratic Republic as well as the process of unification.*

It analyses the results of the Berlin Declaration, the parallel existence of limited sovereignties and the suitability of different conceptions, such as 'Identity', 'Partial Identity', 'State Core' and 'Shrunken State' Theories. Legal and administrative level of unification, the situation of the Federal Republic of Germany as the legal successor of the German Democratic Republic, including the issue of taking over debts and its relations to international law is also in the focus.

One of the main objects of examination is the development of the East of Oder and Neisse territory's status, the intentions to annex on the Polish and Soviet side with the expulsion of Germans and settlement of a Polish or Soviet population, and the impact of the Görlitz Treaty not ignoring the question of encroachment upon territorial integrity and of violation of international legal principles.

The development of the Two-plus-Four Treaty in 1990, with respect to external aspects of re-unification and a peaceful settlement is also examined.

*The study addresses the question of enforceability in the case of a provision ceding of a territory that, violating people's right to self-determination, ignores a *ius cogens* rule of international law.*

1. Continuity of the German state

1.1 Responsibility of the Allies

After the end of World War II, the issue of the continuation or discontinuation of the German state had to be addressed. In the declaration of 5 June 1945 'regarding the defeat of Germany and the assumption of supreme authority with respect to Germany', the so-called 'Berlin Declaration'¹, the four main conquering powers explicitly excluded an annexation of Germany. They merely wished to occupy Germany, not to annex the state territory. Even the

¹ Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany (adopted 5 June 1945) 68 UNTS 190-202 (Berlin Declaration).

subjective element of an annexation, the intention to annex, was absent. No doubts arose either concerning the state's people as the personal element of a state. The regulations concerning citizenship as such had not been affected. Evidence for the continuing existence of the German state authority is given by the Allies' state practice after the collapse 1945. The German Empire did not become extinct as a result of the unconditional surrender of the military forces on 7 and 8 May 1945,² as this was just a military act and did not put an end to the German state authority. Neither could the arrest of the members of the last state government, the so-called Dönitz Government, on 23 May 1945 be regarded as a cessation of German state authority. On the one hand this arrest did not strike at the heart of the German state authority; on the other hand the fate of state authority does not depend on the fate of one of its executive leaders. Moreover, German state authority was still exercised at the middle and lower levels. Even if the German state should have become unable to govern due to the arrest of the Dönitz Government, the German state authority as such was not lost. After all, a state does not cease to exist due to a merely temporary discontinuation of state authority.³

This shows that the 'Berlin Declaration' was decisive for Germany's legal fate. In this statement the four main powers assumed 'supreme authority with respect to Germany'. According to the Four Powers, the aim of this step was 'to make provision for the cessation of any further hostilities on the part of the German armed forces, for the maintenance of order in Germany and for the administration of the country'. It is an issue of dispute if this meant that the Four Allies held the German state authority in trust. One position is that the Four Powers were neither able to plead that they had been accordingly authorized by the trustor, by Germany or a different institution, nor did they have the intention to establish a trustee relationship. However, others take the view that the German state authority was pursued in trust by the Allies. On the whole we can assume that at all events the German state authority continued to exist.

The German Empire had thus not ceased to exist after 1945. All instruments of state of the Federal Republic of Germany professed from the beginning their unreserved belief in the continuation of the German Empire.

1.2 The emergence of two states within Germany

The continuation of Germany within its borders of 31 December 1937 was once more endangered by the establishment of the Federal Republic of

Germany on 23 May 1949 as well as by the establishment of the German Democratic Republic (GDR) on 7 October 1949. Subsuming the events of 1949 under the criteria of the Three-Elements Theory, we can neither assume dismemberment nor secession. It is true that both German constituent states disposed of a state territory, a state people and state authority, but these entities were still subject to the Four Powers' rights declared as occupation rights. Thus the perpetuation of the Allies' seizure rights deprived the newly-born German constituent states of decisive rights of sovereignty. Besides, in 1949 neither the Federal Republic of Germany nor the GDR had the intention of secession. On the contrary, both states took Germany's unchanged legal situation as a starting point. This means that Germany continued to exist as a subject of international law unable to govern itself, and therefore as a state, while the Federal Republic of Germany and the GDR were both able to govern in limits and therefore subjects of international law with limited sovereignty and a respective status of restricted quality.

The question of continuation or discontinuation arose again in 1955 when the Federal Republic of Germany and the GDR gained an – albeit – limited sovereignty. Under article 1 paragraph 2 of the Convention on relations between the Three Powers and the Federal Republic of Germany,⁴ taking effect on 5 May 1955, the Federal Republic of Germany 'shall' merely 'have accordingly the full authority of a sovereign State over its internal and external affairs'. The reductions made on a full sovereign status become clear in article 2. As for the GDR, corresponding reductions of sovereignty are not equally obvious to international law. However, they were nevertheless existent and are made plain by the Soviet Union's declaration of 25 March 1954,⁵ concerning the sovereignty of the GDR. Here, while the latter is referred to as sovereign, the Soviet Union still retained control over 'functions connected with guaranteeing security, and resulting from the obligations incumbent on the USSR as a result of the Four-Power Agreement'.

This meant that now a continuing state as a whole as well as the two states Federal Republic of Germany and GDR existed on Germany's territory. Due to the complicated legal situation of Germany, several theories regarding Germany evolved.⁶ If we take the continuation of the German Empire in its 1937 borders as a starting point, we can ignore all theories which are based on differing assumptions. One of the prevailing theories is the 'Identity Theory'. The Federal Republic of Germany was identical with the whole of Germany. A problem of the Identity Theory, however, was the relation of the federal German state authority to the state authority of Germany as a whole. The

² Act of Military Surrender (adopted 8 May 1945, entered into force 8 May 1945) Official Journal of the Control Council in Germany, Supplement no 1 p. 6.

³ See Blumenwitz, Dieter: What is Germany. Germany. Exploring Germany's Status after World War II. Kulturstiftung der deutschen Vertriebenen. Bonn, 1989 p. 29. et seq.

⁴ Convention on Relations between the Three Powers and the Federal Republic of Germany (adopted 26 May 1952, amended 23 October 1954, entered into force 5 May 1955) (1955 II) FLG 305–372 (Germany Convention/General Convention).

⁵ See Europa Archiv 1954, p. 6534. et seq.

⁶ See Blumenwitz, Dieter op. cit. p. 32. et seq.

Federal Republic of Germany was able to represent the entire German state as far as the sovereignty of this state was not limited by the Four Powers' rights. To the extent that the Federal Republic exercised state authority, this was therefore simultaneously German state authority. The 'Identity Theory' features sub-theories dealing with the relations between the Federal Republic of Germany and the GDR. According to the 'State Core Theory', the Federal Republic made up the state core of a larger Germany and was thus identical with the German Empire. Its state authority at the time, though, did not extend to the whole state territory due to a lack of effectiveness. The GDR was in the process of secession. Consequently, according to this theory, state territory and constitutional territory disintegrated. The Federal Constitutional Court called this a partial identity.⁷ The 'Partial Identity Theory' can be taken to mean in terms of the 'State Core Theory' that the legal subjects Federal Republic of Germany and German Empire were identical, but that not all the legal conclusions commonly entailed by identity could be drawn, due to the principle of effectiveness in international law. According to the 'Shrunk State Theory', the German state had shrunk to the area within the scope of the Basic Law whilst maintaining its legal identity. State territory and constitutional territory were identical, but only relating to the area of the Federal Republic of Germany. This theory was neither compatible with the Basic Law nor with international law, as it on the one hand contradicted the obligation to safeguard national unity; on the other hand it acted on the assumption of a not occurred secession of the GDR and did not respect the Four Powers' responsibility for Germany as a whole. According to the 'Partial Order Doctrine' or 'Roof Theory' the order created by the Basic Law was not that of the whole state, did however not intend to replace this order. Instead it wanted to submit to the latter as the roof of the Empire with the Federal Republic as a kind of member state. In this model the Federal Republic and the GDR faced each other as equals on a level below full state sovereignty. Against the backdrop of these theories we must also assess the GDR's accession to the Federal Republic of Germany.

1.3 The unification of the two German states

The free elections in GDR in March 1990 gave the impetus for a speedy unification. Regarding the issue of the unification of the two German states the question arose how to come to terms with this unification. Up to debate was the possibility offered by article 146 of the Basic Law that after the collapse of the German state as a whole the then fully sovereign German states, Federal Republic of Germany and GDR, could merge and form a homogenous subject of international law. This consideration, mainly preferred by those who with the

⁷ Decision of the Federal Constitutional Court concerning the Basic Treaty between the two German states, 36, p. 1. et seq. (16).

collapse of the GDR also wanted to enforce the downfall of the Federal Republic of Germany and its social order, did not prevail. In fact, use was made of the possibility provided by article 23 sentence 2 Basic Law (former version) according to which the constitution is to be enacted in other parts of Germany on their accession. On 23 August 1990, the People's Parliament declared 'the GDR's accession to the Basic Law's area of jurisdiction according to article 23 on 3 October 1990'.

Making use of the means for unification offered by article 23 sentence 2 Basic Law (former version) unification means accession of the GDR to the organization of the Federal Republic of Germany. For international law, the identity of the German state named Federal Republic of Germany, which again was identical with the state of Germany as a whole, thus continued to exist, the GDR however perished. From the point of view of international law, the accession of the GDR to the Federal Republic's confederation can be classified as incorporation.⁸

The negotiations between the two German states resulted in two treaties, the Treaty Establishing a Monetary, Economic and Social Union (Economic Union Treaty)⁹ on 18 May 1990 and the Treaty on Unification (Unification Treaty)¹⁰ on 31 August 1990. As the accession took effect on 3 October 1990, simultaneously the Treaty on Unification was enforced. Initially, by means of article 3 of the Treaty of Unification, the Basic Law was enacted in the joining areas, thus partially fulfilling the constitutional mandate of article 23 Basic Law (former version). The Treaty of Unification dealt with the consequences of the collapse of the GDR. The Federal Republic became the GDR's legal successor. As the continuity of legal relations is explicitly requested by the Treaty of Unification, we can assume a singular legal succession. There are no directions towards a universal succession of the Federal Government and the Federal States into the GDR's legal positions.

Owing to the continuing existence of the Federal Republic, its assets and debts remained unaffected. German citizens retained their citizenship pursuant to the Imperial and Federal Nationality Law (Reichs- und

⁸ See Oeter, Stefan: German Unification and State Succession. In: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV) 1991/51. pp. 349-383; Gornig, Gilbert: Der völkerrechtliche Status Deutschlands zwischen 1945 und 1990. Auch ein Beitrag zu Problemen der Staatensukzession. Wilhelm Fink Verlag, München, 2007 p. 25. et seq.

⁹ Treaty Establishing a Monetary, Economic and Social Union (Federal Republic of Germany-GDR) (adopted 18 May 1990, entered into force 30 June 1990) (1990 II) Federal Law Gazette (FLG) p. 537-544 (Economic Union Treaty). See: Horn, Norbert: The Lawful German Revolution: Privatization and Market Economy in a Re-Unified Germany. In: *American Journal of Comparative Law* (A. J. Comp.) 1991/39. pp. 725-746.

¹⁰ Treaty on Unification (adopted 31 August 1990, entered into force 29 September 1990) (1990 II) FLG 889-904. (Unification Treaty).

Staatsangehörigkeitsgesetz) of 22 July 1913. The remaining laws of the Federal Republic are now also valid throughout the new member states (Bundesländer) under article 8 Treaty on Unification as far as their area of jurisdiction is not restricted to specific states or parts of states. In article 11 the Treaty on Unification contains a provision regarding the fate of the Federal Republic's international treaties and agreements after 3 October 1990. According to this, the contracting parties work on the assumption that international treaties and agreements, which the Federal Republic of Germany is part of, retain their validity; this includes treaties which establish membership in international organisations and institutions. According to the principle of flexible treaty boundaries, all treaties of the Federal Republic expanded to include the area of the five new *Bundesländer*. This especially applied for contracts that established a membership in international organisations.

GDR law remains in force pursuant to article 9 of the Unification Treaty, as far as it regards legislative matters of the states within the Federal Republic and is compatible with the Basic Law, the remaining federal law and the law of the European Communities. The GDR's treaties on principle ceased to exist with the extinction of the GDR as a subject of international law. However, article 12 of the Unification Treaty provides that the termination of these treaties is to be established with the respective former partners. In accordance also the remaining-in-force and amendment of the treaties can be settled, taking into account the protection of confidence and the interests of the involved states. As memberships in international organisations are strictly personal and therefore succession cannot be passed on, the Federal Republic did not automatically become member in the international organisations the GDR belonged to. According to article 12 paragraph 3 of the Treaty of Unification, the Federal Republic could only be admitted to such organisations in agreement with the respective partners to the treaty.

The GDR's administrative assets became federal assets as far as they were not intended for tasks now in the responsibility of the *Länder* and municipalities. Insofar as they did not devolve upon the Federal state, they were taken over by the new body responsible for administration pursuant to article 21 of the Unification Treaty. Similar regulations apply to the financial assets. Regarding administrative assets in third countries, no provision is made in article 21 of the Unification Treaty. Therefore it must be assumed that the generally accepted principles of international law apply to the GDR's administrative assets located in third countries at the time of accession to the Federal Republic of Germany. This means that the GDR's administrative assets located in third countries on the day of its accession devolved upon the Federal Republic. Especially diplomatic buildings belonging to the administrative assets fell into the financial assets of the Federal Republic of Germany after collapse of the GDR. In accordance with the general rules of international law financial assets of the GDR located in third countries devolved to the Federal Republic of Germany. The comprehensive regulation of debts in the Unification Treaty

article 23 clearly demonstrates the partners' intention of the Federal Republic completely taking over the GDR's debts at the moment of the GDR's accession to the Federal Republic on 3 October 1990. The contractual terms concerning administrative liabilities – as far as provisions are made – exceed the requirements of international law. In addition, they do not distinguish between German debtors and debtors abroad, but treat the debt issue independently. Nor do the contractual regulations make any provision for the principal exclusion of transition or acceptance of so-called odious debts. All administrative debts consisting of cash are taken on. This also includes the administrative liabilities of local subdivisions, as the GDR's budget was organized as a homogeneous state budget. Additionally the GDR's financial liabilities devolve upon the Federal Republic of Germany. Even here so-called odious debts are not excluded from transitions, as would have been possible for reasons of fairness according to general international law. That means that regarding debt agreement the principle '*res transit cum suo onere*' (the thing passes with its burden) was followed, as is done time and again also in international law.¹¹

In conformity with article 7 of the Two-plus-Four Treaty, the Four Powers terminated their 'rights and responsibilities' concerning Berlin and Germany as a whole. However, article 7 paragraph 1 refers to the agreements of the four Allied Powers concerning Germany. Pursuant to article 7 paragraph 1 sentence 2, as a result of the ending of the Four Powers' rights, 'the corresponding, related quadripartite agreements, decisions and practices are terminated and all related Four Power institutions are dissolved'. As the united Germany 'shall have accordingly full sovereignty over its internal and external affairs', as stated in article 7 paragraph 2, the regulations of the three Western Allies' treaties with the Federal Republic of Germany, which affect the German sovereignty, may have lost their significance. This would result in the termination of the Germany Treaty, taking effect on 5 May 1955, as well as of the Convention on the Settlement of Matters arising out of the War and the Occupation of 26 May 1952 (Transition Agreement).¹² Both treaties, though, are subject of an exchange of notes on 27 and 28 September 1990, an administrative agreement in conformity with article 59 paragraph 2 sentence 2 Basic Law, between the Federal Republic's government and the governments of the three Western Allies, which settled the expiration of the German Treaty and the Transition Agreement. However, the provisions of part 6 and 9 Transition Agreement, which are relevant for the property rights issues, were not terminated by the exchange of notes. They therefore remain in force also in future. Internally, the continuing standards now have the nature of a statutory ordinance issued by the

¹¹ See Gornig, Gilbert: Staatennachfolge und Einigung Deutschlands, Teil II. Gebr. Mann Verlag, Berlin, 1992.

¹² Convention on the Settlement of Matters arising out of the War and the Occupation (adopted 26 May 1952, amended 23 October 1954, entered into force 5 May 1955) (1955 II) FLG 405–459 (Transition Agreement).

Federal Government. The waiver of objections in article 3 paragraph 2 part 6 Transition Agreement resulted in the fact that the Federal Government abstains from the enforcement of any claim for compensation according to international law by way of diplomatic protection as far as the Allies are concerned. The extinction of the exercise of legal recourse resulting from article 3 paragraph 3 part 6 of the Transition Agreement merely excludes the enforcement of respective claims by means of procedural law. Article 3 makes no statement concerning the claims' legal continuance and therefore does not annul them as substantive law.

2. The Oder-Neisse boundary

2.1 Annexation of the Oder-Neisse territories by Poland and the Soviet Union

While negotiations concerning the fate of Germany and Germany's eastern territories were still ongoing, Poland and the Soviet Union tried to create a fait accompli in the areas east of the Oder and the Lausitzer Neisse by expulsion of the Germans and settlement of a Polish or Soviet population respectively as well as by administrative measures.

This unilateral annexation of Germany's eastern territories by force into Poland and Soviet Union represents an annexation contrary to international law. After the expulsion of the German population and the settling with new inhabitants the territories east of Oder and Neisse were actually taken into possession. The question regarding an *animus domini* (intent to be owner) of Poland and the Soviet Union had to be answered in the affirmative. The decree of 13 November 1945,¹³ concerning the administration of the regained territories can be regarded as a manifestation of the Polish intention of annexation; here the Polish federation takes control of Germany's eastern territories. Also the later enacted laws and provisions illustrate the Polish intention to annex. By a decree of the presidency of the Supreme Soviet of 7 April 1946,¹⁴ the northern part of East Prussia was integrated into the USSR's national territory.

The concession of the territorial sovereignty by the Allies was not compatible with international law and constitutes an encroachment upon the

¹³ Dziennik Ustaw, Pos. 295/51; see: Bundesministerium für Vertriebene, Flüchtlinge und Kriegsgeschädigte (ed.), Dokumentation der Vertreibung der Deutschen aus Ost-Mitteleuropa I. Die Vertreibung der deutschen Bevölkerung aus den Gebieten östlich von Oder-Neiße, vol. 3, 1984, p. 95.

¹⁴ See Verdross, Alfred – Simma, Bruno – Geiger, Rudolf: Territoriale Souveränität und Gebietshoheit. Zur völkerrechtlichen Lage der Oder-Neiße-Gebiete. Kulturstiftung der deutschen Vertriebenen, Bonn, 1980 p. 69.

territorial integrity of Germany. This fact was taken into account by the theories concerning Germany developed by German experts in constitutional and international law. According to the so-called 'State Core Theory' Germany continued to exist in the old boundaries of 31 December 1937. The Federal Republic of Germany constituting the state core of a larger Germany was identical with the German Empire; for want of effectiveness, however, its state authority did not expand to the entire state territory, especially not to the areas east of Oder and Neisse. According to this theory, state territory and constitutional authority were therefore not identical. While the territorial sovereignty remained with the German state as a whole, Poland and the Soviet Union exercised the territorial jurisdiction on the grounds of the fait accompli they had created.

2.2 The German Democratic Republic's Görlitz Treaty

On 6 July 1950, the German Democratic Republic and the People's Republic of Poland laid down unanimously in an agreement 'concerning the Demarcation of the Established and Existing Polish-German State frontier', the so-called Görlitz Treaty,¹⁵ that the Oder-Neisse boundary line 'is the State frontier between Germany and Poland'. The government of the Federal Republic of Germany commented that it would not recognize the fixation of the Oder-Neisse boundary as the final frontier between Germany and Poland, and that the government of the Soviet Zone of Occupation possessed no rights whatsoever to speak for the German people. The decision as to Germany's eastern territories at the time under Polish and Soviet administration could only be reached in a forthcoming peace settlement with the whole of Germany.

2.3 The Federal Republic of Germany's Moscow and Warsaw Treaties

In these agreements, the so-called '*Ostverträge*', the Federal Republic of Germany did not dispose of German territories. This results from the wording which does not refer to changes, cessions or recognition of territories. Neither could such recognition be concluded from the waiver of territorial claims expressed in the treaties, in particular as also the parties of the agreements opposed this. The stipulations of unaffectedness in article 4 of the Moscow Treaty¹⁶ and in article IV of the Warsaw Treaty¹⁷ finally were aimed at holding

¹⁵ Agreement concerning the demarcation of the established and existing Polish-German State frontier (Poland – GDR) (adopted 6 July 1950, entered into force 28 November 1950) 319 UNTS 95–112 (Görlitz Treaty).

¹⁶ Non-Aggression Treaty (Federal Republic of Germany–Soviet Union) (adopted 12 August 1970, entered into force 3 June 1972) (1972 II) FLG 354–355 (Moscow Treaty).

on to the Four Power responsibility for Germany as a whole. The bilateral and multilateral treaties which the parties had formerly agreed on or which related to these parties should remain unaffected. This meant that also the provisions of a peace settlement as embodied in the Potsdam Protocol of 2 August 1945,¹⁸ and in the Germany Treaty of 26 May 1952, in the version of 23 October 1954,¹⁹ retained its legal force. Therefore Germany continued to exist at least in its boundaries of 31 December 1937, even after the Moscow and Warsaw Treaties. The territorial sovereignty of the areas east of Oder and Neisse remained with the German state as a whole. The right to finally fix Germany's eastern state border was to be left to the regulation of a peace settlement.

2.4 The Two-plus-Four Treaty

2.4.1 Origin

After the peaceful revolution in the GDR in autumn 1989, the issue was not only to complete the reunification from a constitutional point of view. Rather, also the external aspects of the reunification had to be considered and if necessary – the Soviet Union first insisted on this – be dealt with in a peace settlement. To receive the Four Powers' assent to the German reunification, especially that of the Soviet Union, some political questions had to be answered to everybody's satisfaction, in particular whether a sovereign, reunited Germany would be willing to acknowledge the existing borders in Europe.²⁰ The claims of the Western Allies' representatives to accept the Oder-Neisse boundary as the western frontier of Poland was difficult to bring in line with article 7 paragraph 1 of the Germany Treaty, according to which the common goal was laid down as 'a peace settlement for the whole of Germany freely negotiated'. Furthermore in the same treaty all parties had consented that the 'final determination of Germany's boundaries' would have to be delayed until this settlement. There was general agreement regarding one issue, namely that only the sovereign united Germany could dispose of territories, neither the non-sovereign Federal Republic and the non-sovereign GDR, nor a not sovereign

¹⁷ Treaty Concerning Basis for Normalizing Relations (Federal Republic of Germany-Poland) (adopted 7 December 1970, entered into force 3 June 1972) (1972 II) FLG 362-363 (Warsaw Treaty).

¹⁸ Report on the Tripartite Conference of Berlin (Potsdam Protocol), *Amtsblatt des Kontrollrates in Deutschland*, *Ergänzungsblatt* No. 1, p. 13. et seq.

¹⁹ Convention on Relations between the Three Powers and the Federal Republic of Germany (adopted 26 May 1952, amended 23 October 1954, entered into force 5 May 1955) (1955 II) FLG 305-372 (Germany Convention/General Convention).

²⁰ See Gornig, Gilbert: *The Contractual Settlement of the External Problems of German Unification*. *Außenpolitik*. *German Foreign Affairs Review* 1991/42. pp. 3-12; Gornig, Gilbert: *Der völkerrechtliche Status Deutschland* p. 39. et seq.

entire German state. However, only if a sovereign German state as a whole could waive the territorial sovereignty of areas, then the danger existed that the German state might decide differently after the reunification and when sovereignty had been granted. Reunification, receipt of sovereignty and cession of territory were therefore supposed to coincide in one act. It soon became clear, however, that this goal was not to be achieved. At least the coming-into-force of the treaty regulating the external aspects of the reunification could not possibly occur until after the completed reunification, as it seemed impossible to ratify the Two-plus-Four Treaty²¹ in time. The fact, though, that the reunification of Germany should be linked to the recognition of borders meant that for Germany the people's right to self-determination was made dependent on the compliance with international claims.

On 12 September 1990, the Two-plus-Four Treaty was signed and awarded the name 'Treaty on the Final Settlement with Respect to Germany'. In time for the state unification, the external aspects of the German unification were finally regulated under international law.

2.4.2 Regulation of territorial issues

The treaty's first article deals with the problem relating to the boundaries. However, the particular areas whose regulation was still to be attended to are not mentioned *expressis verbis*. Article 1 paragraph 1 merely states that the united Germany will comprise the territories of the Federal Republic of Germany, the German Democratic Republic and entire Berlin²² and that its external borders will be those of the Federal Republic and of the GDR. This regulation may have been the only possible one to put into practice, due to the fact that thus complicated and controversially discussed questions of international law concerning the status of disputed areas could remain unanswered. All the same it remains open when and by means of which constitutive acts the territorial sovereignty – of which area? – devolved upon the new authorities.²³ If we assume that the territories east of Oder and Neisse were still under territorial sovereignty of Germany as a whole, then it can be construed that the acquisition by the new sovereigns, Poland and the Soviet Union, occurred through dereliction of title. This would mean that sovereign Germany gave up its territorial sovereignty and that – after a logical second of

²¹ Treaty on the Final Settlement with Respect to Germany (Federal Republic of Germany, GDR, USA, Soviet Union, United Kingdom, France) (adopted 12 September 1990, entered into force 15 March 1991) (1990 II) FLG 1318-1329 (Two-plus-Four Treaty).

²² See Wilms, Günter E.: *The Legal Status of Berlin after the Fall of the Wall and German Reunification*. In: *ZaöRV* 1991/51. pp. 470-493.

²³ See Gornig, Gilbert: *Der Zwei-Plus-Vier-Vertrag unter besonderer Berücksichtigung gebietsbezogener Regelungen*. *Recht in Ost und West (ROW)*, 1991 pp. 97-106.

the area being ownerless – the state already exercising the factual control occupied the territory. A different option is, though, that Germany waived its territorial sovereignty. This construction finally also amounts to a dereliction of title.

Taking the position of Germany having already lost the territorial sovereignty long before, for example by postulating that Germany had ceased to exist at some time after 1945, the provision of article 1 paragraph 1 could only be interpreted as a declaration. An argument for the view that this position underlines the Two-plus-Four Treaty may be found in article 1 paragraph 1 sentence 3 according to which the 'confirmation' of the borders' final nature constituted an essential part of the peaceful order of Europe. As this position, formerly held by the states of the Eastern Bloc, hardly proves legally tenable and therefore was not accepted by any German federal government, it seems improbable that the federal government in charge intended to base the treaty on this concept. This would not only render the Federal Republic's politics implausible as it would mean retroactively withdrawing from a notion of identity held for forty years. It would also infer far-reaching consequences as then the German Reich would necessarily have had to perish at some time and consequently the Federal Republic of Germany would represent a new state.

Provided that the federal government – following the jurisdiction of the Federal Constitutional Court – assumed a continuation, the confirmation would prove a meaningful part of the treaty if Poland and the Soviet Union had acquired Germany's eastern territories by adverse possession. In this case however – given you accept the legal institution of adverse possession in international law – the exercise of territorial sovereignty would have to have been 'undisturbed', 'unchallenged' and 'uninterrupted', which did not apply.

A 'confirmation of the definite nature of the borders of the united Germany' would also make sense if it related to an annexation conducted by Poland. It is doubtful, though, if an action like an annexation that is contrary to international law can be 'recognized'. It appears obvious that the prohibition of violence, the Stimson doctrine and the people's right to self-determination are being disregarded. Incidentally it seems improbable that the Soviet Union intended to base the treaty on a concept according to which the annexation of Germany's eastern territories by Poland – and the Soviet Union – first resulted from an act contrary to international law, which was later approved by a united Germany. However, if we support the position that the annexation was recognized, the problem arises if the recognition is contestable or void.

One could suspect that the chosen wording merely intended to avoid disputes as to the border issue. This would mean that a change of the territorial sovereignty had not yet occurred. This view, though, is hardly compatible with the provision concerning territorial issues of article 1 paragraph 1 sentence 1 of the Two-plus-Four Treaty.

The possibility remains that the term 'confirmation' is just used to point out that the territorial sovereignty should be adapted to the current situation, i.e. the

current situation is confirmed. But from that point of view, article 1 paragraph 1 sentence 3 makes little sense.²⁴

2.5 Boundary confirmation treaty

In the treaty of 16 November 1990 between the Federal Republic of Germany and the Republic of Poland concerning the confirmation of the existing German-Polish border,²⁵ the parties confirm the frontier as it exists between them and the delimitation of which is laid down in the Görlitz Treaty of 6 July 1950 between the GDR and the Republic of Poland on the marking of the established and existing German-Polish state border, and in the agreements concerning its implementation and its amendment (Act of 27 January 1951, on the execution of the state border's marking between Germany and Poland; treaty of 22 May 1989, between the GDR and the People's Republic of Poland on the sea area's delimitation in the bay of the Oder) as well as in the Warsaw Treaty of 7 December 1970 between the Federal Republic of Germany and the People's Republic of Poland about the basis of normalization of their relations. The boundary settlements entered into by the two German states independently of each other therefore are in future also binding for the united Germany.

3. Final assessment

With the Two-plus-Four Treaty the Republic of Poland and the Soviet Union attained territorial sovereignty over the areas east of Oder and Neisse.

Experts in international law must address the issue if a ceding of territory without ascertaining the intention of the people involved – whoever this may be in the case concerned – is at all admissible according to the people's right to self-determination as this is today recognized in literature as *ius cogens*, as mandatory international law.

It was the expulsion violating mandatory international law that finally led to the fact that Poland and the Soviet Union obtained the territorial sovereignty over the areas east of Oder and Neisse. Had eight-and-a-half million Germans still been living in those areas, this ceding of territory, today regarded as the price for the unity, would not have been enforceable.

²⁴ See Rauschnig, Dietrich: Beendigung der Nachkriegszeit mit dem Vertrag über die abschließende Regelung in bezug auf Deutschland, Deutsches Verwaltungsblatt (DVBl.), 1990 pp. 1275-1285; Gornig, Gilbert: Der Zwei-Plus-Vier-Vertrag pp. 97-106.

²⁵ Treaty on the confirmation of the frontier (Federal Republic of Germany and Poland) (adopted 14 November 1990, entered into force 16 January 1992) (1991 II) FLG 1329-1330 (Boundary confirmation treaty).

The principle of *laesio enormis* in sale and purchase contracts in Roman law

JUSZTINGER, János

ABSTRACT *The essay gives a detailed analysis of the passages (CJ. 4.44.2, CJ. 4.44.8) found in the Codex Justinianus relating to the principle of laesio enormis. In addition to the question of authenticity and to some suspicion of interpolation in these texts, the study tries to answer the question of whether the Roman legal system was able to harmonise the principle of equity and the requirements of a stable commercial life with the help of laesio enormis. Further, it pays close attention to the origin of the strict criterion of "dimidia pars", as well as to the dogmatic structure of the legal institution examined. According to the author, a seller's unilateral declaration addressed to the judge, claiming the return of merchandise at the same time as the repayment of the purchase price, is, when modern legal definitions and terminology are applied, nothing more than a declaration of rescindment, which aims at the unilateral dissolution of a valid, effective sales contract with ex tunc effect. In order to avoid this and preserve the effective contract, the purchaser was given the right to pay the purchase price (facultas alternativa). The two rescripts appearing in the Codex of Justinian with their strict criterion of 50% "dimidia pars" mean the first (still rudimentary, but important) step towards a balance between freedom of contract manifesting itself in the free bargain and the principle of equity applied in protection of the economically weaker party.*

1. Introduction

The rule of *laesio enormis* (*laesio ultra dimidium*)¹ has added the *pretium*, or, more precisely, excessively low price in comparison with the value of merchandise, to those factors which, when they emerge and within limits make

¹ On the questions of *laesio enormis* see the rich foreign and domestic literature: Scheuer, Hans: Die *laesio enormis* im römischen und im modernen Recht. In: Zeitschrift für vergleichende Rechtswissenschaft 1933/47. pp. 77-117., Visky, Károly: Die Proportionalität von Wert und Preis in der römischen Rechtsquellen des III. Jahrhunderts. In: Revue internationale des droits de l'antiquité 1969/16. pp. 355-388., Hackl, Karl: Zu den Wurzeln der Anfechtung wegen *laesio enormis*. In: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 1981/98. pp. 147-161., Visky, Károly: Spuren der Wirtschaftskrise der Kaiserzeit in den römischen Rechtsquellen. Akadémiai Kiadó, Budapest, 1983 pp. 24-66., Sirks, A. J. Boudewijn: La *laesio enormis* en droit romain et byzantin. In: Tijdschrift voor Rechtsgeschiedenis

a contract of sale terminable. According to this principle, a purchase price must reach at least half of a fair market price for real estate to be sold. If this rule is breached, the purchaser can demand the cancellation of the contract and repayment of the price already paid, this taking place simultaneously with the return of the merchandise.

This essay deals with an examination of *laesio enormis*: firstly, it tries to answer the question of whether the regulations of Roman law were successful in harmonising the freedom of contract and the criterion of proportionality of the purchase price. A second question is whether Roman law could reconcile the demands of the rule of law and the requirements of stable commercial life with the principle of the elimination of inequality and the principle of equity, both aiming at the protection of an economically defenceless, weaker party and, if so, to what extent.

2. The emergence of *laesio enormis* in imperial rescripts

2.1 From free bargain to the rule of *laesio enormis*

In relation to the regulations of the classical period regarding purchase price, the only visible restrictions to the rule were that it had to be expressed in

1985/53. pp. 291-307., Klami, Hannu Tapani: «*Laesio enormis*» in Roman law? In: Labeo 1987/33. pp. 48-63., Sirks, A. J. Boudewijn: Diocletian's Option for the Buyer in Case of Rescission of a Sale, A Reply to Klami. In: Tijdschrift voor Rechtsgeschiedenis 1992/60. pp. 39-47., Dömötör, László: Észrevételek a *laesio enormis* és továbbélése kérdéséhez. In: Acta Facultatis Politicæ-Iuridicæ Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae. Sectio iuridica 1995-1996/35. pp. 45-65., Casani, Amparo Montañana: La rescisión por lesión (Origen, evolución histórica y recepción en Derecho moderno). Tirant lo Blanch, Valencia, 1999 pp. 1-159., Sciuto, Patrizia: Sulla c.d. rescissione per lesione enorme. In: Labeo 2000/46. pp. 404-433., Pókecz Kovács, Attila: A *laesio enormis* és továbbélése a modern polgári törvénykönyvekben. In: Jogtudományi Közlöny 2000/5. pp. 177-185., Pennitz, Martin: Zur Anfechtung wegen *laesio enormis* im römischen Recht. In: Schermaier, Martin Josef – Rainer, Michael J. – Winkel, Laurens C. (ed.): Iurisprudentia universalis – Festschrift für Theo Mayer-Maly zum 70. Geburtstag. Böhlau Verlag, Köln-Weimar-Wien, 2002 pp. 575-591., Cardilli, Ricardo: Alcune osservazioni su *leges epiclassiche* e interpretatio: margine di Imp. Diocl. et Maxim. C. 4. 44. 2 e C. 4. 44. 8. In: Acta Universitatis Szegediensis de Attila József nominatae. Acta Iuridica et Politica 2004/65. pp. 115-145., Hake, Jan Dirk: *Laesio enormis* als error in negotio. In: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 2005/122. pp. 91-102., Sirks, A. J. Boudewijn: *Laesio enormis* again. In: Revue internationale des droits de l'antiquité 2007/54. pp. 461-469., Westbrook, Raymond: The Origin of *Laesio Enormis*. In: Revue internationale des droits de l'antiquité 2008/55. pp. 39-52.

monetary terms,² be definite (*certum pretium*) and real (*verum pretium*).³ This meant that classical Roman law did not wish to interfere into the process of bargaining, since it regarded it as natural that the parties to the contract would have tried to reach the price most favourable to them.⁴ On these grounds, it is possible to say that the purchase price did not have to express the objective value of the merchandise whilst any relationship between price and value was irrelevant - which made its correctness questionable.⁵

The system, which regarded this *circumscriptio* as a natural element of the sale and purchase process, remained unchanged for many centuries in Roman law.⁶

As one of the symptoms of the financial-economic crisis of the empire⁷ the question of equality of contractual service and consideration emerges in more and more imperial rescripts from the 3rd century AD. This did not mean any withdrawal from the principles of classical law, since they considered the purchase price the subject of free agreement between parties, allowing mutual manoeuvring⁸ and applying the same principles as in solving legal disputes.⁹

² See Gaius 3. 141 ill. I. 3. 23. 2, Paul. D. 18. 1. 1. 1. Vö. Tomulescu, Constantin St.: Paul, D. 18. 1. 1 pr. et la mancipatio. In: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 1971/18. p. 721., Daube, David: The Three Quotations from Homer in Digest 18. 1. 1. 1. In: Cohen, David – Simon, Dieter (ed.): Collected Studies in Roman Law. Vittorio Klostermann, Frankfurt, 1991. pp. 341-343., Bürge, Alfons: Geld – und Naturalwirtschaft im vorklassischen und klassischen römischen Recht. In: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 1982/99 p. 142., Mayer-Maly, Theo: Pactum, Tausch und *laesio enormis* in den sog. *Leges Barbarorum*. In: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 1991/108. p. 214.

³ For more detailed information, with the literature referred, see Jusztinger, János: Az árképzés korlátai a római adásvételnél. In: Publicationes Universitatis Miskolciensis, Sectio Iuridica et Politica 2005/23/1. pp. 49-64.

⁴ Paul. D. 19. 2. 22. 3: ...in emendo et vendendo naturaliter concessum est, quod pluris sit, minoris emere, quod minoris sit, pluris vendere, et ita invicem se circumscribere... Ulp.-Pomp. D. 4. 4. 16. 4: Idem Pomponius ait in pretio emptiois et venditionis naturaliter licere contrahentibus se circumvenire. Pap. Iustus D. 18. 1. 71: ...quibus mensuris aut pretiis negotiatores vina compararent, in contrahentium potestate esse...

⁵ von Lübtow, Ulrich: De iustitia et iure. In: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 1948/66. pp. 500-502., Mayer-Maly, Theo: Privatautonomie und Vertragsethik im Digestenrecht. In: Iura. Rivista internazionale di diritto romano e antico 1955/6. p. 131., Baldwin, John W.: The Medieval Theories of the Just Price. Romanists, Canonists and Theologians in the Twelfth and Thirteenth Centuries. The American Philosophical Society, Philadelphia, 1959 p.13.

⁶ See Zimmermann, Reinhard: The Law of Obligations. Juta-Kluwer, South Africa-Deventer-Boston, 1992 pp. 255-258.

⁷ See Hamza, Gábor: Gazdaság és jog kapcsolata a császárkori római birodalomban. In: Jogtudományi Közlöny 1995/9. pp. 412-413.

⁸ See Kaser, Max: Das Römische Privatrecht II. Beck, München, 1975 p. 388.

Consequently, petitions addressed to the emperor protesting against the distortion of the market and the purchase price of goods were generally dismissed.¹⁰

Numerous rescripts issued by *Diocletian* and *Maximian* in 293 confirm that a negotiated purchase price was binding on both parties, and it had nothing to do with the question of whether it was equal to the real value of the merchandise or not.¹¹ This meant the state had no possibility to modify the contract in order to help the economically weaker party on the grounds of the inequality of the contractual service and consideration.¹²

2.2 CJ. 4.44.2, CJ. 4.44.8

Besides the imperial rescripts preserving mostly the principles of the classical period, two rescripts can be found in the *Codex Iustinianus* both attributed to *Diocletian* and *Maximian*. Their conception is fundamentally different from the preceding approach, as they allowed only to the seller the rescindment of the contract on the grounds of apparently disproportionate contractual performance and consideration.

The first of these dates back to 285, eight years before the previously mentioned rescripts.

CJ. 4.44.2 (*Imp. Diocletianus et Maximianus AA. Aurelio Lupo*):

Rem maioris pretii si tu vel pater tuus minoris pretii distraxit, humanum est, ut vel pretium tu restituente emptoribus fundum venditum recipias auctoritate intercedente iudicis, vel, si emptor elegerit, quod deest iusto pretio recipies. Minus autem pretium esse videtur, si nec dimidia pars veri pretii soluta sit. (a. 285)

"If you or your father sell a more valuable property for a lower price, it is equitable that you either get back the sold land through a court order, whilst refunding the price to the purchasers, or, if the buyer so chooses, you receive a fair price for it. The price is deemed to be too low if less than half of the fair price has been paid."

The rescript, appearing in CJ. 4.44.2 and addressed to *Aurelius Lupus*, contained the rule: the seller is entitled to demand the return of the property if the negotiated purchase price has not reached a minimum of half of the market price at the time of the conclusion of the contract. However, the purchaser has

the option (*facultas alternativa*) to increase the amount already paid up to the real price of the object (*verum rei pretium*), which was equal to the objective value of the merchandise. (In the latter case the contract remained valid).

The second rescript, which appeared eight years later, in 293, is also attributed to *Diocletian*.

CJ. 4.44.8 (*Idem et CC. Aureliae Euodiae*)

Si voluntate tua fundum tuum filius tuus venum dedit, dolus ex calliditate atque insidiis emptoris argui debet vel metus mortis vel cruciatus corporis imminens detegi, ne habeatur rata venditio. Hoc enim solum, quod paulo minori pretio fundum venundatum significas, ad rescindendam emptionem invalidum est. Quod videlicet si contractus emptionis atque venditionis cogitasses substantiam et quod emptor viliori comparandi, venditor cariori distrahendi votum gerentes ad hunc contractum accedant vixque post multas contentiones, paulatim venditore de eo quod petierat detrahente, emptore autem huic quod obtulerat addente, ad certum consentiant pretium, profecto perspiceres neque bonam fidem, quae emptionis atque venditionis conventionem tuetur, pati neque ullam rationem concedere rescindi propter hoc consensu finitum contractum vel statim vel post pretii quantitatis disceptationem: nisi minus dimidia iusti pretii, quod fuerat tempore venditionis, datum est, electione iam emptori praestita servanda. (a. 293)

"If your son sells your land with your consent, then, in order to have the sale invalidated, fraud due to the craft and guile of the buyer or the immediate fear of death or physical torture must be proved. The simple fact that you state that the land was sold at too low a price is insufficient to rescind the purchase. It is the nature of a contract of sale that the buyer approaches the contract with the wish to buy cheaply and the vendor to sell at a high price. The seller will reduce his price step by step less from the original asking price and the buyer will increase his offer until, after long bargaining, they agree on a final price. It is immediately clear that neither the good faith surrounding the agreement of buyer and seller, nor any other reason permits - either immediately or after further dispute regarding the price - the contract which was agreed to be rescinded, unless less than one half of a fair price prevailing at the time of sale was paid, in which case the choice already accorded to the buyer has to be maintained."

According to the rescript addressed to *Aurelia Eulia*, *Aurelia's* son had sold her land with parental consent. The rescript expresses the imperial point of view that a contract could be declared void on the basis of very serious cause: fraud must have been proven due to the craft and guile of the buyer or the immediate fear of death or the possibility of physical torture must have been manifested. In the absence of these, the sole fact that the purchase price may have been a little lower was insufficient to rescind the purchase ("*ad rescindendum emptionem*"). In fact, the major part of the lengthy rescript emphasises the importance of the agreement of the parties to the contract. This part of the rescript does not describe the negotiations which had taken place in the particular case, but it

⁹ Cp. Visky, Károly: Spuren p. 34.

¹⁰ See for example Phil. et Phil. CJ. 8. 40. 18: *Si, ut proponis, fundum ob debitum obligatum non iusto pretio vendidisti, residuam quantitatem, quam ex iusto pretio eiusdem servare potuisses, refundi tibi a fideiussore non iure poscis.*

¹¹ Diocl. et Maxim. CJ. 4. 44. 4, CJ. 4. 44. 6, CJ. 4. 44. 11. 1, CJ. 4. 45. 2. 2

¹² Cp. Kecskés, László és munkaközössége: A szolgáltatás és ellenszolgáltatás értékaránytalansági problémái a szerződési jogban I. In: Magyar Jog 1999/46/2. p. 66., Pókecz Kovács, Attila op. cit. p.177.

rather provides an abstract legal-sociological description of a process mirroring the continuity of such classical principles as the principle of mutual bargaining between purchaser and seller.¹³ Surprisingly enough, at the end the text provides the seller with the possibility of rescission from the purchase, if the purchase price had not reached at least half of a "fair (equitable) price" at the conclusion of the contract.¹⁴

Both rescripts represent the legal institution of *laesio ultra dimidium*, or, expressed with its medieval name¹⁵, *laesio enormis*, and both have obviously accorded to classical principles. By the purchase of real estate, the rule has clearly given the seller such a right that has never been available before to either of the parties, namely, that, if the purchased price was lower than half of the market price, the seller could unilaterally, without having the purchaser's consent, or even contrary to his will, demand the termination of the contract and, simultaneously, the mutual restitution of the services. If the purchaser wished to avoid this, he had no other option available than to pay a purchase price according to the real value of the property.

3. Some issues of *laesio enormis*

3.1 Authenticity of legal sources

It cannot be ignored that the authenticity of both cited rescripts has invoked passionate debate among the scholars of Roman law. GRADENWITZ offered a theory in the 19th century that both rescripts in question had been interpolated, which means that only the compilers of *Justinian* shaped them into their present form by adding the closing sentences to the rescripts, and – where it seemed necessary – modifying the texts.¹⁶

The theories concerning the origin of the rescripts mentioned above can be divided into three main categories.¹⁷

For obvious reasons, the theory of GRADENWITZ found many followers in the first decades of the 20th century, which was the golden age of the interpolation critical movement: among others BRASSLOFF,¹⁸ SOLAZZI,¹⁹

¹³ Hackl, Karl op. cit. p. 148.

¹⁴ Westbrook, Raymond op. cit. p. 40., Pennitz, Martin op. cit. p. 581.

¹⁵ Scheuer, Hans op. cit. p. 77., Arangio-Ruiz, Vincenzo: La compravendita in diritto romano. Jovene, Napoli, 1956 p. 148., Hamza, Gábor: Le développement du droit privé européen. Bouchal, Budapest, 2005 pp. 70-71.

¹⁶ Gradenwitz, Otto: Interpolazioni e interpretazioni. In: *Bulletino dell'Istituto di Diritto Romano* 1889/2. pp. 3-15.

¹⁷ See Klami, Hannu Tapani op. cit. p. 50., Pókecz Kovács, Attila op. cit. p. 179.

¹⁸ Brassloff, Stephan: Zur lehre von der *laesio enormis* im byzantinischen Recht. In: *Zeitschrift für vergleichende Rechtswissenschaft* 1912/28. pp. 261-272.

¹⁹ Solazzi, Siro op. cit. pp. 51-87.

ALBERTARIO²⁰ and SCHEUER²¹ held that the legal institution of *laesio enormis* had been introduced by *Justinian*. According to them, the compilers of *Justinian* simply changed that model of decision which had been used by *Diocletian* and *Maximian* and, parallel to the necessary modifications, added the criterion of "*nec dimidia pars veri/iusti pretii*" to the rescripts. This thesis was grounded mostly on the fact that there is no single text between the issue of these two rescripts and the codification of *Justinian* which mentioned the possibility of dissolution of the contract with reference to the *laesio*. Therefore, this rule is missing from the *Codex Theodosianus* too, and whilst, moreover, many decisions included in it confirm that the sole fact of disproportionate value between service and consideration does not give rise to the dissolution of a contract.²²

In contrast to these theories, some authors – for example, ZACHARIAE VON LINGENTHAL,²³ MONNIER²⁴ and NOVICKIJ²⁵ – ascribe the basic idea of *laesio* to *Diocletian*. MAYER-MALY²⁶ attributes the two rescripts completely to the emperor. In his view *Diocletian* primarily wanted to avoid the mass migration of poor tenants. VISKY²⁷ and HACKL²⁸ also support the authentic origin of the rescripts, and they draw special attention to the economic crisis of the 3rd century and to its financial aspects, namely inflation.

A third group of romanist scholars – for example, LANDUCCI,²⁹ NICOLAU³⁰ and CARELLI³¹ – accept the rescripts' *Diocletian* origin, although they still regard

²⁰ Albertario, Emilio: *Iustum pretium e iusta aestimatio*. In: *Bulletino dell'Istituto di Diritto Romano* 1921/31. pp. 1-19.

²¹ Scheuer, Hans op. cit. p. 82.

²² CT 3. 1. 1: *Venditionis atque emptionis fidei nulla circumscriptionis violentia facta rumpi minime decet. Nec enim sola pretii vilioris querella contractus sine ulla culpa celebratus litigioso strepitu turbatus est*. See CT 3. 1. 4 ill. CT 3. 1. 7. Vö. Zimmermann, Reinhard op. cit. p. 260., Klami, Hannu Tapani op. cit. pp. 52-53.

²³ Lingenthal, Eduard Zachariae von: *Zur Lehre von der laesio enormis*. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 1883/4. pp. 49-60.

²⁴ Monnier, Henry: *Études de droit byzantin*, IV: La lésion de plus de moitié dans la vente. In: *Nouvelle revue historique de droit français et étranger* 1900/24. pp. 181-185.

²⁵ Peretyerszkij, Ivan – Novickij, Ivan: *Római magánjog (Rimskoe cásznoe pravo)*. Tankönyvkiadó, Budapest, 1951 pp. 295-296.

²⁶ Mayer-Maly, Theo: *Pactum, Tausch und laesio enormis* p. 227.

²⁷ Visky, Károly: *Die Proportionalität* pp. 381-382, illetve Visky, Károly: *Spuren* p. 45.

²⁸ Hackl, Karl op. cit. pp. 147-161.

²⁹ Landucci, Lando: *La lesione enorme nella compra e vendita*. In: *Atti Istituto Venezia* 1915-1916/75. pp. 1189-1255.

³⁰ Nicolau, Mathieu: *Les origines de la laesio enormis*. In: *Revue historique de droit français et étranger* 1936/15. pp. 207-208.

³¹ Carelli, Edoardo: *C. 2. 36, 1 e 3 e l'origine della rescissione per 'laesio enormis'*. In: *Studia et documenta historiae et iuris* 1937/3. pp. 446-450.

them as interpolated, on the grounds that the dissolution of sales contracts based on low purchase price was allowed only to the *fiscus* in *Diocletian's* time.³²

Though the passionate debate revolving around possible interpolation during the compilers' work and the authenticity of the texts has apparently calmed down during recent years, there is disagreement in the latest literature in relation to the historical origins of the legal institution of *laesio enormis*. CASANÍ considers those closing sentences of the rescripts that mention the rule of *laesio* as interpolated,³³ whilst, in contrast, SCIUTO³⁴ and PENNITZ³⁵ argue for the rescripts' authenticity. Contrary to PENNITZ, SIRKS, who has analysed numerous questions of *laesio*, insists that the last sentences of the rescripts are modifications from the post-*Diocletian* era.³⁶ When discussing the *constitutio* addressed to *Aurelius Lupus* (CJ. 4.44.2), the Dutch author remarks that, originally, the possibility of choice was given to the purchaser only in individual cases and under special circumstances: namely, the purchaser could choose between returning the object (*in integrum restitutio*) or, to avoid this, supplementing the purchase price to the market price.³⁷

If we take a closer glance at the text, however, there are signs of modification.

The beginning of the sentence with "*Rem maioris pretii*" in CJ. 4.44.2 is stylistically incorrect, as SIRKS notes; it had been put into words very awkwardly.³⁸ Identification of the seller also turns out to be problematic: is *Aurelius Lupus* the seller or his father? The fact that the text refers to more purchasers while discussing the possibility of restitution ("*pretium tu restituente emptoribus fundum venditum recipias*") but mentions only one of them when it comes to the possibility of choice ("*si emptor elegerit*") makes the task of the keen interpreter even more difficult. At the time of discussing the purchasers' *facultas alternativa*, the rescript uses the expression of *iustum pretium*, whilst later, by determining the conditions of application, *verum pretium* is used. The text is at least as paradoxical in labelling the goods, since at the beginning the general formula "*rem*" is used, whilst later the more specific "*fundum*" is used to describe the *merx*.³⁹

It is even more striking that, in the lengthier rescript of CJ. 4.44.8, the possibility of *laesio* appears only at the very end of the text as an exception to

the general rule. It is remarkable, compared to the previous rescript ("*si nec dimidia pars veri pretii soluta sit*") the criterion of "real price" (*verum pretium*) had been changed to "fair price" (*iustum pretium*), the latter expression emerging in the closing sentence ("*nisi minus dimidia iusti pretii*").

In my opinion the inconsistency of the terminology is insufficient to prove that the basic idea of *laesio* does not derive from *Diocletian*.

In contrast to those authors who suspect interpolation during the codification of *Justinian*, we may ask ourselves: why would the compilers and *Justinian* borrow a model of decision runs counter to the institution of *laesio* invented by the emperor? If the rule of *laesio enormis* did not exist during the reign of *Diocletian*, why would anyone add these later devised regulations to rescripts issued in the 3rd century – especially to CJ. 4.44.8, which clearly expresses the principle of freedom of contract? It seems more plausible that the rule of *laesio* already existed during the *Diocletian*, era, although it was granted only in individual cases, and the compilers of *Justinian* institutionalised the rule as the manifestation of equity and imperial grace. It is beyond any doubt that the rule of *laesio enormis* was introduced to mitigate the consequences of the crisis of the 3rd century, and it is not the only element of that period's legislation to serve this purpose. HAMZA sees in the rule of *laesio* the corollary of *Diocletian's* economic policy.⁴⁰ The classical view concerning inflation during the 3rd century crisis, which was formulated by VISKY,⁴¹ assumes at least a 100% rate of inflation between the conclusion of the contract and the payment of the purchase price, but some newer research results⁴² seem to overwrite this thesis.⁴³ Still, the most significant aspect of the economic crisis of the 3rd century was clearly inflation, and, in connection with this, the rise of prices, especially during *Gallienus* (253-268).⁴⁴ In order to solve the signs of the crisis, *Diocletian* was ready to use public law instruments and to interfere in the legal relationship of private persons. It is obvious that the *Edictum de pretiis rerum venalium*,⁴⁵ issued in 301 was the most direct manifestation of this central

⁴⁰ Hamza, Gábor: Gazdaság és jog p. 413.

⁴¹ Visky, Károly: Die Proportionalität pp. 381-382.

⁴² See for example: Bellefonds, Xavier Linand de: Un modèle monétaire pour l'économie de l'Empire romain au IIIe siècle de notre ère. In: Revue historique de droit français et étranger 1980/58. pp. 561-586., Callu, Jean-Pierre – Barrandon, Jean-Noël: L'inflazione nel IV secolo (295-361): il contributo delle analisi. In: Giardina, Andrea (ed.): Società romana e impero tardo-antico vol. I. Roma, 1986 pp. 559-600.

⁴³ Sirks, A. J. Boudewijn: Quelques remarques sur la possibilité d'une règle dioclétienne sur la rescission d'une vente à cause de lésion énorme (*laesio enormis*). In: Atti dell'Accademia Romanistica Costantiniana V. Maggiori, Perugia, 1983 pp. 40-46., Pókecz Kovács, Attila op. cit. p. 180., Pennitz, Martin op. cit. pp. 582-583.

⁴⁴ Hamza, Gábor: Gazdaság és jog p. 412., Rostovtzeff, Michael: Gesellschaft und Wirtschaft im römischen Kaiserreich II. Quelle und Meyer, Leipzig, 1929 p. 178.

⁴⁵ Lauffer, Sigfried: Diokletians Preisedikt. Walter de Gruyter & Co., Berlin, 1971 pp. 1-361., Visky, Károly: Spuren pp. 19-23.

³² Sirks, A. J. Boudewijn: *Laesio enormis* und die Auflösung fiskalischer Verkäufe. In: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 1995/112. pp. 411-422.

³³ Casaní, Amparo Montañana op. cit. p. 23.

³⁴ Sciuto, Patrizia op. cit. pp. 407-411.

³⁵ Pennitz, Martin, op. cit. p. 577.

³⁶ Sirks, A. J. Boudewijn: *Laesio enormis* again p. 469.

³⁷ Sirks, A. J. Boudewijn: *Laesio enormis* p. 307.

³⁸ Ibid. p. 294.

³⁹ Cp. Baldwin, John W. op. cit. p. 18., Klami, Hannu Tapani op. cit. p. 55.

intervention. This ordinance, part of a comprehensive reform conception beside the monetary reform, prescribed systematically and in detail the maximum purchase price of many market products; in some cases it even determined the maximum level of wages also. Any violation of its regulations was severely punished and could even lead to capital punishment. It is also noteworthy that the contracts violating the ordinance remained valid.⁴⁶ This bureaucratic schematism, which in many cases remained unaware of economic circumstances and real market prices, achieved results opposite to what was intended. Although this regulation, in contrast to the *laesio enormis* aimed at the protection of the purchaser from the negative consequences of the crisis, both its economic and its social effects proved to be very detrimental. Of course, the idea of equity manifesting itself in the prescriptions regarding the *laesio ultra dimidium* could be ascribed to Justinian⁴⁷ as the effect of the stoical moral philosophy and Christian thinking on ethical economy. On the other hand, the *Edictum de pretiis rerum venalium* provides a basis solid enough to attribute the instruments restricting the parties' contractual freedom as well as the *laesio enormis* to Diocletian.⁴⁸ Since, if the emperor's general approach to high prices was to set maximum prices, then it is plausible that he turned to the same remedy when it came to low prices on the real estate market: he set a minimum threshold with half of the market price as a realistic purchase price. As BENEDEK remarks,⁴⁹ the economic crisis may compel someone to sell real estate rapidly at a reduced price, but it could not bring about a detrimental purchase.

On the other hand, I believe that the question of whether these rescripts were interpolated or not, does not have the importance attributed to it by some authors of the Romanist literature. It seems certain that classical Roman law did not accept the possibility of the dissolution of a contract as a result of the disproportional nature of service and consideration. Consequently, the institution of *laesio enormis* emerged in later periods of Roman law, and no earlier than the end of the 3rd century, and in the earlier stages of its development it was applicable only under special circumstances and in individual cases. To avoid distraction by interference from often endless, hopeless debate revolving around the authenticity of the rescripts it seems more practical to summarise the results of our analysis: according to the *Codex* the rule of *laesio ultra dimidium* was not a general rule applicable to all forms and types of sale and purchase, it was applicable only if, by the sale of real estate,

⁴⁶ Kaser, Max: Das Römische Privatrecht II p. 389.

⁴⁷ Hohenlohe, Constantin: Einfluß des Christentums auf das Corpus juris civilis. Hölder-Pichler-Tempsky, Wien, 1937 p. 195.

⁴⁸ Cp. Mayer Maly, Theo: Der gerechte Preis. In: Frotz Gerhard, – Ogris, Werner (ed.): Festschrift Heinrich Demelius zum 80. Geburtstag. Manzsche Verlags und Universitätsbuchhandlung, Wien, 1973 p. 146.

⁴⁹ Benedek, Ferenc: Római magánjog. Dologi és kötelmi jog. JPTE-ÁJK, Pécs, 1995 p. 172.

the interests of the seller were at stake.⁵⁰ So it did not refer to the sale and purchase of other merchandise and it did not serve the protection of the purchaser, if the latter had paid more than double the realistic market price.

3.2 The criterion of “*dimidia pars*”

The Roman rule of *laesio ultra dimidium* defines very precisely the conditions of its application and has an objective basis: the most important criterion is the difference between service and correspondence, which should exceed fifty percent, but other, more subjective, circumstances, such as the good faith of the seller and/or the purchaser do not come into question. There is neither need nor place for an examination of other circumstances surrounding the conclusion of a contract, and the economic situation of the parties is also irrelevant, as well as their possible lack of experience in business matters. It is also required that the obvious imbalance between service and correspondence has to be visible when the contract is concluded “*conditionis*”).

The strict criterion of “*dimidia pars*” has been explained by means of many different opinions in the Romanist literature: some emphasised the oriental and others the Mesopotamian influence,⁵¹ certain authors drew attention to the works of ARISTOTLE,⁵² to stoical moral philosophy,⁵³ to ST. AUGUSTINE⁵⁴ and to Christian ethics.⁵⁵ This colourful setting needs to be used with the rule's origin. According to GENZMER's view, whose starting point is the Romans' unifying approach of substantive and procedural law, the criterion of “*nec dimidia pars*” was nothing other than the application of the *id quod interest concept*. He considers the rule of *laesio* an innovation of Justinian's legislation, which was nothing more, than a successful *compromissum* between the classical principle of the freedom of contract and the equitable philosophy of Christian teaching that protected the economically weaker and weaker party through the just price (*iustum pretium*) equivalent to the market price.⁵⁶ According to SIRKS opinion, this criterion was established in oriental law schools in order to be able to determine more precisely the definition of *damnum grande* (*damnum enorme*), which was necessary to application of *in integrum restitutio*. The

⁵⁰ Cp. Hackl, Karl op. cit. p. 152., Harke, Jan Dirk: *Laesio enormis* p. 102.

⁵¹ Westbrook, Raymond op. cit. p. 44.

⁵² Baldwin, John W. op. cit. pp. 10-12.

⁵³ Hackl, Karl op. cit. pp. 159-160., Schlosser, Hans: Grundzüge der Neueren Privatrechtsgeschichte. C. F. Müller, Heidelberg, 2005 p. 66.

⁵⁴ Albertario, Emilio op. cit. n. 403.

⁵⁵ Mayer-Maly, Theo: Privatautonomie und Vertragsethik p. 138., Kaser, Max: Das Römische Privatrecht II p. 390., Zimmermann, Reinhard op. cit. p. 261.

⁵⁶ Genzmer, Erich: Die antiken Grundlagen der Lehre vom Gerechten Preis und der *laesio enormis*. In: Zeitschrift für ausländisches und internationales Privatrecht 1937/11. pp. 55-59.

Dutch author refers to a certain limit of value, which had been fixed through intervention of the state, and which appears in a decision of CJ. 4.44.6, where the seller was unable to reach the invalidation of the contract, even though he offered the purchaser a repayment of double the original purchase price.⁵⁷ Most surprisingly, PENNITZ mentions a passage attributed to *Paulus* in the principium of D. 18.1.57⁵⁸ as the possible classical precursor of the *laesio enormis* rule, which was possibly taken into consideration by the compilers while formulating the criterion of *dimidia pars*.⁵⁹ According to this text, a house had been burnt down before the conclusion of the contract and without the parties' knowledge. The Roman jurists agreed that should the whole building have been destroyed, the sales contract could not have come into effect, and so repayment of the already paid price could be demanded with a *condictio*. However, according to *Neratius*, who is cited by *Paulus*, in case the house had been destroyed only partially, the decision would be determined by the fact of how much of the house had been burned down: if most had been destroyed, the purchaser cannot be obliged to fulfil the sales contract, and he is also entitled to demand the already paid purchase price back. However, if at least half of the house remained undamaged, the *emptor* can be compelled to perform, although, based on the estimation of a *vir bonus* he may be released from the performance of that part of the price that is equivalent in value to the damage caused by the fire.

Though the classical parallel drawn by PENNITZ is interesting (without any doubt because of the immanent criterion of *dimidia pars*) the matters of fact mentioned in his parallel have to be separated doctrinally from the legal construction of the *laesio enormis*. In contrary to the rescripts containing the *laesio*, D. 18.1.57 is not about the dissolution of a valid contract on the basis of

⁵⁷ Sirks, A. J. Boudewijn: La *laesio enormis* p. 303. Sirks, A. J. Boudewijn: Diocletian's Option p. 46.

⁵⁸ Paul. D. 18. 1. 57 pr.: *Domum emi, cum eam et ego et venditor combustam ignoraremus. Nerva Sabinus Cassius nihil venisse, quamvis area maneat, pecuniamque solutam condici posse aiunt. Sed si pars domus maneret, Neratius ait hac quaestione multum interesse, quanta pars domus incendio consumpta permaneat, ut, si quidem amplior domus pars exusta est, non compellatur emptor perficere emptionem, sed etiam quod forte solutum ab eo est repetet: sin vero vel dimidia pars vel minor quam dimidia exusta fuerit, tunc coartandus est emptor venditionem adimplere aestimatione viri boni arbitrati habita, ut, quod ex pretio propter incendium decrescere fuerit inventum, ab huius praestatione liberetur.*

⁵⁹ Pennitz, Martin op. cit. p. 586., Apathy and Schermaier consider the *Paulian* passage interpolated because of the unusual terminology of *dimidia pars*. See Apathy, Peter: Sachgerechtigkeit und Systemdenken am Beispiel der Entwicklung von Sachmängelhaftung und Irrtum beim Kauf im klassischen römischen Recht. In: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 1994/111. p. 111. n. 74., Schermaier, Martin Josef: Auslegung und Konsensbestimmung. In: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 1998/115. p. 272. n. 161.

equity in order to protect the seller's interests.⁶⁰ In my opinion, *Paulus* is speaking about a contract concerning partly or totally impossible services. Of course, if, by the time of the conclusion of the contract, the merchandise had been destroyed without the parties' knowledge,⁶¹ the sales contract contains impossible service(s), and, therefore, cannot come into being.⁶² However, if some part of the building remained unharmed, we speak only about a partly impossible service, and in this case the service which is still possible suits the other party and the debtor is obliged to perform his service, naturally with a proportional reduction. If this would not suit the creditor's interests, he can deny performance and be released from performing the consideration.⁶³ Now, if we compare the rules of partly impossible service to the decision of *Neratius*: if more than the half of the house, which is the object of the contract, has burnt down, the remaining part of the house would certainly not suit the interests of the purchaser, and so he could not be compelled to pay the purchase price. If at least half of the house remained intact, assuming that the purchase of the intact part still serves the interest of the purchaser, he is obliged to pay the proportionately reduced part of the purchase price. Of course, it is possible that the purchaser does not intend to buy a lightly damaged building, even if the purchase price is proportionally lowered, or the seller does not wish to sell the half-damaged house for half of the original price since he has the chance to make a better deal. As we see, the decision of *Neratius* is unique and special and, at the same time, quite arguable, also.⁶⁴

⁶⁰ Instead of requirements of equity, Harke sees a simple risk-sharing rule in the *dimidia pars* criterion of the *Paulian* source. See Harke, Jan Dirk: *Laesio enormis* p. 96.

⁶¹ Benedek, Ferenc op. cit. p. 133.: „Ha azonban az egyik fél a szerződéskötéskor e lehetetlenséget ismerte, vagyis magatartása bona fides-ellenes volt, tartozik a biztatósi kárt megtéríteni annak, aki a szolgáltatás lehetetlen voltáról nem tudva a szerződésben bízott.” [But if at the time of the conclusion of the contract one of the parties knew that the service was impossible, his behaviour was against the bona fides, so he is obliged to refund the damage caused by incitement to that person, who was unaware of the impossibility and had faith in the contract.]

⁶² Cels. D. 50. 17. 185: *Impossibilium nulla obligatio est...* Of course, according to a different approach, the invalidity of the contract could be ascertained on the grounds of the significant mistake (*error in essentialis*) of the parties, since they were unaware of the fact that at the time of the conclusion of the contract, the house had already been burnt down. Cp. Harke, Jan Dirk: Si error aliquis intervenit – Irrtum im klassischen römischen Vertragsrecht. Duncker & Humblot, Berlin, 2005 pp. 188-189., Siklósi, Iván: Észrevételek a szerződés részleges érvénytelenségének problémájához a római jogi források tükrében, kitekintéssel egyes modern jogrendszerekre. In: Acta Facultatis Politicae-Iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae. Sectio iuridica 2007/44. p. 50.

⁶³ Benedek, Ferenc op. cit. p. 134.

⁶⁴ Sirks, A. J. Boudewijn: *Laesio enormis* again p. 468.

3.3 The dogmatic structure of *laesio enormis*

Now, if we turn to the dogmatic construction of the legal institution of *laesio enormis*, just as we have seen in connection with other aspects, we experience a great variety of views in the Romanist literature, but lack uniformity in terminological questions. For example, while HACKL⁶⁵ uses the expression "Anfechtung" when discussing impugnation, which leads to "Aufhebung", the annulment of the sales contract, KASER⁶⁶ and SCHLOSSER⁶⁷ mention the termination of the contract ("auflösen") as a legal consequence, which assumes the validity of the contract, although in the two rescripts there is no such reference, SIRKS⁶⁸ and PENNITZ⁶⁹ discuss the *laesio enormis* under invalidity of contract and presume the possibility of *in integrum restitutio*.⁷⁰ HARKE, whilst criticising the theory of PENNITZ who closes the rule of *laesio* to the abovementioned fragmentum of *Paulus* and the thought of *error in negotio*, is also concerned by the remedy of *in integrum restitutio* in the judicial provision exercised in protection of the seller who sustained injury by the contract.⁷¹

Considering that the rescript of CJ. 4.44.2 does not mention expressis verbis the *in integrum restitutio*, KLAMI proposes a new way of approach regarding the dogmatic construction of matters of fact.⁷² He emphasises that the expression of "*verum pretium*", which represents the rule of *laesio enormis* appearing in the conclusion of the text should not be identified with the term "*iustum pretium*" used in the previous sentence. According to KLAMI, the *verum pretium* is nothing else than the purchase price, determined by the parties to the contract, which means that the phrase "*minoris pretii distraxit*" refers to selling below the purchase price. In his view, though the *traditio* had been performed, the purchaser(s) had not paid the purchase price completely ("*rem maioris pretii*"), and not even half of it. Since ownership was transferred, the seller is not entitled to reclaim the land anymore, and the only possibility remaining is an *actio*

⁶⁵ Hackl, Karl op. cit. p. 147.: „Unter...laesio enormis...versteht man nach der justinianischen Kompilation die Aufhebung des Vertrages durch gerichtliche Anfechtung."

⁶⁶ Kaser, Max: Das Römische Privatrecht II p. 389.: „Der Verkäufer ist berechtigt, den Kaufvertrag aufzulösen..."

⁶⁷ Schlosser, Hans op. cit. p. 66.: „in diesem Falle dürfte der Verkäufer auf Vertragsauflösung klagen."

⁶⁸ Sirks, A. J. Boudewijn: La *laesio enormis* pp. 299-301., Sirks, A. J. Boudewijn: Diocletian's Option pp. 44-47., Sirks, A.J. Boudewijn: *Laesio enormis* again pp. 464-469.

⁶⁹ Pennitz, Martin op. cit. p. 587.

⁷⁰ Kaser, Max: Zur *in integrum restitutio*, besonders wegen metus und dolus. In: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 1977/94. pp. 154-155.

⁷¹ Harke, Jan Dirk: *Laesio enormis* pp. 99-101.

⁷² Klami, Hannu Tapani op. cit. p. 59.

venditi against the purchaser(s). However, considering the possibly high rate of inflation, this opportunity would not serve the interests of the *venditor* and so giving him the right of rescindment sounds more rational, except if the purchasers provide the missing part of the purchase price.⁷³ According to the author, the compilers extended the rule of CJ. 4.44.2 to those cases where the already paid purchase price was not equivalent to the market price, and later they added this extension to the rescript of CJ. 4.44.8.⁷⁴ The approach of KLAMI is innovative indeed, but it is not without problems:⁷⁵ for example, it does not answer the question how could ownership be transferred immediately to the purchaser(s) despite the lack of necessary payment, since it does not appear in the text that the seller gave credit in respect of the purchase price demanded and which was secured with a guarantee or pledge. Namely, according to the *Institutiones of Justinian*, the seller would acquire the ownership of the sold and delivered merchandise only when he pays the purchase price or gives a pledge or secures the contract with a guarantee, or if the seller gives him credit.⁷⁶ In my opinion, the author applying also the purchasers' *facultas alternativa* sees the condition of *lex commissoria* in that passage, with no grounds, and he gives no answer to the question regarding the interpretation of "*rem maioris pretii minoris pretii distraxit*". Namely, if the major part of the merchandise means the purchase price, which is expressed by *verum pretium* at the end of the rescript ("*si nec dimidia pars veri pretii soluta sit*") and the lesser price means the actually paid purchase price, it is questionable why the text mentions *iustum pretium* ("*si emptor elegerit, quod deest iusto pretio recipies*") regarding the purchaser's possibility of choice instead of *verum pretium*.

Recently SCIUTO dismissed the possibility of the application of the *in integrum restitutio* also; in his view the *laesio ultra dimidium* causes such harm to the requirements of the *bona fides* that nothing impedes suing it by *actio venditi*.⁷⁷

We usually find the expression of "termination" in the Hungarian Romanist literature, which in a modern sense means the bilateral dissolution of the contract with *ex tunc* effect.⁷⁸ Recently SIKLÓSI proposed a different way of approach: besides other reasons, on the ground of the term "*rescindere*" in CJ. 4.44.8 he considers the obvious disproportion of service and consideration a criterion leading to invalidity, the seller's declaration aiming *in integrum*

⁷³ Ibid. p. 56.

⁷⁴ Ibid. p. 57.

⁷⁵ Cp. Sirks, A. J. Boudewijn: Diocletian's Option p. 41.

⁷⁶ I. 2. 1. 41

⁷⁷ Sciuto, Patrizia op. cit. p. 431.

⁷⁸ See for example: Benedek, Ferenc op. cit. p. 172., Pókecz Kovács, Attila op. cit. p. 180., Földi, András – Hamza, Gábor: A római jog története és institúciói. Nemzeti Tankönyvkiadó, Budapest, 2005 p. 513.

restitutio as impugnation, as the purchaser's supplementing act as elimination of grounds for invalidation (*convalescentia*).⁷⁹

Though the doctrinal questioning and analysis was averse from the casuistic, practical and procedure-oriented thinking of Roman jurists, we cannot avoid the usage of such modern categories during the interpretation of *laesio enormis*. On these grounds, in my opinion it would remain closest to the Roman jurists' intention regarding the *laesio* as the right of rescindment provided to the *venditor*. Namely, according to the rescripts, the declaration of the seller addressed to the judge, demanding the return of the merchandise parallel to the repayment of the purchase price aims at nothing else than the unilateral termination of a valid, effective contract with an *ex tunc* effect. To avoid this, the purchaser is allowed to complete the purchase price.

Summarising the remarks regarding the dogmatic structure and the legal consequences of *laesio enormis*, it is obvious that Roman lawyers did not distinguish between the categories of invalidity, annulment, impugnation, rescindment and termination as strictly as is expected in modern legal systems. Consequently, the analysed imperial rescripts do not provide any orientation, whether the legal consequences of *laesio enormis* should be discussed within the invalidity (invalidity-impugnation) or outside of this question (rescindment-termination with *ex tunc* effect). However, if we somewhat anachronistically intend to use modern legal terms while analysing the *laesio* rule, clear distinctions between these categories are of immense importance.

4. Summary

By way of summary of the Roman legal sources analysed which deal with the legal institution of *laesio ultra dimidium*, we can assert that, originally, it aimed at remedying a special injury, namely the disadvantage affecting the seller of property through a bad bargain. In a system where objective criteria for fair price had not been determined, there was no possibility that *iustum pretium* could become a general rule, since a realistic (fair) price for the merchandise had to be re-set from time to time in order to see any difference between service and consideration (exceeding fifty percent). The extension of the *laesio* to a general principle applicable to movable property as also serving the protection of the purchaser could be ascribed to the institution's medieval development.⁸⁰

⁷⁹Siklósi, Iván: Az érvénytelenségi ok kiküszöbölésének néhány kérdése a római jogban és annak továbbélése során. In: Acta Facultatis Politicæ-Iuridicæ Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatæ. Sectio iuridica 2005/42. pp. 72-73.

⁸⁰From the inland literature see: Dömötör, László: Észrevételek a *laesio enormis* középkori, különös tekintettel kánonjogi továbbélése kérdéséhez. In: Acta Facultatis Politicæ-Iuridicæ Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatæ. Sectio iuridica 1997-1998/36. pp. 45-55.

The requirement of fair price (*iustum pretium*) was formulated by canonist scholars only later⁸¹, as they applied this criterion not only to contracts of sale and purchase, but to all types of onerous obligation, leading to the prohibition of major difference between the value of service and consideration.⁸² In conclusion, the ancient rule of *laesio enormis*, which had been an individually applied concession in Roman times, became a general instrument of state intervention concerning private autonomy only in its medieval stage of development.

The two rescripts in the *Codex of Justinian* with their strict criterion of *dimidia pars* mean the first, somehow rudimentary but important, step towards a balance between the freedom of contract and the principle of equity aiming at the protection of the economically weaker party. It is true that the concept of equivalence of service and such related issues as harmful to justice and equity and demanding intervention were changed during the course of time, and by its nature it has appeared in different ways in every legal system. Still, the Roman rule as well as the basic idea that the law cannot tolerate an obvious imbalance between service and consideration has played an important role in European history and the development of private law.

⁸¹Wolter, Udo: *Ius canonicum in iure civili*. Kaufrecht, *laesio enormis*, *iustum pretium*, *aequalitas*. Böhlau, Köln – Wien, 1975 p. 113., Baldwin, John W. op. cit. pp. 41-58.

⁸²See Zimmermann, Reinhard op. cit. pp. 264-267. with the referred literature.

Criminal Law vs. Competition Law, or the interaction between branches of law in Hungarian and German cartel law

KÉRYNÉ KASZÁS, Ágnes Roxán

ABSTRACT *In Hungary, the framework of the fight against cartels is laid down in Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition (UMPA) and Section 296/B of the Criminal Code, which regulates the prohibition of agreements restraining competition related to public procurement and concession procedures. German cartel law comprises the Act against Restraints on Competition ("Gesetz gegen Wettbewerbsbeschränkungen") and the relevant provisions of the German Criminal Code ("Strafgesetzbuch").*

The regulations relating to cartels in both legal systems have been significantly affected by the example set by the Community, although the pressure exerted by the EU could not guarantee the application of identical regulatory solutions. The question is of how the differences between regulations in Germany and in Hungary influence the effectiveness of prosecuting such actions. Success in curbing people engaged in cartels depends on the concurrence of numerous circumstances. The proper regulation of the scope of subjects, the acts of perpetration and the sanctions to be applied are important, and it is essential that the authorities have the appropriate means of investigation. In the following, focusing on these features, I shall show the differences in the approach to cartels via Competition Law and Criminal Law in the German and Hungarian legal systems, and how these influence the effectiveness of action against the practice.

1. What is the story about?

In Hungary and Germany, two branches of law include rules related to the prohibition of cartels. Paragraph (1) of Section 11 of the UMPA includes the following provisions:

"Agreements between undertakings and coordinated practices, as well as the decisions of the social organisations of undertakings, public corporations, unions and other similar organisations of undertakings (hereinafter, collectively, "agreements"), which are aimed at the prevention, restriction or distortion of economic competition, or which may display or do display such an effect, are prohibited. (...)"

The Criminal Code evaluates the concession and public procurement procedure-related aspects of cartelising as follows:

"Section 296/B. (1) Any person who reaches an agreement aiming to fix the prices (charges) or any other term of the contract or rather to divide the market or takes part in any other coordinated practices in order to manipulate the outcome of an open or restricted tender published in connection with a public procurement procedure or concession requirement and through this act causes the restriction of competition is guilty of felony punishable by imprisonment for up to five years.

(2) Any person who takes part in making decisions of a social organisation, of undertakings, public corporations, unions and other similar organisations of undertakings, and adopting any decision that has the capacity for restraining competition aiming to manipulate the outcome of an open or restricted tender published in connection with a public procurement procedure or concession requirement shall be punished as set out in Subsection (1).

(3) The punishment shall be imprisonment for up to two years, public works, or a fine for a misdemeanour, if the act is in accordance with Subsections (1) and (2) and the value of the public procurement is not above substantial value.

(4) The perpetrator of a criminal act defined in Subsections (1)-(3) shall be exonerated from punishment if he confesses the act to the authorities, before the authorities have information of the act and reveals the circumstances of the criminal act. Authorities shall also mean the bodies supervising competition and financial operations and the body of legal remedy in connection with public procurement contracts.

The statutory definition of German Competition Law differs little from the Hungarian:

"Agreements between undertakings, decisions by associations of undertakings and coordinated practices which are aimed at the prevention, restriction or distortion of competition, or which do display such an effect, are prohibited."¹

The Criminal Law approach to banning cartels is far removed from the Hungarian. There are two facts dealing with this act. If cartelising is not accompanied by the risk of causing material damage, or no damage is caused, the "reaching an agreement aiming at the restriction of competition in connection with invitation for tender" must be established if the following legal facts are realised:

(1) Whoever, upon an invitation for tender in relation to goods or industrial services, submits an offer based on an unlawful agreement which is aimed to force the tender announcer into accepting a particular offer, shall be punished with imprisonment for up to five years or a fine.

(2) Subsection (1) is applicable to the procedure of competition for participation in tender.

¹ Gesetz gegen Wettbewerbsbeschränkungen 1.§

(3) Whoever voluntarily prevents the tender announcer from accepting the offer or from providing the service, shall not be punished under subsection (1) and (2). If the offer is not accepted or the service is not provided independently from the contribution of the perpetrator and the perpetrator voluntarily and earnestly makes efforts to prevent the acceptance of the offer or the providing of the service, then he shall be exempt from punishment.²

If cartelising also causes material damage, those applying the law have to classify the act as fraud based on the following provision:

"Whoever misleads someone or keeps them in error by pretending that false facts are true or by distorting or suppressing true facts with the intent of obtaining for himself or a third person an unlawful material benefit and causes loss, shall be punished with imprisonment for up to five years or a fine."

Those guilty can expect to be sentenced to imprisonment from six months to ten years in cases of business-related offences, or if they are engaged in a criminal conspiracy, cause a serious loss, if the intention to place a large number of people in danger of loss of assets exists, or if they abuse their powers or their position as public officials.³

As provisions for the crime of fraud aims at the protection of assets, and the Criminal Law prohibition of reaching an agreement aiming at the restriction of competition in connection with invitation to tender aims at the protection of free and fair competition, the two crimes can be aggregated with one another,⁴ and, moreover, in cases where fraud is established, the aggregation of the two crimes is statutory.

2. The targets for prosecution

According to the provisions of Hungarian Competition Law, undertakings may be held liable for cartelising. The specialty of German Competition Law is that it allows not only undertakings to be fined but natural persons participating in cartelising also.⁵ This is how German legislators have tried to ensure that it is not worth employees participating in competition restricting agreements, and I believe that Hungarian legislators should also consider the possibility of making natural persons accountable under Competition Law.

There is a significant difference between the German and Hungarian solutions in respect of the definition and interpretation of the scope of persons who can be subject to Criminal Law sanctions. The subject, according to Hungarian Criminal Law, can be anyone. This entails the criminal

² Strafgesetzbuch 298.§

³ Strafgesetzbuch 263.§

⁴ Hefendehl, Roland: Vorlesung Wirtschaftsstrafrecht (WS 2005/2006).

⁵ http://www.strafrecht-online.org/index.php?dl_init=1&id=2618 [2010.07.20.] p. 14.

⁶ Gesetz gegen Wettbewerbsbeschränkungen 81.§ (4)

accountability of persons involved in calling or assessing a tender.⁶ From the perspective of the effectiveness of legal action, holding to account whoever calls a tender is essential since they often collaborate in influencing the outcome of the tender.

The subject of the German statutory definition of fraud is also a general subject, and so it is possible in principle to do this, although reaching an agreement aiming at the restriction of competition in connection with an invitation for tender the text of the statute only provides for the accountability of the bidders, that is, those who make an offer. Although it is not clear from the text of the statutory definition, the literature clearly indicates that both statutory definitions relate to the same cartelising behaviour. The possibility of bringing to account whoever calls a tender with those otherwise involved in cartelisation only depends on the existence of a risk of causing damage to the entity calling the tender.⁷ This shows a serious inconsistency of legislation.

It is also an interesting difference that Hungarian legislation provides special Criminal Law protection only to public procurement and concession procedures, while German provisions deal with tendering procedures in general, and so, under the relevant statutes, even agreements relating to private invitations to tender can be grounds for criminal proceedings.⁸

3. The scope of prohibition

Both German and Hungarian Competition Law determine three different types of perpetration: reaching agreement, coordinating practice, and making decisions. Hungarian legislation also includes the actions mentioned in the Criminal Law definition, whilst the solution in German Criminal Law is not at all similar to that in Competition Law. Moreover, the German definitions of the crimes are not even similar to each other, even though the only difference between the two crimes is the element of risk of causing damage or the occurrence of damage. With regard to the definition of the act of perpetration, keeping the Competition Law provisions in mind would be important as the definition which does not evaluate the occurrence of damage makes criminal accountability possible only in cases of making an offer whereas not only persons making an offer but those failing to make an offer on request may also contribute to a decision by whoever called the tender in favour of the cartel members. It is no coincidence that, under the relevant provisions of Competition Law, those withholding offers may also face sanctions. In principle, persons withholding offers can be held to account under the statutory definition of fraud

⁶ Molnár, Gábor: *Gazdasági bűncselekmények*. HVG-ORAC, Budapest, 2009 p. 80.

⁷ *Submissionsbetrug*. <http://de.wikipedia.org/wiki/Submissionsbetrug> [2010.07.20.]

⁸ Pasevald, David: *Zehn Jahre Strafbarkeit wettbewerbsbeschränkender Absprachen bei Ausschreibungen gemäß § 298 StGB*. http://www.zis-online.com/dat/artikel/2008_2_21pdf [2010.07.20.] p. 86.

due to the "collective" nature of the said crime, which means that it is realised not through making an offer but by misleading or keeping somebody misled, and such acts of perpetration can be established even when withholding an offer.

In my opinion, complying with and applying the law are both difficult because the wording of the German statutory definitions in respect of cartel crimes does not reflect the system of concepts of Competition Law. Moreover, it is unnecessary to have in force two types of crime in respect of cartels; it would be sufficient to have only one definition related to cartelising.

The precondition of being held liable for cartelising under Hungarian Competition Law is that the above acts of perpetration be anti-competitive. An act is anti-competitive if its objective or possible effect is the prevention, restriction or distortion of competition.⁹ The examination of the actual effects of an agreement is not necessary if it aims at the prevention, restriction or distortion of competition by its nature.¹⁰ In the absence of a competition-restricting objective, the anti-competitive effects of the agreement must be examined.¹¹ This effect exists even if there is only a possibility that the agreement may restrict, distort or prevent competition.¹² What has been said in connection with the Hungarian legal system substantially applies to the German Competition Law also, with the difference that, without a competition-restricting objective, the Competition Law definition does not evaluate risking the fairness of the competition but only the effects caused by the act under the statutory definition.

The Hungarian Criminal Law definition does not look for the existence of a competition-restricting objective and the existence of a potential competition-restricting effect as alternatives, but the realisation of a cartel crime depends on the two cumulative conditions that both the intention to influence the outcome of the tender and the competition-restricting effect have to be established.

There has been criticism in Hungary that there is no Competition Law or Criminal Law definition available to those applying the law with respect to the results of competition-restriction.¹³ This is a serious difficulty in the determination of the Criminal Law phases of the act. There is an opinion to the effect that the restriction of competition takes place only upon the announcement of the outcome of the manipulated tender or upon the conclusion

⁹ Nagy, Csongor István: *Kartelljogi kézikönyv. A közösségi és a magyar kartelljog joggyakorlata*. HVG-ORAC, Budapest, 2008 p. 342.

¹⁰ Tóth, Tihamér: *Az Európai Unió versenyjoga*. Complex, Budapest, 2007 p. 119.

¹¹ Tóth, Tihamér op. cit. p. 121.

¹² Nagy, Csongor István op. cit. p. 344.

¹³ Csepai, Balázs – Ujvári, Ákos: *A versenyt korlátozó megállapodás közbeszerzési és koncessziós eljárásban való büntethetőségének kérdésköre*. In: *Jogtudományi Közlöny* 2006/6. p. 226.

of the agreement based on the announcement of the result of the tender,¹⁴ whilst, according to other opinions, the restriction of competition is the inevitable consequence of the realisation of the acts of perpetration and the establishment of the phase of consummation is independent of the announcement of the outcome or the actual conclusion of the agreement.¹⁵ If we interpret the restriction of competition literally, we are forced to identify with the latter opinion, as, from the nature of the procedures protected by the Criminal Law definition, it follows that competition automatically becomes more restricted upon the performance of the acts of perpetration. If the cartelising activity does not come to light until the announcement of the results, or if everything goes according to the plan of the persons engaged in cartelising, meaning that no unexpected bidder outside the cartel agreement shows up at the last minute, then the exclusion of competition is realised but the Criminal Law definition settles for the restriction of competition. It is a different matter that it was unnecessary to include the competition-restricting effect automatically accompanying the performance of the acts of perpetration, as the uncertainty caused by this only made the application of the law more difficult. Of course, it is possible that the legislator intended to associate the consummated phase, with the announcement of the outcome, but, due to imprecise wording, it failed to achieve its objective.

As mentioned above, the German statutory definition of fraud is "collective" in nature, which means that it provides opportunity for the criminal prosecution of many acts which should have been evaluated in a separate crime definition because of their special nature. Many cases of fraud are known which are associated with separate definitions in practice or legal literature, meaning that it is defined what kinds of action match the definition of a certain type of fraud. The objective of gaining benefit, similarly to the Hungarian example, is shown by the intention to influence the outcome of the tender, and the existence of such an objective is reflected in the determination of the price or the division of the market. Fraud may be established subject to a further condition, the occurrence of asset loss caused by the act, which is typically the product of a bid price above the market price. If the expected profit for some reason cannot be realised by an agreement aiming to obtain an offer above the market price, the attempt of fraud can be established.

Those engaged in cartel activities do not always endeavour to determine an offer price above the market price, as, on many occasions; the parties are satisfied with deciding the tender winners themselves by dividing up the market. In such cases the tender announcer does not suffer material damage, and so it is not possible to apply the statutory definition of fraud but criminal accountability for reaching an agreement aiming at the restriction of competition in connection with an invitation to tender cannot be avoided. As

mentioned above, the latter crime is to be aggregated with fraud in cases where material damage is caused. In such cases also, the objective is to have the caller of the tender accept a certain offer, but the statutory definition does not evaluate the occurrence of a result. As the competition-restricting effect is automatically created by the submission of offers aiming to influence the outcome of the competition, highlighting it in the text of the act would be unnecessary and misleading.

4. Resources

4.1 The use of excessive force?

Those who engage in conduct according to the statutory definition do not always have to have regard to the Competition Law sanctions for cartelising, as proceedings against cartel information incapable of substantially jeopardising market competition by their nature, would impose an unnecessary burden on the authorities. Agreements according to the statutory definition have a "resource" provided for by Competition Law: the institution of exemption. Legal practice differentiates two types of exemption: individual and group exemption. In Hungary, both types of exemption are based on a system of conditions consisting of four elements: the agreement has to entail an economic benefit, a reasonable part of the benefit has to be conveyed to the consumers, the restriction of competition may be only proportionate to the given objective, and the agreement cannot result in ending the competition in the major part of the market of the goods involved. The exemption may be applied only if the all four mentioned conditions are simultaneously met.¹⁶ The German Competition Act mentions the same conditions with respect to exemption, with the difference that it is sufficient if only either the prohibition of the restriction of competition exceeding the extent appropriate for the purpose or alternatively, the prohibition of the exclusion of competition is met.¹⁷ In this way, the system consisting of four elements in Hungary is decreased to one consisting of only three, and it is up to the cartel members to decide to which the alternative conditions relate. If they choose to observe the prohibition of the restriction of competition exceeding the extent appropriate for the purpose, in a "justified case" even the exclusion of competition may take place. If they only have regard to the prohibition of the exclusion of competition, they may even exert a competition-restricting effect that exceeds the extent appropriate for achieving the economic purpose. I consider this solution as a serious mistake of legislation, and it goes against Community regulations also.

¹⁴ Csépai, Balázs – Ujvári, Ákos op. cit. p. 227.

¹⁵ Molnár, Gábor op. cit. p. 77.

¹⁶ Section 17 of Act LVII of 1996

¹⁷ Gesetz gegen Wettbewerbsbeschränkungen 2.§ (1)

German Competition Law also provides an advantage for SMEs unknown to Hungarian regulations. The legislators removed from the effect of the prohibition of cartels those agreements concluded by small or medium-sized enterprises which aim to rationalise economic activities and improve competitiveness - and which do not substantially restrict competition on the relevant market. I think that the objectives of the "rationalisation of economic activities" and the "improvement of competitiveness" are too general and can serve as an excuse for competition-restricting activities. It is also unclear what "not substantial restriction of competition" means. The objective of this provision is probably to give green light to cartelising for small and medium sized enterprises, who are many times in more disadvantageous situations than larger enterprises, in order to prevent them from being ousted from competition. I think that in a market economy, the task of the state is to protect free competition and it does not have the right to exempt certain groups of enterprises from regulations generally serving the protection of competition. This classifies as a serious intervention into free market processes, for which the state is not authorised in a market economy-based system.

The question may be asked of how the institution of Competition Law exemption affects Criminal Law accountability. Due to the framework disposition nature of the Hungarian Criminal Law statutory definition, in the course of the establishment of a cartel crime, in prin

ciple, the aspects of the Competition Law exemption have to be taken into consideration but due to the nature of public procurement and concession procedures, the conclusion of relating cartel agreements always entail the risk of ending the competition, which prevents the realisation of the fourth condition of exemption, meaning that the possibility of the application of the exemption is excluded.

Although the German statutory definitions do not refer to Competition Law roots, it still can be assumed that in case of cartel formations enjoying exemption under Competition Law cannot be called to accounts under Criminal Law, therefore the deficiencies shown in relation to the system of conditions of exemption under German law derogate the scope of accountability not only under Competition Law but under Criminal Law as well.

4.2 Privileged case

Neither Hungarian nor German Competition Law includes provisions respecting privileged cases, although the amount of the benefit generated as a result of the cartelising does have a great significance in sanctions. The Hungarian statutory definition makes lighter evaluation subject to the value of public procurement; the perpetrator may expect such lighter evaluation of values below HUF 50 million, whilst in the case of competition restricting conduct in concession procedures, the Hungarian legislator did not provide for a

privileged case. There are authors who think that the reason for this inconsistency of the legislator lies in the nature of activities subject to a concession¹⁸ but I think that the amount of the benefit deriving from cartelising can be estimated in the case of concession procedures also, although it would be much easier and more efficient to remove the privileged case from the Criminal Law definition for several reasons.

The section of the Hungarian Criminal Code dealing with the prohibition of cartels is a framework arrangement, which means that the basics, the substantive rules of crime definition are included in the UMPA, and so the system of Criminal Law enforcement can never be independent of the provisions of Competition Law. Therefore, it should be remembered that the Hungarian Competition Authority (HCA) imposes a fine for an act declared to be contrary to Criminal Law, and in the course of determining the level of the penalty, the Authority takes into consideration the benefit generated by cartelising, and so a repeated evaluation of the detail by Criminal Law is redundant.

What is more, although the public procurement value limit specified in relation to the privileged case of the statutory definition of Criminal Law is in line with the system of sanctions of Criminal Law, it is not suitable for determining the real significance of public procurement procedures as the amount specified in the statutory definition can be near to the value limit which requires a community procedure depending on the object of the public procurement, meaning that procedures below a value of HUF 50 million may not necessarily be classified as insignificant from a public procurement aspect. In my opinion, the "success" of cartelising is independent of the value of the public procurement procedure, and can better be measured by the difference in percentage terms between the estimated market price and the price generated by cartelising. In addition, the public funds paid in public procurement procedures need greater protection irrespective of the amount of the sum representing the object of the given procedure, which, again in my opinion, does not allow for lighter evaluation based on perpetration value, which is otherwise customary in the system of Criminal Law sanctions. Another argument for privileged case being unnecessary is the attitude of the legislators since a privileged case has not been determined in relation to concession procedures with regard to the convenience of those applying the law, even though public procurement and concession procedures represent the same "weight group".

It is clear from the above that, in its present form, the privileged case is not necessary, and for its application in practice, the modification of its conditions or the extension of the legal institution to concession procedures would be essential. I think that the effectiveness of the leniency policy (described below) and, at the same time, the effectiveness of the investigation into the act would

¹⁸ Belovics, Ervin – Molnár, Gábor – Sinku, Pál: Bűntetőjog. Különös Rész. HVG-ORAC, Budapest, 2009 p. 523.

be improved if the lighter Criminal Law evaluation granted by the law would depend on when a confession is made and on the value of the information provided.

German Criminal Law does not include any provisions whatsoever on privileged cases of cartelising, but, in the case of fraud causing an asset loss of great magnitude, i.e. EUR 50,000,¹⁹ the perpetrators can expect a sentence much longer than the one defined in the basic case; they can be imprisoned for up to 10 years. Hungarian legislators aimed to ensure that those engaged in cartel activities try to cause as little damage as possible by promising a reduced sanction but they did not determine an upper limit pertaining to the basic case. On the other hand, German provisions give preference to no-one within the basic case; legislators reject all forms of cartel activities in connection with tendering procedures and they only distinguish bidders for more severe judgement. Thus the German Criminal Law approach to cartelising is contrary to the Hungarian approach, which reflects the difference between the approach of the two states in terms of the prosecution of competition-restricting agreements. I think that German Criminal Law provisions conceptualise the prohibition of cartels much more clearly and authoritatively than do the Hungarian.

4.3 Leniency

Leniency policy is known in both the Hungarian and the German legal systems. In Hungary, the actualisation of the institution of leniency is made significantly more difficult by the fact that both Competition Law and Criminal Law provide the possibility of the remittal or reduction of the fine to persons engaged in cartel activities but the conditions for receiving such alleviation are different in these branches of law. In the course of the examination of eligibility for alleviation, the Competition Law rules for leniency policy do not consider the information of the authorities other than the Hungarian Competition Authority (the HCA); only the information of the HCA related to the act are definitive, and the sequence of leniency applications submitted to the HCA is one of the most important aspects, whereas, in the course of considering the granting of exemption from the Criminal Law sanction, the information of all authorities having competence in relation to the prohibition of cartels regarding the act has to be considered. It is another important difference that, according to the leniency policy regulated by Competition Law, the fine may also be completely remitted when the HCA has already searched the site in connection with the cartel in question if the HCA does not have the evidence necessary for the unequivocal establishment of cartel activities and others are not eligible for the remittal of the whole fine because the site search was made

possible.²⁰ Applicants who missed the possibility of the remittal of the fine may still receive a substantial alleviation within the framework of reduced fines, and even 50% of their fine may be remitted²¹ if they provide evidence representing substantial additional value to the HCA.²² Further, if the applicants provide evidence in respect of a fact of which the HCA is unaware and which qualifies as an aggravating circumstance in determining the amount of the fine, the HCA guarantees that it will overlook such aggravating circumstance against the company supplying the evidence when determining the amount of the fine.²³

With regard to exemption from Criminal Law sanctions, only one revealing testimony may be heard. There exists a view in which the Criminal Code does not exclude the possibility of several perpetrators simultaneously using the institution of grounds for the preclusion of culpability,²⁴ but I think that there is a very small possibility that "traitors", who otherwise would compete to be the earliest to make a report, would risk their first place.

Leaking the intention to make a report may bear a significant risk of retaliation, and, also, someone reporting who does not enjoy the trust of the other members of the cartel is less useful to the authority since, if the danger of being reported is known, it may result in the disappearance of evidence. As the Criminal Code does not entice additional penitents with the promise of a lighter sentence, those who receive an alleviated fine from the HCA cannot expect milder Criminal Law consideration by virtue of the law. Although in the course of considering the sentence, confessing to the act is taken into account as a mitigating circumstance, the evaluation of aggravating circumstances deriving from the role played in the cartelising activity will not be ignored. At the same time, perpetrators who intended to influence the outcome of a tender below the 50 million public procurement value and who do not help the work of the authority in any way, may be punished with no more than two years imprisonment, according to the privileged case, instead of imprisonment up to five years.

Exemption from the Criminal Law sanction, therefore, is subject to stricter conditions, which, in this case, reduces the effectiveness of the leniency policy in both Competition Law and Criminal Law considering that, if the HCA remits the entire fine, it does not guarantee exemption from the Criminal Law sanction.²⁵ Moreover, if the conditions of exemption from the Criminal Law sanction are not met, being held accountable under Criminal Law cannot be avoided as the HCA has an obligation to report any cartel activities prohibited by the Criminal Code that come to its attention. Any available evidence must be

¹⁹ BGH, Urteil vom 7. 10. 2003 - 1 StR 274/ 03 (Lexetius.com/2003,3420 [2004/3/209])

²⁰ Paragraph (2) b) of Section 78/A of Act LVII of 1996

²¹ Paragraph (4) a) of Section 78/A of Act LVII of 1996

²² Paragraph (3) of Section 78/A of Act LVII of 1996

²³ Paragraph (5) of Section 78/A of Act LVII of 1996

²⁴ Molnár, Gábor op. cit. p. 87.

²⁵ Molnár, Gábor op. cit. p. 87.

attached to such report.²⁶ The attraction of the leniency policy lies in the possibility of being exempt from the sanctions and it is important that the conditions of exemption be clear and calculable, although the provision on the grounds of the preclusion of culpability does not fulfil these requirements.

In Germany, if the cartel activity produces (the crime of) fraud, exemption from Criminal Law sanction is not possible, and so perpetrators who receive some alleviation or the remittal of the entire fine or a reduced fine from the competition authority, still have to face imprisonment up to 10 years. Fraud is usually aggregated with a crime definition prohibiting reaching an agreement aiming at restricting competition in connection with an invitation to tender. Although, in the latter case, a remittal of the sanction is possible, it is subject to two conditions: the perpetrator has to use his best endeavours to prevent the person who invited the tender accepting the offer designated by the persons engaged in cartel activity, and regardless of whether, as a result of the perpetrator's influence, such an offer should not be accepted. A consummated form of fraud can be established only if material disadvantage is caused, which precludes the failure of the acceptance of the offer, and so, everything considered, we can say that, in the case of fraud in a consummated phase, the perpetrator may not be granted any kind of alleviation under Criminal Law, but in the case of an attempt to fraud, the cumulative sentence may be lighter due to the leniency policy. The Criminal Law sanction may be remitted completely only by reaching an agreement aiming at the restriction of competition in connection with an invitation to tender is established. In my opinion, this breaks the momentum of the efforts aiming to prevent damages if, in the case of fraud, it matters only in the infliction of a cumulative sentence that the perpetrator has prevented the realisation of the contents of the agreement, the occurrence of the prospective damage, and the reason that the act has remained an attempt lies only in his behaviour. I think that is unnecessary to evaluate cartelising as fraud; it is sufficient to keep in effect the statutory definition in respect of reaching an agreement aiming at the restriction of competition in connection with an invitation to tender with modifications made in line with Competition Law requirements.

The two branches of law provide for the alleviation and conditions of granting alleviation differently. Contrary to the provisions of Hungarian regulations, German law enforcement authorities do not insist on being the first to be informed of the act. Similarly to what has been written in connection with the Hungarian solution, Criminal Law leniency knows only one type of alleviation, but this has been compensated by the legislators when they connected exemption from the Criminal Law sanction not to making a report but to the endeavour to prevent the acceptance of the offer, and this allows granting leniency alleviation even to multiple perpetrators. In order to be granted leniency, it is not absolutely necessary to reveal the activity before the

authority: successfully convincing or a refusal to implement the agreement may be sufficient. If the authority or the person who class the tender learns of the cartel activity before the conclusion of the procedure, and so before the acceptance of the offer, those who can prove to have been fighting to prevent the implementation of the agreement may be exempt from Criminal Law sanctions without "treachery", although, without a report, they may not expect the fine imposed on natural persons to be remitted since the condition of receiving leniency under Competition Law is that an application for leniency be submitted and information and evidence necessary for the investigation are provided.²⁷ From the persons submitting an application for leniency, those perpetrators will receive exemption from the Criminal Law sanction who made a report before the acceptance of the offer, but those who submit an application for leniency after the offer is accepted will not enjoy Criminal Law leniency, regardless of their assistance provided in the investigation and even if the competition authority finds them worthy of a reduction or remittal of the fine

It is objectionable that Criminal Law leniency primarily aims to prevent the final outcome of cartelising but for the sake of the protection of public funds and of the investigation of the act, the assistance provided by the perpetrator after the acceptance of the offer should be appreciated not only by Competition Law leniency but by Criminal Law leniency also. Consequently, in addition to the provision on the grounds for the preclusion of culpability, a paragraph respecting a privileged case that appreciates activities assisting investigation would be necessary. Creating harmony between Criminal and Competition Law features of leniency policy is essential for the effective working of the institution.

5. Impeachment

5.1 Disappeared into thin air...?

Both the German and the Hungarian legal system make it possible for the authorities to request information and hear witnesses if necessary, and both legal systems know the institutions of sectoral inquiry and onsite investigation. Many think that the power for the latter is the most effective investigative means for pursuing cartels. Under the relevant Hungarian regulations, the investigators of the HCA are authorised to search and arbitrarily enter the business premises of the client and any undertakings in a relationship with the client, including vehicles and any areas used for business activities. The investigator has the same powers respecting the private purpose or privately used premises (including vehicles and other areas) of executive officers,

²⁶ Paragraph (2) of Section 171 of Act XIX of 1998

²⁷ Bekanntmachung Nr. 9/2006 über den Erlass und die Reduktion von Geldbußen in Kartellsachen- Bonusregelung Section 3, Subsection 2; Section 5, Subsection 1.

employees (agent) of the client or any other person who effectively exercises control over the client.²⁸ The effectiveness of a raid-like onsite investigation may be impeded by the court authorising the requested investigative measure if the HCA is able to substantiate probable cause, when any other investigative measure is unlikely to produce the required results, and if there is reason to believe that the source of information - relating to the illegal activity investigated - indicated is in the location for which the court order is requested and it is presumed that this information will not be surrendered voluntarily or that it would be destroyed.²⁹ In practice, this means that the HCA must have evidence proving the perpetration of cartelising almost beyond doubt and, even without onsite investigation, in order to receive authorisation to carry out onsite inspection. Therefore the request for authorisation is usually preceded by a long period of data collection, in the course of which the persons involved can easily gain knowledge of the authority's "background checks" and make arrangements to get rid of the evidence before the commencement of the onsite investigation.

German Competition Law has solved the above mentioned problem. According to the relevant provisions, if the delay caused by having to obtain a judge's permission would jeopardise the success of the procedural measure, the onsite investigation may be carried out without a judge's permission during business hours, although the minutes drawn up about must include the circumstances justifying such immediate proceeding. Other substantial differences between the Hungarian and German solutions cannot be seen.

An important deficiency of both legal systems is that only the criminal investigative authority is authorised to collect data secretly, although criminal investigation is typically preceded by the proceedings of the competition authority, and it is not likely that substantially more information, evidence, can be obtained by secret data collection after the proceedings of the competition authority. Typically, only a few companies have been fined out of several prosecuted under these proceedings. Further, supporting a cartel agreement by withholding an offer is difficult to prove. I think that the protection of public funds and the great secrecy which characterises such activity would clearly justify enabling the competition authority to use powers of secret data collection.

5.2 Suitable punishment?

In Hungary, cartel activities are indictable under Criminal Law as of 1 September 2005 but no final judgement has been made in any case since then. Germany has much older traditions of the Criminal Law pursuit of cartelising as

legislation has provided for the culpability of the conclusion of competition-restricting agreements since 1997 - so that those engaged in cartel activities can be held accountable under Criminal Law not only in cases where they cause material damage.³⁰ In spite of this, the infliction of sentences of longer periods of imprisonment has not been typical, and even in cases where multiple counts of the crime have been established and cumulated, sentences of imprisonment were generally between 1 and 3 years. Imprisonment is always accompanied by a fine and perpetrators often have to face only the latter in many cases. In Germany persons engaged in cartels are often held accountable and the perpetrators have to face the risk of criminal proceedings, although the Criminal Law aspect is not the one most emphasised in detaining those responsible.

Perpetration is motivated by the aim to gain material benefit, and so the practice of enforcement has to prevent the success of such motivation. Fines are, therefore, an element of key importance in the system of sanctions. EU Member States have to observe EU regulations regarding the amount of the fine imposable on companies, and so it is not possible to impose a fine in excess of 10% of the turnover realised in the business year preceding the making of the decision establishing the violation of the law either in Hungary or Germany.³¹ In my opinion, an upper limit should not be determined since the material benefit deriving from the activities of a cartel network operating successfully for years can easily exceed the inflexible fine maximum. Moreover, the amount of the upper limit is determined on the basis of the turnover of only one year. In order to circumvent the inflexible maximum of the fine imposable on companies, German legislation has introduced a new type of legal sanction aiming at financial assets. The competition authority deprives enterprises of that part of the material benefit of the cartelising activity remaining after the payment of the fine, the satisfaction of claims for damage, and confiscation within the framework of a so-called skimming-off of additional proceeds. In this regard, the German Competition Act has targeted the entire material benefit gained through cartelising.³² It should be noted that the sum taken by the Competition Authority should be a multiple of the sum deriving from cartelising so that the parties entering into competition-restricting agreement have something to lose. If this meant the payment of enormous amounts, and if the authority applying the law did not want to jeopardise the viability of the enterprise with the sanction, the enterprise in question could be granted an alleviation of payment in instalments. This practice is already known in German Competition Law as the applier of the law resorts to reducing the fine only exceptionally, rather granting permission for payment on improved business

²⁸ Section 65/A of Act LVII of 1996

²⁹ Paragraph (4) of Section 65/A of Act LVII of 1996

³⁰ Pasevald, David op. cit. p. 84.

³¹ Gesetz gegen Wettbewerbsbeschränkungen 81.§ (4), Paragraph (1) of Section 78 of Act LVII of 1996

³² Gesetz gegen Wettbewerbsbeschränkungen 34.§ (1)-(2)

results, or, if necessary, it grants a deferral of payment.³³ Nevertheless, when compared to the Hungarian example, it is an important step forward that the withdrawal of all proceeds of the cartel activities is made possible and established as an objective. The possibility of imposing a fine amounting to no more than €1m against natural persons can also serve as an example for Hungary.

6. Conclusion

As regards German legislation, the definition of the scope of persons enjoying exemption needs reconsideration, just as the necessity of maintaining two crime definitions in force or the modification of such definitions according to Competition Law traditions have to be reconsidered. There are things to be re-evaluated in respect of the leniency policy in both legal systems, and it would be worth considering granting powers to the Competition Authority to collect data secretly. For Hungary, studying the German examples regarding on-site inspection, and the sanctions system in particular, would be edifying, and removing the privileged case from the Criminal Law definition or modifying its conditions would also be worth considering.

Both the Hungarian and the German provisions relating to cartels have faults, although the German system endeavours to eliminate cartels much more seriously than does the Hungarian. The objective of damage prevention, which is reflected in the leniency policy and the education of enterprises, as well as the creative circumvention of the fine limit set by the EU prove how advanced is the competition environment.

The German legislators are not only "testing" how to hold natural persons responsible but they consistently attack the employees standing behind cartel activities both from the side of Competition Law and Criminal Law. The need for Criminal Law involvement developed early and a proper practice of law enforcement has been formed in this relation. Although the German Criminal Law regulations are no more capable of laying the foundations for holding persons responsible for cartelising effectively than is the Hungarian solution, due to the advanced state of the competition environment and the determined approach of prosecution, the Criminal Law sanction does have a place and function in the system of sanctions related to cartelising. Based on the enforcement practice, which operates smoothly despite the serious deficiencies shown in connection with the German legal system, we can assert that the basis for changes in a positive direction would be a change of approach; this would give practical force to the necessary regulation modifications.

³³ Bekanntmachung Nr. 38/2006 über die Festsetzung von Geldbußen nach § 81 Abs. 4 Satz 2 des Gesetzes gegen Wettbewerbsbeschränkungen (GWB) gegen Unternehmen und Unternehmensvereinigungen-Bußgeldleitlinien, Section 24.

New aspects of local government in Europe – what we can learn from each other

KISS, Mónika Dorota

ABSTRACT *The main aim of this study is to introduce several models of East and Central European systems of local government, and especially Poland, Latvia, Lithuania, Estonia, the Czech Republic, Slovakia and Slovenia. We analyse those special forms of local government exercised locally and their specific rules which might be adapted to Hungarian public law. During the study it emerges that there are many excellent examples of institutions of local power in Eastern Europe, although in our professional and scientific thinking it is common for researchers to propose West European models to resolve our own local government issues and problems. However, East European legal systems also contain also new solutions, and especially in terms of referendums, popular initiatives, public hearings, publicity of municipal council sessions, transparency created by the local media and, finally, by public meetings. Almost all of these are also to be found in the Hungarian legal system, but a number are impaired by loopholes. To eliminate these in Hungarian local government, we could suggest adopting specific appropriate measure.*

The two main conclusions of the study are:

- *Rational models of local government systems can be found in the East European countries examined;*
- *In cases where models from another country are involved, it is generally better not to adopt complete institutional packages but, rather, selected elements.*

1. Basis of the study

Exercising power at local level can be done either directly or indirectly, as laid down in the classical professional literature. The indirect system of local government system is implemented by a municipal council elected by means of normal universal suffrage (involving a secret ballot). The period for which the council (the representative body) and the mayor are elected is commonly four years, but in the legal administrative systems of Eastern Europe we can also find shorter terms. In such cases different regulations also apply to the mandate of the elected representatives.

Direct local government is also found, albeit exceptionally. Its main characteristic is that exercising direct power involves a variety of institutions,

although in the states of the East European region we can observe a similar tendency in the exercise of power. This uniformity was created by the European Charter of Local Government¹ and is alive not only in those countries which ratified the Charter, but in other countries also.

The professional literature of local government is uniform on the question of the indirect exercise of power, since this means the functioning of representative bodies. Voters can exercise their collective public power through the municipal council. By contrast, direct public power institutions lack uniformity: one sector of the foreign literatures rates only a local referendum as falling within this group, but, according to other professional opinion, a direct institutional system can embrace not only a local referendum, but other forms also, such as public initiatives, public hearings, public meetings, institutions with special competences etc. The reason for this difference of opinion is the theory which says that directness concerns not only the local authority's decision-making but other factors also, and particularly the division of responsibility between the inhabitants (the electorate) and the representative body, the relationship between the resident population and those managing the tasks and the handling of proposals and general interest questions etc.

We have to understand that directness in the exercise of local power does not stem only from decision-making, but means that institutions belonging to the direct forms can also function in an indirect way. The writer grouped the institutions of public power somewhat differently, especially in terms of directness. For this reason this theory will not be further discussed here,² although several pragmatic questions regarding directness are addressed. In spite of the diversity of this grouping, in Eastern Europe there are many examples which other countries might usefully follow.

2. Models in East European countries

We stress that, in the Eastern region of Europe, there are a number of institutions of public law which it would be useful to examine and even to adopt: we need not go to Western democratic systems to find answers to our unresolved legal issues, ways to close loopholes and introduce needed changes. In East European countries, Poland, Slovakia, the Czech Republic, Slovenia, Lithuania, Latvia and Estonia have regulations that Hungary could adopt into its own system to complete the required modification or re-regulation.

¹ 15. October 1985, Strasbourg.

² The study was published only in Hungarian. See more: Kiss, Mónka Dorota: A közhatalom közvetlensége. In: Kocsis, Miklós – Zeller, Judit (ed.): A köztársasági Alkotmány 20 éve. Pécsi Alkotmányjogi Műhely Alapítvány, Pécs, 2009 pp. 527-543.

2.1 Poland

The constitutional regulation of local government provides for direct and indirect forms of the exercising of power. This dogmatic solution is not followed by every country, since indirect power usually has a central regulation, namely the operation of an elected body. Direct institutions are generally regulated only in other sectoral statutes rather than in the constitution.

According to the Polish Constitution, local authorities shall perform their duties through constitutive and executive organs.³ Elections to constitutive organs shall be universal, direct, equal and shall be conducted by secret ballot. The principles and procedures for nominating candidates and for conducting elections, as well as the requirements for the validity of elections, are specified by statute.⁴ Residents may decide, by referendum, matters concerning their community, including closing some organ of local government established by direct election. The principles of and procedures for conducting a local referendum are to be specified by statute.⁵

The Polish Sejm gives the right to recall elected representatives and the mayor, but this right can be exercised only by a free vote of the council, which means that the representatives and the mayor cannot be recalled for their activities and the decisions made. Consequently, the representatives do not have to report on their work and activity whilst they were members of the council. Irrespective of the free vote, the right to recall councillors (representatives) and mayors during their elective cycle already means a quality measure in local government and the exercise of power. Moreover, it is very important, that the right to recall can refer to the whole representative body – the full municipal council – and the mayor separately; recalling councillors individually is impossible. At the time of recall the local authority must call a new election in order to replace the representative body and/or mayor.⁶

As the Act on Local Government of 1990 declares, a local referendum is obligatory for the recall of the municipal council and/or mayor and for the introduction of local taxes. Additionally, the local council can hold a local referendum on every matter within its scope. However, local referendums are entirely optional for the council, which has no obligation to call them.

Another form of exercising power locally in Poland is the Public Hearing. Public Hearings are also specified in the Hungarian Act on Local Government of 1990. The Polish regulation of the Public Hearing institution is similar to the Hungarian model. In terms of public power at local level, in a Public Hearing,

³ The Polish Constitution, Article 169. paragraph (1).

⁴ The Polish Constitution, Article 169. paragraph (2).

⁵ The Polish Constitution, Article 170.

⁶ Kiss, Mónka Dorota: Direct Democracy in Hungary. These remarks were presented at the conference named „Forum 2009 – What We Ought To Know About One Another.” University of Silesia, Katowice, Poland, 30 April – 3 May 2009.

voters and other citizens can initiate questions of public interest and proposals directly for the municipal council.⁷ Its main characteristic is the direct link between citizens and councillors.

Further to these two forms of participation, there are other citizens' meetings, or sessions provided for in Polish law, and their common typical attributes are that the detailed formulae are specified in the local ordinances. Nevertheless, there are various institutions to represent local power, the main form being the local referendum. With the authority of a local referendum, voters can interfere in their public interest tasks and affairs and can control the council. The theory of the local referendum with the possibility of dismissing the council has often arisen in the professional literature. There are arguments concerning the realization of this theory, but there is also an opposing view. If we analyse the scope of the right of the local authority, we must see that this right is for the voters. In this case the voters also have the right to recall the council and the mayor, and not only the right to vote representatives on to the municipal council. This is one opinion referring to recall, but there is another point of view also. First of all, the political culture of the voters has to be mentioned. Many researchers believe that people usually do not have enough political culture and discretion to recall their representatives. Professionals say that the lack of political culture could create a chaotic situation in the life of the municipalities. Despite this unfavourable opinion, perhaps the new model of the local referendum could function well. There is a question in connection with the latter opinion: if the voters do not have enough political culture to recall their representative bodies and mayors, how can they vote for them? Specifically, political culture is needed not only for recall purposes, but also for voting for representatives also.

At the same time, we can mention DANIEL POP'S comparative project achievement analyzing local power in Hungary, Poland and Romania.⁸ DANIEL POP introduces the following conclusions to his examination: the intention to participate in affairs of public interest in Poland is double that in Hungary. In Poland the participation index of the power institutions is usually similar in every municipality. However, this tendency cannot be said of Hungary, since the people keep themselves aloof from exercising a power at local level. Many believe that Hungarians need to change this negative tendency and develop a real referendum which should function in a rational way.

⁷ Kowalczyk, Andrzej: Local Government in Poland. In: Horváth, M. Tamás (ed.): Decentralization: Experiments and Reforms. Open Society Institut, Budapest, 2000 p. 231.

⁸ Pop, Daniel: Municipality Size and Citizen's Effectiveness: Hungary, Poland and Romania. In: Soós, Gábor – Zentai, Violetta (ed.): Faces of Local Democracy. Open Society Institute, Budapest, 2005 pp. 196-197.

2.2 Slovakia

Similar to Polish constitutional law, Slovak law also regulates direct and indirect forms of power in the Constitution. According to the Constitution, local government can be realized through local councils, by local or regional referendums, and also by local and regional referendums.⁹ It is an extraordinary regulation since alongside local and regional referendums, the Slovak legislator regulates the citizens' assembly in the Constitution as a direct form of exercising power. Examining the legal models of Eastern Europe, only the Slovak Constitution defines citizens' assemblies, and formulates not only local, but also regional referendums. It is a curiosity since other countries do not usually regulate these questions at constitutional level, except for local referendums. This does not mean that countries do not regulate the different assemblies of voters and citizens, but in other statutes rather than in the constitution.

In Slovakia local and territorial referendums can be held for various reasons. There are two types of referendum: the obligatory and the advisory. The representative body has to hold a referendum on regional issues (such as the integration or division of municipalities, local taxes and their levels) at the request of 20% of eligible voters. The result of an obligatory referendum is binding on the representative body. In addition to obligatory cases, councils can hold a referendum on other issues within their scope, but the result of such a referendum is not binding on the council.

Other forms of participation are also regulated in Slovak law. The main form is the public hearing. There are arguments both for and against. There are similarities among Slovak, Polish and Hungarian models of the public hearing. In a public hearing, all residents can take part in the meeting, exercise their right to question in the public interest, and make proposals directly to the council. Consequently, between the citizens and the council two-way communication can develop. Neither the proposals nor questions in the public interest are binding on the council, but, nevertheless, the public hearing has an important function: the *communis opinio* can be made very clear in this forum. The *communis opinio* should have its effect on the decision-making of the council at a later point, and so the citizens can demonstrate their interest and wishes through a public hearing. This is the same situation in Hungarian legal practice, since public interest proposals are non-binding, but councils can take the proposals and questions into account during later decision-making. The electorate and citizens expect their opinions to be considered by their representatives.

Moreover, in Slovak law there are other special participation institutions such as the right to petition right and the right of representatives to hold

⁹ Nemec, Jura – Bercik, Peter – Kuklis, Peter: Local Government in Slovakia. In: Horváth, M. Tamás op. cit. p. 314.

meetings for their voters. These meetings are usually not obligatory, but they are held in the case of more important issues affecting the life of a given municipality.

It is worth noting that the regulation of the participation rights of the representative body's meeting carries serious guarantees in Slovak local governmental law. Citizens can take part in all sessions and can also join in consultation and conversation. It is a very important and carefully planned aspect of local power, since it enables the building of a direct connection between representatives and voters. (Note: Hungarian law does not regulate the right to petition explicitly, but we have more forms giving the right to initiate collective complaints such as public hearings, village sessions and other citizens' meetings.) This rule declares that municipalities are governed by the representative body, and the higher levels are governed by the general assembly.¹⁰

2.3 The Czech Republic

In the Czech Constitution the types of local government are regulated only as an indirect form: the operation of the elected representative body. Naturally, despite central regulation, direct forms of local government have also evolved in the Czech Republic. As in other countries, in the Czech Republic the local referendum belongs to the direct institutions for which regulation is similar to the Hungarian model. According to the operative law, a local referendum can be held in all cases within the competence of the representative body, except for the local budget, the dissolution of the municipal council and the recall of the mayor, as well as the incorporation into an independent local authority of a given municipal division with less than 300 inhabitants.¹¹

Following the main rule, the general form of local government is through local councils; compared to this, local referendums are rare. Voters have the right to initiate a local referendum in cases within the authority of the council. The result of a local referendum is valid when 20% of those eligible to vote do so.

Additional participation possibilities are membership of a given committee, transparency and publicity of council meetings, representatives' and mayoral consultations, the right of petition and also local publicity generated by the local media.¹²

It is generally held, professionally, that direct forms of exercising power have no authority over local decisions; for example, the impact of a local referendum becomes real only when the decision is implemented. However in

the Czech Republic – as in other European countries – a local referendum can generate a local government decision also. We have the same situation in Hungarian law: voters can make a decision in a local referendum, but there are some matters on which a referendum cannot be held and in such matters voters cannot make a local public decision.

2.4 Slovenia

The constitution of Slovenia permits local referendums. The primary object of a referendum concerns establishing a new municipality. According to the law, a new municipality can be established only by statute, but, before establishing a new municipality, a local referendum is needed to ascertain the wishes of the inhabitants.¹³ The Constitution does not regulate the relation of direct and indirect forms of power. The constitutional regulation refers to establishing new municipalities, levels of local government, regional organisation and the local budget.

The Act on Local Government guarantees three types of participation, comprising local referendums, popular initiatives and citizens' assemblies.¹⁴

In respect of the last, theses can be initiated by the mayor, the municipal council and 5% of the electorate. In a citizens' meeting, residents can take public interest proposals to the council, and initiate discussions between councillors and the public.

Popular initiatives can be initiated by a minimum of 5% of the electorate. It is an important rule that the cases initiated must be discussed and decided within three months.

The local referendum has two forms in Slovenia: the obligatory and the advisory. The obligatory referendum is novel in that it states the term of the obligation. This model may be a new solution for Hungary also. Many specialists in Hungary believe that Hungarian regulation is deficient in that it does not lay down the obligation term of a local referendum. The Slovenian regulation adjudges the term mentioned and the results are binding for the representative body until the end of its term of office. This may also be appropriate for Hungary. Otherwise, local referendums may be held in respect of public issues concerning the municipality and other public service tasks. Local taxes, their levels and the budget cannot be subject of a referendum, and so at this stage the Slovenian model is similar to Hungarian law.

¹⁰ Constitution of the Slovak Republic, Article 101, paragraphs (1)–(2)

¹¹ Lacina, Karel – Vajdova, Zdena: Local Government in the Czech Republic. In: Horváth, M. Tamás op. cit. pp. 266–267.

¹² Ibid. p. 269.

¹³ Constitution of Slovenia, Article 139, paragraph (3).

¹⁴ Setnikar-Cankar, Stanka – Vlaj, Stane – Klun, Maja: Local Government in Slovenia. In: Horváth, M. Tamás op. cit. p. 393.

2.5 Latvia

In the participative local democracy of Latvia there are two elemental institutions: the local referendum and the public hearing, in addition to which publicity of council meetings is also considerable.¹⁵ Wide publicity of local councils is visible in all countries, but we can see that publicity differs in its local forms in individual countries. For example, council sessions in Latvia involve delegates of the local media and heads of institutes being invited to the sessions. In respect of publicity, everyone has the right to examine the minutes and decisions of municipal councils, committees and mayors.

The mayor and the representatives hold open sessions for the citizens to take their public interest questions and proposals, sessions which are held at least once per week. In this regulation, the Latvian model is similar to the Hungarian, since citizens can acquire the right to join a given committee or another working group of the local authority. Latvia has one of the most interesting regulations in that the legislator regards the question session as a direct form of participation. Neither the question sessions nor the roundtable negotiations are well known in other countries. Clearly, special direct institutions have also been introduced in other countries in Eastern Europe, but we do not find such forms of participation, even though almost every country has some specific forums which cannot be found outside the region.

The public hearing has a special significance in Latvia, since the citizens' opinions on regional organization are discussed here. However, public hearings are not decision-making bodies, being merely advisory, with the result that¹⁶ expert opinion holds that there is no important element of direct local power in Latvia.

Finally, the voters have the right to initiate meetings of their representative body. The additional forums specialise in sectoral Acts, such as the Act on the Relationship between Central and Local Government'. A local authority can exercise the right to petition in cases which concern their authority, but in which the council has no competence to decide.

2.6 Lithuania

The Lithuanian Constitution prescribes the indirect form of local government, with different regional and local levels having the right to exercise this collective right through representative bodies.¹⁷ The Constitution does not recognise local or regional referendums, but there are direct institutions in

¹⁵ Vanags, Edvins – Vilka, Inga: Local Government in Latvia. In: Horváth, M. Tamás op. cit. p. 135.

¹⁶ Ibid. p. 131.

¹⁷ Constitution of Lithuania, Article 119, paragraph 1.

Lithuania also. The exercise of direct power is regulated in local ordinances, under which communities can organize citizens' meetings to review decisions, and citizens can intervene in matters of public interest, although such consultations are only advisory.

Other forms include so-called obligatory consultations as regulated in the sectoral statutes, and when the events for debate are considered important by a sectoral statute, the representative body must hold the consultation. For example, issues requiring "obligatory" consultation include changing the name of a municipality and disputed regional development plans, in which cases a public hearing is needed.¹⁸ Lithuanian practice shows that participants do express their opinion in cases in which they are directly interested. Municipal council sessions are public, but special feature is that the specific rules are laid down only in local ordinances. In respect of publicity, one of the important issues concerns the workings of public administration and its organs with the monitoring authority. Delegates from these organs have the right not only to take part in the meeting of the representative bodies, but also to join the council and, moreover, to make decisions. Such rights can help build a stronger advisory system instead of a simple outside control. To this end, delegates are provided with council decisions in advance rather than later, it being considered that access to decisions after the event is not effective in terms of the working of local authorities and that a different approach is needed. Social organs can join working committees and offer opinions on cases affecting the local community to the public administration (the right to petition).¹⁹

2.7 Estonia

The Constitution of Estonia regulates the basics of local government very briefly. The regulations mention only indirect forms of local government: the representative body of a local authority is the council which shall be elected in free elections for a term of four years. The period of authority of a council may be shortened by an Act due to a merger or division of local authorities or the inability of the council to act. Elections shall be general, uniform and direct and voting secret.²⁰ Before the Amendment to the constitution in 2005, councils were elected for three years.

The formulae of direct local power are detailed in the Act on Local Government. There are two elements: a local referendum and a voters' meeting. The first, as elsewhere, is an exceptional form of the exercise of power and is

¹⁸ Beksta, Aruna – Petkevicius, Algirdas: Local Government in Lithuania. In: Horváth, M. Tamás op. cit. pp. 178-179.

¹⁹ Ibid. pp. 186-187.

²⁰ Constitution of The Republic of Estonia, Article 156.

usually restricted to territorial organization cases.²¹ A voters' meeting is similar to a public hearing in other countries, such as Hungary, Poland, Latvia or Lithuania, but it is only advisory. In the Baltic States public hearings are usually held only in the capital and its region.

The special form of participation in local decision-making in Estonia is the law-making initiative. According to this right, at least 1% and at best 5% of the citizens eligible to vote can initiate law-making on a specific issue within the scope of the authority. The initiative must be dealt with within three months and a delegate of the initiators can take part in the discussion.²² It is a remarkable rule, especially since the initiators have resort to the courts in the event of any failure during the process.

3. Table of forms of participation

Country	Democratic forms
Czech Republic	a) local referendum; b) committee membership c) consultation; d) petition right
Estonia	a) local referendum; b) voters' meeting c) law-making initiative
Poland	a) local referendum; b) public hearing c) citizens' assemblies
Latvia	a) local referendum; b) public hearing; c) publicity of council meeting; d) round-table negotiations; e) committees
Lithuania	a) obligatory consultations; b) citizens' meetings; c) public hearing; d) publicity of the council meetings
Slovenia	a) local referendum; b) citizens' meetings; c) popular initiative
Slovakia	a) local referendum; b) citizens' meetings c) petition right; d) complaint right
Hungary	a) local referendum; b) people's initiative; c) public hearing; d) village session; e) publicity of council meetings; f) mayors and representatives' consultations; g) others (e.g., committee membership)

Reviewing the differences and the similarities among the forms of participation in the countries examined, we can see more similarities than differences in the local power operation. The differences usually arise in the authority of a given institution. The similarities manifest themselves in the demand for building various institutions, since most countries regulate not only

one or two democratic forms to help the participate in the public tasks, but there are various institutional systems for activating people in local public life, as the table shows. We can find similarities in the behaviour of citizens and voters when democratic regulations allow this.

The local referendum has the most varied features among the countries of Eastern Europe, and so this institution of direct democracy affords the most possibilities to adopt various technicalities into other countries. Beyond the local referendum, publicity for local authority affairs and public hearings also stand out. The public hearing functions in Hungary also, and we can assert that Hungarian law incorporates a good model of public hearing – specifically since public hearings must be held at least once per year by the local council and so is an obligatory forum.

4. General conclusions and solutions

In examining any legal system, what is advisable is never to adopt an institution in its totality but merely the relevant elements into another legal system. The Act on Local Government also demands this. Not only foreign legal systems, but also the Hungarian have positive solutions and models that are suitable to be followed by another system. Naturally, what solutions are suitable in a given country depends on specific circumstances, and it is necessary to examine, which European models have a qualitative system suitable for the current Hungarian situation. There is no uniform local government legal system in the EU, but even so the European Charter of Local Government creates a uniform principle at local level. On the whole, we can find the most novel methods relating to local referendums.

It would be useful at this point to review the most important problems and solutions which are advantageous for today's local government system in Hungary.

First, we should mention the local referendum, since many problems have appeared in connection with the referendum and the popular initiative in Hungary over the last 20 years. In respect of the countries examined, the Polish and the Slovenian systems contain much which is acceptable in Hungarian law, also. In Hungary, the use of local referendums is infrequent, especially in reaching a local government decision. It is almost never practised. However, the Act on Local Government of 1990 declares: the local government decision shall be made by the representative body or by the citizens eligible to vote. For example, one of the most momentous questions of the local referendum is not regulated in the Act; namely the legislator did not regulate the question: How long is the outcome of the local referendum binding on the representative body? A further question arises: After holding an obligatory local referendum on a given question, how its outcome should be modified next time, by the citizens eligible to vote or by the representative body? This cardinal question is

²¹ Maeltsmees, Sulev: Local Government in Estonia. In: Horváth, M. Tamás op. cit. p. 74.

²² Ibid. p. 77.

regulated neither in the Act on Local Government, nor in the local ordinances at the present time. The Slovenian local referendum model offers an adequate solution to these questions, since in that country the outcome of the local referendum is also binding on the council, but only until its term of office ends. The question of the modification can also be answered: as the outcome is binding on the council, any modification or any invalidation of the result of the referendum can come about only in the next electoral term during the life of the new council. This model, however, has some disadvantages. For example, a question from a local referendum cannot be asked more than once in the same electoral period. The possibility of any modification or invalidation of a result can be reopened only in a new electoral period. This method preserves further problems also. If this model was incorporated in Hungarian law, it could happen that representative bodies abstained from calling referendums on advisory issues. In other words, local referendums would concern only obligatory issues. This, of course, is merely supposition although there is a strong possibility that it will be common in practice.

There are also differences in the issues of local referendums in European countries. It is curious that there are two themes which are either obligatory or invalid issues; these concern the dissolution of the council (and the recall of the mayor) together with local taxes. In Hungary these two themes are listed as invalid questions, but, for example, in Poland they are obligatory - namely the council has to call a referendum on these issues. In some cases, exercising the right of dissolution supposes the imperative mandate, but there are also examples of the free mandate.

We need to know if this extension of the right to local government is accepted in the countries examined. Dissolution is not granted as a right of voters in Hungary, but, on the contrary, the Polish Sejm regarded this as an important and natural right of the voters. It can be seen that local authorities can function using both systems, but at the same time, we can see that the dissolution of the council is impractical if unrestricted. The restrictions have two sides: on the one hand, dissolution may involve only the whole council (and not the representatives as individuals); on the other hand, the time interval cannot apply to the whole electoral period, but only to certain parts. In respect of the four-year cycle, the author's opinion is that councils would have enough time to begin the activity according to their cycle programme, which is why, after the election, the right of dissolution should not be exercised by the voters for at least one year, although from that time a local referendum on dissolution should be called. As for the end of a cycle, six months before the end of the representatives' mandate, dissolution should not be available to the voters since at that time dissolution is pointless.

The other facet of the delimitation of dissolution concerns the right to local government. If our hypothesis says that the right to local government is a total right, then the voters should not have only universal suffrage, but also the right of dissolution. Many in Hungary believe that there is no political culture among

voters and so exercising the right of dissolution would cause a chaotic situation in everyday political life. The author disagrees with this oversimplified philosophical view on the basis that the right of dissolution should not be denied to the electorate. It might be useful to pursue some thoughtful research and comparative studies to look at those countries where the right of dissolution is exercised and determine how these countries manage this right?

The second institution which also has adequate elements for adopting is the public hearing. In this regard, the Baltic states have particularly useful models which Hungary could use in many ways. The qualitative elements of public hearings in the Baltic states might be beneficial for the Hungarian model. Primarily, those cases which are obligatory for public hearing deserve careful attention. Currently, a public hearing in Hungary is obligatory in that it has to be held at least once per year, but its subjects are not determined by statute. The institution of the public hearing should be authorized for specific obligatory issues centrally regulated by the Act on Local Government: consultation on regional development plans and the debate on a given question initiated by a local referendum. Currently the scope of a public hearing does not cover these issues. With this the general role of the public hearing can also maintain its present status, but the additional authority may encourage voter participation in public issues and tasks in which they are interested.

In Hungary, many problematic questions arose in the practice of public hearings during the last 20 years. One of these concerns participation rights. As in the Hungarian model, the main participation rights of public hearings are public interest questions and proposals by voters to the council. However, practice justifies: these participation rights are not exclusive to public hearings, since other rights are also involved, such as information on activity in multipurpose micro-region associations, lobbying by local organs, the examination of local regulations by citizens etc. In respect of monitoring local regulations, the author's views have already been expressed: central and local law-making regarding local government cannot be only a one way activity. Not only should the local law-maker consider the higher law, but the legislator, Parliament, should also publish local regulations and utilize them at statute level, especially the long-standing features of local law. With this duplex mechanism we can reach a level of law-making able to handle pending cases, and unregulated institutions and help to create the exercise of real power at local level.

Today, participation rights and the authority of public power which were established by the Act on Local Government, the Act on Multipurpose Micro-region Associations and influenced by the professional literature and precedents. The potential functions of the public hearing – obligatory consultation on pre-determined questions – could supplement the original functions and authority of the institution.

Publicity of the meetings of representative bodies is also an important part of local participative democracy. American researchers analyzing the subject came to the conclusion that Most communities have only one newspaper, and in small

communities it is often a weekly. Some newspapers and local radio and television stations do a good job of covering city and county politics, but this is the exception rather than the rule. Many recognize that their readers or listeners are more interested in state or national news, and especially of sport, than in what is going on in municipal planning meetings or county sessions.²³ We can also see this tendency in Europe and in Hungary also. More Hungarian studies have now acknowledged that people are interested primarily in national news, followed by local mass media product and finally in regional news.

Inhabitants should be well informed about local public services in order to influence local politics. This thesis is formulated on the study mentioned above. Americans believe that "The art of asking questions is also important to scientific polling. The wording of questions can influence the answers given. Good questions have been presented and are delivered by trained and professional interviewers, who read the question exactly as written and without any intonation in their voices."²⁴

It is an instructive view: Hungarian central law permits of only the participation on the meetings of the municipal council, but the citizens' participation in the concrete consultation and negotiation is not allowed. It means, the inhabitants can only listen to but not take part the counsel. The Slovakian model has some elements for adopting, as it allows participants to take part not only on session, but the consultation, also. In fact, the direct democracy was put forward at all times. Next to the indirect institutional functioning, significance of the direct institutions derives from the earliest times. „The question of why citizens ought to participate in politics is one that is as old as the study of politics itself. As far back as ARISTOTLE, participation was seen as a vital part of the *res publica*, as a way for citizens to take part in activities that were important for the collective good... robust participation was not seen exclusively through voting but also through direct involvement in the democratic life."²⁵ Accordingly, this thesis might be a good reason for Hungary to adopt the Slovakian model of local publicity, and give the right not only for the participation, but also the consultation on the representative bodies' sessions.

The other side of the publicity of the sessions connects with the legal supervision concerning the function and system of local governments. The

²³ McGregor Burns, James – Peltason, J. W. – Cronin, Thomas E. – Magleby, David B.: *Government by the people*. Prentice Hall, Upper Saddle River, New Jersey, 2000 p. 529.

²⁴ *Ibid.* p. 254.

²⁵ See more in Rose, Jonathan: *Institutionalizing Participation through Citizen's Assemblies*. In: DeBardeleben, Joan – Pammett, Jon H. (ed.): *Activating the Citizen*. Palgrave Macmillan, p. 214. Additional bibliography in this subject: Shaban, Omid A. Payrow: *Democracy, Power and Legitimacy*. University of Toronto Press, Toronto, Buffalo, London, 2003, as well as Pateman, Carole: *Participation and Democratic Theory*. Cambridge University Press, Cambridge, 1970.

Hungarian model regulates the simple legal control of the local governments, which is an inadequate system as many specialists have seen it lately. So, now is the time to change this inefficient system into a new and effectual mechanism, called legal supervisory control. In this question we can also find adequate examples in the analyzed countries, namely in Poland and Slovakia. In Poland the legal supervisory control prevails the functioning of local governments and Slovakia has also a similar mechanism. This system can be competent to the extensive supervisory work. Hungary should deliberate this system and probably take into practice.

Finally, the law making initiative is needed the introduction shortly, which is regulated in Estonia. However, the Hungarian Act on Local Government²⁶ and the Act on Legislation²⁷ declares the cooperation of citizens about the local ordinances drafts. The Constitutional Court allocated the following thesis: the created local ordinances without cooperation of citizens could be also legal. Incidentally, this resolution can affect the public activities and attendances badly. But at the same time, the cooperation of citizens about the ordinances drafts can slow down the law making procedure, as the citizens and the civil persons are lay in this professional proceedings, so a rewarding work could not be required from the mentioned civil group.

Currently, there is a similar institution to the legislative initiative in Hungary too, named people's initiative. People's initiative is a general form of public power, and its speciality is to help the public participation in the work of municipal council. In principle, with this form the voters can initiate any cases to the council which belongs to its authorities. Within these issues the law making could be also initiated to the council, as the law making is in the authority of the council. After all, the concrete law making initiative would be a better and more effectual institution than the general people's initiative. The major problem of the people's initiative in the Hungarian model: it only functions without the obligatory decision making. Of course, the council can make a decision about a case initiated by the voters, but this is not an obligatory, as it depends only on the council's judgement. The authority of the people's initiative could be solidified by the introduction of the obligatory decision making. At the same time, the law making initiative should also be regulated in the Act on Local Government as the model of people's initiative. Probably, there could be another solution to determinate the mentioned two institutions: Parliament can regulate the law making initiative as a special form of the people's initiative, but in this case the local council should be responsible to discuss and make a decision obligatorily about the initiated law question.

²⁶ Act LXV of 1990.

²⁷ Act XI of 1987. This Act was in force until 31 December 2010.

5. Summary

After the introduction of the local participative democracy in Eastern Europe, there is a need in connection with a few institutions to change into effective models. In the Hungarian public law there are some institutions belonging to the functioning of the municipal council, but some of them are functioning as separate bodies. This grouping can be found in the other European countries as well, as the articles of European Charter of The Local-Self Government that needed the mandatory ratification originate a relative standard local governmental law system. In spite of this tendency, there are such areas of participative democracy in the foreign countries that may be useful to think about.

Finally, it is noticeable: for reaching a better, more effective institutional system, we have to dare to change the present situation, and have to analyze the ambient countries' models. As we could see, there are lots of novel and adaptable regulation methods for the Hungarian public law. We also have to see, there are many different models functioning in our Eastern European region, however the right of the local governance could be exercised by all models. If an adapted component of a given participation form happened to be unsuitable in practice, Hungary still can change it for another model or set the own earlier institution back.

Position marks in the European Union

NÁTHON, Natalie

ABSTRACT *The paper deals with the jurisprudence concerning position marks of the previous years in the European Union. It covers a period of eight years only, considering the relevant cases and trying to present the general rules and the application of these rules to position marks. However, few cases reached the Court of Justice of the European Union and in the two closed procedures (Case T-547/08 "Orange colouring of the toe of a sock" and Case T-388/09 "Jeans pocket design") the General Court revealed its point of view concerning the registration of these non-traditional trade-marks. There are no special criteria applying to position marks, but case-law developed in respect of three-dimensional and two-dimensional trade-marks are often applied to position marks, especially when these reproduce elements of the shape of the product, so reproducing the appearance of the product. In such cases registration is generally refused.*

The registration of position marks is possible only if the mark is unique and original, has an inherent distinctive character and is apt to identify the origin of the products. In case of a lack of distinctiveness, there is still the possibility to demonstrate the prior use of those signs, something which should take place before the trade-mark application is submitted.

Having an appeal against the decision taken in Case T-547/08 before the Court, submitted at the end of October 2010, it will be interesting to see if the Court sustains its opinion or makes some clarification.

1. Introduction

Nowadays brands undergo dramatic change, as classical trade-marks, brands, advertising and marketing techniques are not enough to appeal to consumers. Companies try not only to be unique, but need a steady market share, and so they constantly struggle for differentiation.

Marketers need a broader view and have to think beyond their logo as the sole consistent element in their branding efforts. For this reason they broaden the repertoire of signs and symbols potentially eligible to serve as trade-marks for products or services. Change is the biggest challenge to business success.

"An Industrial Property Rights Strategy for Europe"¹ says that Europe requires strong industrial property rights to protect its innovations and remain

¹ COM(2008) 465 final

competitive in the global knowledge-based economy. A clear regime for intellectual property rights is an essential condition for the single market and in making the "fifth freedom", the free movement of knowledge, a reality. Property, whether tangible or not, is crucial to the operation of a market economy. Industrial property rights facilitate entry of newcomers to a market by helping to attract venture capital and enabling production to be licensed to incumbents. Trade-mark rights are essential for a system of undistorted competition, allowing the customer to distinguish the products and services of undertakings. Trade-marks provide a highly effective means of communication. On the one hand, they serve as a medium for information and advertising, and as a symbol to create and represent the entrepreneurial capacity and the image of an undertaking, on the other. Without competing imitations, the producer can increase his market share, enhance profit margins and develop customer loyalty.

The aim of trade-mark law is not only to confer patrimonial rights to a legal or natural person and thus prevent abusive use by a third party, but essentially to guarantee the origin of goods or services to the consumer.

Trade-marks appear in new and innovative contexts. "Non-traditional marks" such as colour, sound, and even scent can distinguish an undertaking's products from competitors' products and entice consumers.² Businesses utilize these symbols not only as source signifiers, but as promises of reliability and quality. As companies expend resources in creating and developing these unique brand personas, they rely on trade-mark law to protect their investments.

As intellectual property rights become more sophisticated, nations endeavour to adapt their laws to protect them. Included in these regulations are laws related to non-traditional trade-marks. These non-traditional trade-marks go beyond simple words and designs that businesses have long used to distinguish their goods from those of other companies; they include colours, sounds, scents, position marks, trade dress, holograms and motion marks, etc.

Trade-mark law protects against consumer confusion about the origin of the products sold under a trade-mark. The aim of the mark is that it may be perceived immediately as an indication of the commercial origin of the goods or services in question, so as to enable the relevant public to distinguish, without any possibility of confusion, the goods or services of the owner of the mark from those of a different commercial origin.³ Consumers readily recognize

² According to settled case-law each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs enabling the consumer, without any possibility of confusion, to distinguish those goods or services from others which have another origin (see, to that effect, Case C-517/99 *Merz & Krell* [2001] ECR I-6959, paragraphs 21 and 22; Case C-206/01 *Arsenal Football Club* [2002] ECR I-10273, paragraphs 47 and 48; and Case C-412/05 *P Alcon v OHIM* [2007] ECR I-3569, paragraphs 53 and 54).

³ Case T-122/01 *Best Buy Concepts v OHIM (BEST BUY)* [2003] ECR II-2235, paragraph 21.

traditional trade-marks such as brand names and logos as identifying the source and quality of goods and services. However, consumers may not readily acknowledge that a colour, sound, position or scent functions as a trade-mark.

2. Position marks

In the case of position marks, we talk of a new type of trade-mark.⁴ Its use in the market is very elementary and recent⁵, but with two cases already before the Office for Harmonisation in the Internal Market (trade-marks and designs) (OHIM), the Court of Justice and the General Court of the European Union, it might have importance in the near future. To avoid the rejection of applications for these signs, many of them are also applied as figurative and/or three-dimensional marks (in which case the future positions or locations of the mark are not specified in the application) and where jurisprudence is well-established. Before analysing this type of trade-mark in depth, however, we first of all need to define the position mark

The position mark is specified by the position in which it is attached to a particular product⁶ (this type of trade-mark exists only in the case of products, since for services it is difficult to conceive). The mark applied for is designed to protect a specific sign placed on a specific part of the surface of the designated product.⁷ SANDRI and RIZZO believe that such signs have, primarily, a special three-dimensional shape. They also give, as examples, the luxury goods manufacturers such as Rolls Royce ("Flying Lady" and "Spirit of Ecstasy") or Daimler Benz (the Mercedes three-pointed star) where their logo, or, more precisely, the spatial embodiment of the logo, appears or is located on the front of the car, above the radiator and in a particular place. These signs are perceived – by the fact that they are affixed in a permanent place – and memorised immediately by consumers, and for these reasons they are generally suitable for registration. They are, in fact, often treated – by the relevant trade-mark offices – as three-dimensional or figurative signs, although in many cases they are, at the same time, masterpieces of arts and crafts in themselves, too (e.g., bag buckles, coat-buttons etc.).

In the European Union community trade-marks (CTM) are regulated by Regulation No. 207/2009⁸ and, according to Article 4:

⁴ New type or non-traditional trademarks are colour, smell, taste, tactile marks, hologram, moving images, gesture marks, three-dimensional, position and sound marks

⁵ The first case was introduced in 2000 before the OHIM, case No R 983/2001-3.

⁶ Sandri, Stefano – Rizzo, Sergio: Non-conventional trade marks and community law. Marques, 2003. p. 151.

⁷ Case R 1506/2006-1 (OHIM), Case T-547/08 (General Court of the European Union), OJ C 209 from 31.07.2010, p. 36.

⁸ Council Regulation (EC) No 207/2009 of 26 February 2009 (OJ 2009 L 78, p. 1).

"A Community trade-mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings".

Article 7 – concerning absolute grounds for refusal – says the following:

"1. The following shall not be registered:

(a) signs which do not conform to the requirements of Article 4;

(b) trade-marks which are devoid of any distinctive character;

(...)

(...)

(e) signs which consist exclusively of:

(i) the shape which results from the nature of the goods themselves;

(ii)

(iii) the shape which gives substantial value to the goods;⁹

(2)

(3). Paragraph 1(b), (...) shall not apply if the trade-mark has become distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it".

As can be seen from the above, in order to be registered as a community trade-mark, the sign must fulfil two conditions: (a) be capable of being represented graphically (graphical representation) and (b) having distinguishing capability. The Regulation gives a very broad definition concerning the concept of the trade-mark, but concerning the registrable types of trade-mark it gives only a non-exhaustive listing. The reason for this is that the legislator did not wish to exclude possible future marks from the scope of the Regulation.

According to the Guidelines of OHIM,¹⁰ each application must be considered on its own merits, taking into account its own particular circumstances and having particular regard to the trade-mark and the goods which are the subject of the application. The examiner has to bear in mind the nature of the trade concerned, the manner in which the goods are provided and the relevant public. The mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services.

The trade-mark creates a connection between the product and its manufacturer. The mark thus expresses not only the provenance and the origin of the goods, but connects the goods to a defined enterprise. The mark has its

⁹ According to the decision of OHIM in case R 497/2005 (case Bang & Olufsen) „the doctrine of aesthetic functionality” is regulated by Article 7(1)(e)(iii) of the Regulation.

¹⁰ Guidelines concerning proceedings before the Office for Harmonisation in the Internal Market (trademarks and designs) (OHIM), Part B, Examination

role in signifying the quality of the goods, in demonstrating its good reputation and it helps to build a relationship with the consumer.

According to settled case-law, in order for a trade-mark to possess distinctive character, it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings.¹¹ The essential function of a trade-mark is to identify the commercial origin of the goods or services, thus enabling the consumer who acquires the goods or service covered by the mark to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent acquisition.¹²

In the case of position marks, the fulfilment of the condition of graphical representation is not a problem. The sign can – similarly to figurative trade-marks – easily be reproduced and is also available for quick consultation at the Registry of OHIM. In most cases, the rejection of these marks is based on a lack of the second condition: the distinctive character.

3. Distinctive character

The essential feature of a registrable sign is that it must have an intrinsic distinctive character. Only signs with a distinctive character can fulfil in commercial activity the functions or purpose of a trade-mark. The monopolisation of a non distinctive sign by an owner would lead to the distortion of the competition and its registration would be unreasonable towards competitors and towards consumers. This is why, according to case-law, the various grounds for refusing registration (...) must (...) be interpreted in the light of the public interest underlying each of them.¹³

The main purpose of the trade-mark is the capacity to identify the origin of a product or service. One of its aims is to evoke to the consumer a particular company, product or service. According to consistent case-law, for a trade-mark to possess distinctive character within the meaning of Article 7(1)(b) of the Regulation, it must serve to identify the product in respect of which registration has been applied for as originating from a particular undertaking, and thus to

¹¹ Joined Cases C-473/01 P and C-474/01 P Procter & Gamble v OHIM [2004] ECR I-5173, paragraph 32, and Case C-64/02 P OHIM v Erpo Möbelwerk [2004] ECR I-10031, paragraph 42.

¹² Case T-219/00 Ellos v OHIM (ELLOS) [2002] ECR II-753, paragraph 28, and judgment of 22 May 2008 in Case T-254/06 Radio Regenbogen Hörfunk in Baden v OHIM (RadioCom), paragraph 27.

¹³ Case C-299/99 Philips [2002] ECR I-5475, paragraph 77.

distinguish that product from those of other undertakings.¹⁴ Thus the signs referred to in Article 7(1)(b) are signs which are regarded as incapable of performing such a function.¹⁵

Furthermore, the distinctive character of a trade-mark must be assessed, firstly, by reference to the goods or services in respect of which registration has been applied for and, secondly, by reference to the perception of them by the relevant public.¹⁶

Concerning the criteria for assessing the distinctive character of position marks, the relevant public's perception is not necessarily the same in the case of a position mark as in the case of a word or figurative mark consisting of a sign which is independent from the appearance of the products it denotes. Average consumers are not in the habit of making assumptions about the origin of products on the basis of the appearance of a product, in the absence of any graphic or word element and it could, therefore, prove more difficult for distinctiveness to be established in relation to such a position mark than in relation to a word or figurative mark.

It should also be noted that a finding that a mark has distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94 is not subject to a finding of a specific level of linguistic or artistic creativity or imaginativeness on the part of the proprietor of the trade-mark. It suffices that the trade-mark should enable the relevant public to identify the origin of the goods or services it covers and to distinguish them from those of other undertakings.¹⁷

Finally, a minimum degree of distinctiveness is sufficient to render inapplicable the ground for refusal set out in Article 7(1)(b) of the Regulation.¹⁸ In the case of position marks, it should also be noted that – as will be shown below – position marks are often perceived as decorative or functional elements (aesthetic functionality), which do not give them the minimum degree of distinctive character as required.

¹⁴ See judgments of the Court of 29 April 2004 in Joined Cases C-473/01 P and C-474/01 P *Procter & Gamble Company v OHIM* ('Tabs') [2004] ECR I-5173, at paragraph 32; of 21 October 2004 in Case C-64/02 P *OHIM v Erpo Möbelwerk GmbH* ('Das Prinzip der Bequemlichkeit') [2004] ECR I-10031, at paragraph 42; of 4 October 2007 in Case C-144/06 P *Henkel KgaA v OHIM* ('Tabs') [2007] ECR I-8109, at paragraph 34.

¹⁵ See judgment of the Court of First Instance of 27 February 2002 in Case T-79/00 *Rewe Zentral AG v OHIM* ('Lite') [2002] ECR II-705, at paragraph 26.

¹⁶ See judgment of the Court of 22 June 2006 in Case C-24/05 P *August Storck KG v OHIM* ('Karamelbonbon') [2006] ECR II-5677, at paragraph 23; and 'Tabs', cited above, at paragraph 35.

¹⁷ Case C-329/02 P *SAT.1 v OHIM* [2004] ECR I-8317, paragraph 41, and Case T-23/07 *Borco-Marken-Import Matthiesen v OHIM* (α) [2009] ECR II-0000, paragraph 43.

¹⁸ See Case T-34/00 *Eurocool Logistik v OHIM* (EUROCOOL) [2002] ECR II-683, paragraph 39.

4. Acquired distinctiveness or secondary meaning

Distinctiveness can be inherent, in which case consumers immediately recognise the mark as distinguishing goods, or it can be acquired through consumer recognition, i.e., secondary meaning. What does it mean? According to Article 7(3) the rules concerning the lack of distinctive character shall not apply if the trade-mark has become distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it. As such, non-traditional trade-marks, including position trade-marks are unlikely to be regarded as inherently distinctive and generally will need substantial acquired distinctiveness, i.e., consumer recognition, for registration.¹⁹ These signs need to acquire by usage an independent reputation.

The crux of the secondary meaning doctrine is that the mark comes to identify not only the goods but the source of those goods. To establish secondary meaning, it must be shown that the primary significance of the sign in the minds of the consuming public is not the product but the producer. This may be an anonymous producer, since consumers often buy goods without knowing the personal identity or actual name of the manufacturer.²⁰

Similarly to colour trade-marks, in the case of position marks, distinctiveness without any prior use is inconceivable, save in exceptional circumstances, particularly where the number of goods or services for which the mark is claimed is very restricted and the relevant market very specific²¹. It means that, before the submission of a trade-mark application, the sign should have been used. In general, proof of previous use and concerning acquired distinctiveness should be submitted together with the trade-mark application. According to the Guidelines of OHIM a trade-mark is distinctive in this sense if it is recognised by a sufficiently large part of the relevant public as a mark of one single trader.

The criteria for showing acquired distinctiveness of a position trade-mark do not differ from those applied to all other types of trade-mark. It is not in itself an obstacle to the finding of acquired distinctiveness if the fact that the trade-mark has been widely used, or has obtained market recognition, is due to a monopolistic situation; however the acquired distinctiveness should be proved in the European Union as a whole and not just in one Member State.

To be noted are: (1) that the evidence of use is to be assessed in order to judge whether that use has produced a situation where a mark which would otherwise have to be refused on one or several grounds has become distinctive

¹⁹ Roth, Melissa E.: *Something Old, Something New, Something Borrowed, Something Blue: A New Tradition in Non-traditional Trademark Registrations*, 27 *Cardozo L. Rev.* 457 (2005)

²⁰ *Ralston Purina Co. v. Thomas J. Lipton, Inc.*, 341 F. Supp. 129, 133, 173 USPQ 820, 823 (S.D.N.Y. 1972)

²¹ Case *Libertel*, paragraph 66, and *KWS Saat v OHIM*, paragraph 79.

(the issue not being simply whether, and to what extent, there has been use); (2) the use must be of the trade-mark applied for; (3) the use must relate to the goods and services the subject of the trade-mark application.²²

5. Aesthetic functionality

As will be seen below, the Court often says that a given mark, or a part of a given mark, would be perceived by the relevant public as a decorative element and that, for that reason, it is possible that it is devoid of any distinctive character. Especially in the case of non-traditional trade-marks, or where the appearance or the design of the product is a dominant element of a given sign, the question of aesthetic functionality (a concept deriving from Common Law; and in that respect the author relies on the jurisprudence of the United States) almost always arises.

As a basic rule, a design which is wholly decorative or ornamental may enhance the eye-appeal, and hence the saleability, of the product, and thus should not qualify as a trade-mark. Many products are chosen over competing products primarily because the design appeals visually, and are purchased mainly for their decorative value. In the fashion and clothing industry, it often happens that we choose a product because it has an attractive design or pattern. Almost all products are designed with some degree of visual attractiveness, yet most do not qualify for "fashion design" treatment, because there is no commercial necessity for such elements to be used by others.²³

One of the most important issues to be determined, therefore, is not simply whether the plaintiff's trade-mark serves an aesthetic function at all, but rather whether customers choose the mark primarily because of an aesthetic quality or because they believe that items bearing the mark come from a certain source.²⁴

"In the area of fashion (...) aesthetics also play a decisive role in the perception of the consumers".²⁵ In fact, the secondary aesthetic purpose of certain goods has become more and more important in their selection and purchase, besides their primary functional purpose. Recently, the Court has

²² It is a matter for the applicant to decide on the nature of the evidence to present. Examiners must be prepared to accept opinion polls, surveys, statements from the trade and consumer organizations, articles, brochures, samples, evidence of turnover and advertising and other types of promotion, of successful prosecution of infringers, of trade mark registrations obtained, etc (OHIM Guidelines).

²³ Altman, Louis – Pollack, Malla: Callmann on Unfair Competition, Trademarks and Monopolies (4th Edition)

²⁴ Playboy Enterprises Inc. v. Chen, 45 U.S.P.Q.2d (BNA) 1400, 1406, 1997 WL 829339 (C.D. Cal. 1997).

²⁵ See decision of the Board of 3 September 2003 in Case R 414/2002-4 LOST (FIG. MARK) / LOST, at paragraphs 10 and 12.

decided to give more weight to this factor when noting that goods such as shoes, clothing, hats or handbags have a common "aesthetic" function insofar as they jointly contribute to the external image of the consumer.

Finally, according to the settled law, whether or not a mark may serve a decorative or ornamental purpose is irrelevant for the purposes of assessing its distinctive character. A sign which fulfils functions other than that of a trade-mark in the traditional sense of the term is only distinctive for the purposes of Article 7(1)(b) of Regulation No 207/2009, however, if it may be perceived immediately as an indication of the commercial origin of the goods or services in question, so as to enable the relevant public to distinguish, without any possibility of confusion, the goods or services of the owner of the mark from those of a different commercial origin. The above means that a given sign can have an inherent distinctive character, and so be registrable and at the same time can also serve as a decorative element. The overall impression given by the sign should be assessed, as created by the marks, since the average consumer normally perceives a trade-mark as a whole and does not analyse its different aspects.²⁶

6. The jurisprudence

6.1 OHIM

Currently there are a number of community position trade-marks, which were registered at the Office for Harmonisation in the Internal Market. In the case of "Roter punkt"²⁷ the Office stated that "a design mark in the form of a "position mark", i.e. sign in which a certain element – in this case the red dot – on a certain part of a product – in this case the joint of a scissor – always appears exactly in the same position and in the same size, either in absolute terms or relative to the product as a whole, in a certain colour contrast to the product, generally eligible for trade-mark protection under Article 4 of the Regulation".²⁸

Another recent case was the registration of a community trade-mark with the following description: "The trade-mark consists of a sign on the side of a shoe; the broken lines do not constitute part of the mark and indicate only the position of the mark on the product".²⁹ The mark consisted of sport shoes with a design element on the side. Another shoe design element registered as a CTM was a

²⁶ Case T-363/06 Honda Motor Europe v OHIM – Seat (MAGIC SEAT) [2008] ECR II-2217, paragraph 38.

²⁷ Case R 0983/2001-3.

²⁸ Sandri, Stefano – Rizzo, Sergio op.cit. p. 152.

²⁹ Case R 0581/2007-2

position mark by Prada with the following description: "Red stripe placed longitudinally along an item of footwear partly covering the rear area of the sole and partly the rear area of the item of footwear. Any moulding seen on the sole or on the rear part of the item of footwear and/or production characteristics is not part of the trade-mark".³⁰

In the clothing sector the relevant consumer is member of the general public in the European Union, who buys products belonging to Class 18 and 25. It is still contested whether the number of consumers could be limited in the fashion industry. Probably the relevant public is a restricted public with a higher level of attention than that of average consumers when the goods are top-of-the-range, high-value products marketed exclusively through a selective distribution system, although, according to the jurisprudence, the price of the product concerned is also immaterial as regards the definition of the relevant public, since price will not be the subject of the registration, either.³¹

However, the level of attention of the relevant public is likely to vary according to the category of goods or services in question³² and, as regards everyday consumer goods, the average consumer's level of attention is less than that paid to durable goods or, simply, goods of a higher value or for more exceptional use.

As we can conclude from the jurisprudence of OHIM and the above, an important number of cases are related to clothing products. The registration of these marks is possible, but the position mark should be unique and original, have an inherent distinctive character and should be apt to identify the origin of the products.

6.2 General Court

In one of the most recent cases submitted to the General Court, the applicant, X Technology Swiss GmbH³³ filed an application for registration of a Community trade-mark with OHIM on January 13, 2007. The trade-mark for which registration was sought was identified by the applicant as "Other mark – Positional mark" of the colour "orange (Pantone 16-1359 TPX)". The goods in respect of which registration has been sought come within Class 25 of the Nice

³⁰ Community trademark No 001027747

³¹ Joined Cases T-324/01 and T-110/02 *Axions and Belce v OHIM* (Brown cigar shape and gold ingot shape) [2003] ECR II-1897, paragraph 36.

³² Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 26, and Case T-305/02 *Nestlé Waters France v OHIM* (Shape of a bottle) [2003] ECR II-5207, paragraph 34.

³³ Case R 1506/2006-1 (OHIM), Case T-547/08 (General Court of the European Union), OJ C 209 from 31.07.2010, p. 36.

Agreement³⁴ for the following goods: "Clothing, namely hosiery, socks and stockings".

The following description accompanied the trade-mark application: "The positional mark is characterised by an orange colouration, of the shade "Pantone 16-1359 TPX", in the form of a hood covering the toe of each article of hosiery. It does not cover the toes entirely; it features a limit, which, viewed from the back and the side, appears essentially to be horizontal. The mark always appears in sharp colour contrast to the remainder of the article of hosiery and is always in the same place".

The examiner refused the trade-mark application on the ground that it did not comply with the provisions of Article 7(1)(b) of the Regulation. The Fourth Board of Appeal (BoA) stated that the description of the mark applied for was inadmissible to the extent to which it referred to the contrast between the colour of the toe and the colour of the rest of the sock. Such a description was not sufficiently precise, as it did not identify all colours of the mark. The BoA added that the applicable rules made no provision for the category of "positional marks". Consequently, it took the view that the mark applied for was a three-dimensional or figurative mark accurately reproducing the product, consisting of an orange colouring of the toe of a white sock.

The BoA also noted that the goods covered by the mark applied for were targeted at all end-consumers as being objects of everyday use which tended to belong to the lower-price bracket, which means that the relevant public attaches only a low degree of attention to such goods. Finally, one of the most important facts is that the BoA found that the mark applied for would be perceived by the relevant public as a presentation of the product dictated by aesthetic and functional considerations. It referred, in that context, first, to the existence of a multitude of sock designs, second, to the ordinary nature of the colouring of certain parts of socks, including the part in orange, third, to the fact that the colouring of the toe might indicate the presence of a functional element, namely reinforcement, and, fourth, to the fact that the relevant public was not in the habit of perceiving the colour of the toe of a sock as an indication of origin.

The main question which the General Court needed to answer is whether the mark applied for is confused with the aspect of the designed product, or if it is, on the contrary, separate.³⁵

Following the action submitted by the applicant, the General Court made a similar conclusion. In its opinion, and referring to the jurisprudence, the perception of the relevant public is liable to be influenced by the nature of the sign in respect of which registration is sought. Therefore, to the extent to which average consumers are not in the habit of making assumptions as to the commercial origin of goods on the basis of signs which are indistinguishable

³⁴ Nice Agreement of 15 June 1957 concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, as revised and amended.

³⁵ DLA Newsletter, September 2010

from the appearance of the goods themselves, such signs will be distinctive, only if they depart significantly from the norm or customs of the sector.³⁶ The decisive factor is whether the sign is indistinguishable from the appearance of the product designated.

The General Court stated that the mark applied for is indistinguishable from the form of a part of that product, namely the shape of the toe of an article of hosiery. Accordingly, the view must be taken that the mark applied for is indistinguishable from the appearance of the designated product. It must be also accepted that a consumer is generally attentive when choosing certain articles of clothing and footwear, as consumers will wish to establish, before they purchase, whether the goods on offer meet their expectations from a functional and aesthetic point of view. That finding is not, however, applicable to articles of hosiery, which are not normally tried on prior to the purchase.

A trader who uses, in the course of trade, a sign which does not meet that requirement may, where relevant, be able to establish that the sign has become distinctive in consequence of the use which has been made of it within the meaning of Article 7(3) of the Regulation, or seek other legal means, which may be open to it, such as the law on designs or proceedings alleging unfair competition. In the present case the applicant did not submit any proof concerning the prior use of the given sign, having the view that the position mark in question has an inherent distinctive character, is original, and so eligible for registration.

The Court took the view, as mentioned earlier, that, due to the norms or customs of the hosiery sector, the mark applied for would be perceived by the relevant public as a decorative element and for that reason is devoid of any distinctive character.

In the appeal,³⁷ the applicant (X Technology Swiss GmbH) submitted that the General Court has wrongly and inappropriately interpreted the absolute ground for refusal of registration of trade-marks in Article 7(1) (b) of Council Regulation. On an assessment of distinctiveness, it is not merely a question of the individual features of the mark, but also materially one of the overall impressions of the mark in relation to the goods which it covers. That means that the distinctiveness of the trade-mark applied for must be examined first as regards its different components, such as shape, position or colour, and second – which the General Court failed to do – as regards its overall impression in the light of the required distinctiveness. Within the framework of such an examination, regard must also be given fundamentally to the fact that a certain level of distinctiveness is sufficient to enable a trade-mark to be registered.

³⁶ See, to that effect, Case C-136/02 P *Mag Instrument v OHIM* [2004] ECR I-9165, paragraphs 30 and 31; Case C-173/04 P *Deutsche SiSi-Werke v OHIM* [2006] ECR I-551, paragraphs 28 and 31; and Case C-144/06 P *Henkel v OHIM* [2007] ECR I-8109, paragraphs 36 and 37.

³⁷ Case 429/10, OJ C 301 from 06.11.2010, p. 13.

The General Court unlawfully exaggerated the requirements for distinctiveness of the trade-mark applied for, citing case-law on three-dimensional trade-marks, which consist of the appearance of the goods themselves, and figurative marks, which consist of a two-dimensional presentation of the goods. Unlike the marks to which the cited case-law refers, the appellant's trade-mark concerns only a small part of the goods to be covered. A sign precisely delimited and clearly defined as to colour, which is small in relation to the goods to be covered, is not comparable to a mark which consists of the entire appearance of the goods themselves.

The findings of the General Court on the degree of attention of the relevant public are not comprehensible: in the case of items which cannot be tried on before purchase, the consumer is particularly attentive and possesses particular brand awareness. Insofar as the General Court considers the identification of sports socks as widespread, it is not clear on what ground a colouration, which is always found in the same position and in the same hue with signal effect, is not an identification which is capable of registration.

Considering the above what are the main causes on which the OHIM and the General Court based its rejection?

The applied trade-mark is devoid of distinctive character and it is not suitable for registration for the following reasons:

- 1/ The trade-mark could not be dissociated from the shape of the toe of an article of hosiery, and consequently could be mistaken with the aspect of the designed product.

In its judgement the General Court referred to the jurisprudence concerning three-dimensional trade-marks and the problem of the appearance of the goods themselves.³⁸

It analysed the mark not from the point of view of a position mark, but applied to the sign of the settled case-law of three-dimensional and two-dimensional trade-marks.³⁹ It is a fact that the relevant public's perception is not necessarily the same in the case of a position mark as in the case of a word or figurative mark consisting of a sign which is independent from

³⁸ The applicant maintains that 'positional marks' form a special category of marks, albeit not one expressly provided for in the legislation. A 'positional mark', it argues, is designed to secure the protection of two-dimensional or three-dimensional signs placed, in a precisely determined manner, on the surface, or on part of the surface, of a product. The protection conferred on a 'positional mark' covers only its specific use on the goods in question (paragraph 14).

³⁹ "In addition, it appears that 'positional marks' are similar to the categories of figurative and three-dimensional marks as they relate to the application of figurative or three-dimensional elements to the surface of a product (paragraph 20)". Although it mentions in the following paragraph that "(...) the classification of a 'positional mark' is as a figurative or three-dimensional mark, or as a specific category of marks, is irrelevant for the purpose of assessing its distinctive character". Anyway, in analysing the signs it refers to the jurisprudence concerning three-dimensional marks.

the appearance of the products it denotes. Average consumers are not in the habit of making assumptions about the origin of products on the basis of their shape or the shape of their packaging in the absence of any graphic or word element and it could therefore prove more difficult to establish distinctiveness in relation to such (...) marks.⁴⁰ In case of marks where the appearances of the designated products (or the part of it) "merge" with the trade-marks itself, the establishment of distinctiveness is very difficult. In the present case it would have been helpful if the applicant submitted proof concerning the previous, factual use of the sign which could have helped establish that the sign acquired distinctive character through use (i.e. secondary meaning). In the present case the applicant did not refer to the previous use of its sign.

2/ Level of attention and perception of the consumer

In the present case the relevant public consists exclusively of end-users. Socks are everyday, rather low-priced consumer goods; the relevant public pays them rather low-level attention. The applicant pleads that the relevant public is particularly attentive to clothing trade-marks. However, the author holds that, concerning goods such as those in the present case which are everyday consumer goods, the relevant public consists of average consumers, who are reasonably well informed and reasonably observant and circumspect, but pay less attention to hosiery goods than to other clothing items.

With regards to the perception of the consumers, it was established that the colouring of the toe of a sock is purely of a decorative nature or it is a functional element (reinforcement of the toe). The reference to the decorative nature as a functionality (or as it is called in United States jurisprudence, aesthetic functionality) of a trade-mark is quite recent in the jurisprudence of the Court of Justice. Unlike in the United States, the doctrine is still not clarified, but more and more cases are raising this type of question (most of the non-traditional trade-marks are concerned). The only case before the Court of Justice of the European Union which dealt with the question of aesthetic functionality was the *Glaverbel* case.⁴¹ The examiner rejected the application for registration, *inter alia*, on the grounds that the requested sign was not distinctive.

According to the *Bang & Olufsen* case "The aesthetic value of the sign (...) seems also to be one of the most important reasons for which consumers buy the (...) product. In above case the products in question were loudspeakers (a three-dimensional mark). Although we cannot

connect the two cases, in the present case the applicant submitted in its appeal that the consumer is particularly attentive and possesses particular brand awareness regarding its product (i.e. socks). Based on the settled-law, goods such as shoes, clothing, hats or handbags may, in addition to their basic function, have a common aesthetic function by jointly contributing to their external image ("look") to the consumer concerned⁴², but in our current case, this is not the case; the General Court correctly held that socks are not normally tried on prior to purchase and the attention of the consumers is less thorough in the case of frequent public consumption goods, than with other types of clothing. Nevertheless, it is the task of the General Court to consider the question.

Another interesting case concerned jeans pocket designs. On May 9, 2008, the applicant, *Rosenruist – Gestão e serviços, Lda*, filed an application for registration of a Community trade-mark with the Office for Harmonisation in the Internal Market (OHIM). The description of the mark given in the application for registration reads: "Two Curves Crossed in One Point Design inserted in a Pocket; the mark consists of a decorative stitching made of Two Curves Crossed in One Point Design Inserted in a Pocket; one of the curves is characterised by an arched form, drawn with a fine stroke, while the second one is characterised by a sinusoidal form, drawn with a thick stroke; the unevenly broken lines represent the perimeter of the pocket to which applicant makes no claim and which serves only to indicate the position of the mark on the pocket".

The goods for which registration was sought are in Classes 18 and 25 ("Bags, pouches, purses, wallets, valises, trunks, make-up bags and empty vanity cases, document holders, umbrellas, handbags" and "Dresses, skirts, trousers, shirts, jackets, overcoats, raincoats, coats and pullovers, jerkins, hats, scarves, foulards, hosiery (clothing), neckerchiefs, gloves (clothing), belts for clothing, shoes, boots, sandals, clogs, slippers").

The examiner refused registration for all the goods on the ground that the mark in question was devoid of any distinctive character within the meaning of Article 7(1)(b) of the Regulation. The Second BoA held that, since the goods in question were goods which either covered or protected the human body or which were a fashion accessory or travel goods that met basic fashion needs, the relevant public was composed of average consumers in the European Union who were reasonably well informed and reasonably observant and circumspect.

In our case clothing goods are intended for a potentially unlimited number of consumers of any age group, given the fact that jeans are sold to all age ranges, without exception. All of the jeans have pocket designs, with different style and outlook, but – taking into consideration the number of manufacturers – I do think that none of them is so unique and original that the exclusive right of the trade-mark owner would be corroborated.

⁴⁰ Case C-136/02 *P Mag Instrument v OHIM* [2004] ECR I-9165, paragraph 30; *Storck v OHIM*, paragraphs 24 and 25; and *Henkel v OHIM*, paragraph 36

⁴¹ Case C-445/02 *P Glaverbel v OHIM* [2004] ECR I-6267. The object of the trademark was a design applied to the surface of goods.

⁴² Case T-443/05, *OJ C* 199 of 25.08.2007, p. 36.

Common goods, which are commercialised by many entities, have various colours, various styles, various pocket designs and various sizes; the only major difference between them (that is, the jeans) is – in my opinion – the name of the manufacturer, which is generally affixed to the back of the goods and which is protected in general as a word or/and figurative mark. The brand name is more significant for the public.

In order to perform this function, the sign must be distinctive, since that is what enables it to stand out from all the other names, labels, logos, symbols, phrases, shapes, colours and stitched pockets which are employed in the field of commerce to which the product belongs. It follows that, in order to be distinctive, it must possess some noteworthy quality that makes it likely to capture the attention of consumers⁴³ and be perceived as a badge of origin rather than a mere decoration.

The BoA also noted that, taking into account the description of the trade-mark applied for, the mark is a “position mark” (in the application it was indicated as a figurative mark) consisting of a stitched pattern that had a specific position on a pocket. It considered the stitched pattern to be a mere variation of a common feature of goods covered by the mark in question that would not enable the average consumer to recognise the origin of those goods.

As already mentioned, trade-marks which are devoid of any distinctive character are not to be registered. According to settled case-law, the marks referred to in Article 7(1)(b) of the Regulation are those which are regarded as incapable of performing the essential function of a trade-mark, namely that of identifying the commercial origin of the goods or services at issue.

The opinion of the BoA is similar to the reasoning of the above-mentioned X Technology GmbH case. It is stated that the sign in question is devoid of distinctive character, because the average consumer will not perceive it as a source of indication of the given product. The commercial origin of the goods implied could not be identified. In the present case also, we are dealing with clothing. In the R 226/2009-4⁴⁴ case (the form of a pocket) the BoA stated in its decision that there is nothing imaginative or fanciful in the representation of a pocket to stand out from similar pockets on the market, whose stitching patterns are all quite similar and which resembles, at least to the untrained eye, other stitched pocket designs already on the market.

In the present case the BoA similarly took the view that a stitched pocket was a usual and commonplace feature of many fashion goods, in particular those in Classes 18 and 25. The average consumer would perceive the stitching as a merely decorative feature rather than an indication of the origin of the goods. Again, OHIM took the view that those signs applied to clothing goods have a decorative purpose. The reference to aesthetic functionality appeared again. Product configuration also embodies useful and aesthetically pleasing

⁴³ Case R 226/2009-4

⁴⁴ Decision of the Fourth Board of Appeal of 18 August 2009.

features; aesthetics will frequently determine the design of a product, but if this feature conveys no information about the source, it is not entitled to protection under trade-mark law.⁴⁵

The BoA stated that the stitched pattern covered by the application for registration was a mere variation of a common feature found on pockets of clothing and on other fashion goods covered by the trade-mark in question. It added that, even if it were correct that it was unusual to see a pocket on some of the goods in question, the consumer would pay scant attention to the stitched pattern on the pocket when purchasing such goods. The BoA considered that the mark in question would not trigger a “visual stimulus” enabling the average consumer to recognise the origin of those goods.

The General Court added that, in the fashion sector patterns stitched on pockets are commonplace. Topstitched lines are typical decoration for pockets in general and in particular for pockets of clothing in Class 25. Furthermore, a number of fashion goods in Class 18 also have usually pockets with decorative stitching. Consumers are, therefore, used to seeing patterns stitched on pockets of clothing or fashion goods. It is always necessary for the sign in question, even if it may serve a decorative purpose and need not meet a specific level of creativity, to have a minimum degree of distinctive character.⁴⁶

The mark in question does not have any characteristic element or any memorable or eye-catching features likely to confer a minimum degree of distinctive character and enabling the consumer to perceive it otherwise than as a typical decoration of a pocket for goods in Classes 18 and 25. As it is stated in the judgement it does not depart significantly from the standard presentation of pockets and will, therefore, be perceived simply as decoration, and so the mark in question constituted a mere variation of top-stitching commonly found on pockets of clothing and other fashion goods covered by the trade-mark in

⁴⁵ Kellner, Christopher J.: Rethinking the procedural treatment of functionality: confronting the inseparability of useful, aesthetically pleasing and source-identifying features if products designs. 46 EMORY LJ 913

⁴⁶ In the case R 226/2009-4 the BoA states the following: The Board recognises expressly that, according to case-law, a trade mark’s lack of distinctive character cannot arise from the lack of an additional element of imagination (see judgment of the Court of First Instance of 5 April 2001 in Case T-87/00 Bank für Arbeit und Wirtschaft AG v OHIM (‘Easybank’) [2001] ECR II-1259, at paragraph 39) or of a minimum amount of imagination (see judgments of the Court of First Instance of 31 January 2001 in Case T-135/99 Taurus-Film GmbH & Co. v OHIM (‘Cine Action’) [2001] ECR II-379, at paragraph 31; and of 31 January 2001 in Case T-136/99 Taurus-Film GmbH & Co. v OHIM (‘Cine Comedy’) [2001] ECR II-397, at paragraph 31), as a Community mark is not necessarily a work of invention or founded on any element of originality or imagination, but on its ability to distinguish goods or services on the market from goods or services of the same type offered by competitors (see judgment of the Court of First Instance of 15 September 2005 in Case T-320/03 Citicorp v OHIM (‘Live richly’) [2005] ECR II-3411, at paragraph 91).

question. The mark in question must accordingly be considered to be a simple, commonplace pattern with an exclusively decorative function, which has no aspect that would enable the relevant public to identify the commercial origin of the goods described in the trade-mark application or to distinguish them from others with a different origin.

Such elements make a mark distinctive only in so far as it is immediately perceived by the relevant public as an indication of the commercial origin of the applicant's goods, thus enabling the relevant public to distinguish, with no possibility of confusion, the applicant's goods from those of a different commercial origin. The fact that the mark in question may be perceived as elegant or may convey the idea of movement, and hence be memorable, nevertheless does not mean that it is distinctive.

The BoA found that, since the mark in question had no originality as compared to stitching usually present on the goods in question, that mark would not particularly catch the attention of consumers, who would perceive it as mere decoration.

Ultimately, it should be mentioned that the fact that the mark in question constitute a mere variation of topstitching commonly found on pockets of clothing and other fashion goods covered by the trade-mark in question on the market does not mean that a similar sign is not suitable for registration. It is also well known that several pocket designs are the object of trade-mark protection at national and community level. It is very difficult to find the clear direction given by OHIM, as previously in many cases it found that a pocket design can be inherently distinctive - and so registrable.

7. Conclusion

In the present essay I have tried to sum up the jurisprudence concerning position marks of recent years in the European Union. I covered a period of only eight years, taking into consideration the relevant cases, trying to present the general rules and the application of these rules to position marks. Few cases reached the Court of Justice of the European Union, although, in the two closed procedures (Case T-547/08 "Orange colouring of the toe of a sock" and Case T-388/09 "Jeans pocket design") the General Court stated its point of view concerning the registration of these non-traditional trade-marks. There are no special criteria applying to position marks. Case-law developed in the case of three-dimensional and two-dimensional trade-marks are often applied to position marks, especially when the position mark is reproducing elements of the shape of the product and consequently the appearance of the product is reproduced, in which case the registration generally is denied.

The registration of position marks is possible only if the mark is unique and original, has an inherent distinctive character and is apt to identify the origin of

the products. In the case of a lack of distinctiveness there is still the possibility to demonstrate the prior use of those signs, which should take place before the trade-mark application is submitted.

Having an appeal against the decision taken in Case T-547/08 before the Court, submitted at the end of October 2010, it will be interesting to see if the Court sustains its opinion or gives some clarification.

The institutional system of positive discrimination and the prohibition of discrimination in Kosovo. The role of the EU concerning equality before the law in Kosovo

NÉMETH, Csaba

ABSTRACT The main aim of this essay is to provide information on the essence of positive discrimination and the legal struggle against discrimination in Kosovo. The first part of the essay describes the distinction between the two before proceeding to detail the serious problem of legal regulation in Kosovo. Although discrimination and positive discrimination are problems discussed in Constitutional law also, we cannot ignore their relationship with international public law when discussing Kosovo.

This essay has opted for two approaches to the discrimination issue: the positive regulation regarding ethnic minorities in Kosovo (since this is why Kosovan regulation is a good example) and equality before the law, i.e. international assistance against discrimination in the judicial system (since this is why Kosovo is unique from a Constitutional and international law perspective).

1. About discrimination and positive discrimination in general

1.1 The distinction between discrimination and positive discrimination

Discrimination means a disadvantageous distinction,¹ and its prohibition arises from the equality implicit in the right to human dignity; in itself it denies the right to equality.² The right to equality means that the attributes of a legal entity which are irrelevant regarding the enforcement of a fundamental right,

¹ Bakos, Ferenc: *Idegen szavak és kifejezések szótára*. Akadémia Kiadó, Budapest, 1979. p. 190.

² Chronowski, Nóra – Drinóczi, Tímea – Petrétei, József – Tilk, Péter – Zeller, Judit: *Alkotmányjog III. Alapvető jogok*. Dialóg Campus Kiadó, Budapest-Pécs, 2006 p. 200.

play no role.³ The prohibition of discrimination is a supplementary right, which means that it can be interpreted only with another fundamental right. This approach is also supported by the practice of the European Court of Human Rights.⁴

The term and the different types of discrimination will not be detailed here. In the most common case, discrimination means that a person is distinguished in a disadvantageous manner in relation to another person in a comparable situation, due to his religion, personal or political beliefs, race, gender, sexual orientation or family status (direct discrimination).

Discrimination is prohibited by many international agreements, and, obviously, there is wide legal regulation covering this issue: Article 26 of the International Covenant on Civil and Political Rights, Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 2.2 of the International Covenant of Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination Against Women, Article 1.3 of the Charter of the United Nations, and the Convention on the Elimination of All Forms of Racial Discrimination.

Positive discrimination means a coherent package of measures (supposed to be temporary) and aiming at developing the social situation of a respective group in order to achieve equality in fact.⁵ However, the term "positive discrimination" is regarded as nonsense,⁶ and so the term "affirmative action" should be applied.⁷ In the opinion of many scholars, the term "positive discrimination" is a grammatical monstrosity.⁸ By way of contrast, the author shares rather the opinion that discrimination includes all kind of distinctions and not only distinction in a negative way. In positive discrimination a distinction is made between people in a similar legal situation. This is why positive discrimination is also discrimination, although its aim is legitimate and so may be permitted (benign discrimination).⁹ Affirmative action emanating from the

³ Palásti, Sándor: Szükség van-e antiszkriminációs törvényre? In: *Fundamentum* 1998/3. p. 56. Cited by Chronowski, Nóra – Drinóczi, Tímea – Petrétei, József – Tilk, Péter – Zeller, Judit op. cit. p. 201.

⁴ Chronowski, Nóra – Drinóczi, Tímea – Petrétei, József – Tilk, Péter – Zeller, Judit op. cit. p. 205.

⁵ Szajbely, Katalin: A pozitív intézkedések fogalma és alkalmazásuk lehetősége a faji diszkrimináció elleni küzdelemben az Európai Unió tagállamaiban. <http://jesz.ajk.elte.hu/szajbely19.html> [2010.09.06.] p. 4.

⁶ Szemesi, Sándor: A diszkrimináció tilalma az Emberi Jogok Európai Bírósága gyakorlatában. Complex Kiadó, Budapest, 2009 p. 36.

⁷ Halmai, Gábor – Tóth, Gábor Attila: *Emberi Jogok*. Osiris Kiadó, Budapest, 2008 p. 414.

⁸ Prof. Géza Kilényi as a judge in the Hungarian Constitutional Court, decision of the Constitutional Court No. 30/1997. (IV.25.)

⁹ Sente, Zoltán: A pozitív megkülönböztetés problémái. In: *Fundamentum* 2006/4. p. 26.

state does not infringe international law provided that it is temporary and aims at equality.¹⁰

Types of positive discrimination can be classified as:

- a) quotas (hard, flexible, decision-based quota)
- b) directives
- c) training
- d) advertising

A further group based on positive discrimination would include:¹¹

- a) equality measures: aiming to abolish a current discriminative situation for the public good (training),
- b) reparation measures: as a response to discrimination occurring in the past or still existing for the public good (distribution of budgetary benefits),
- c) affirmative action concerning multiculturalism: this aims to protect the culture of a minority.

According to KATALIN SZAJBÉLY, positive discrimination can be:¹²

- a) affirmative action
- b) rational adjustment
- c) measures against indirect discrimination.

1.2 Discrimination, positive discrimination. Why is the one prohibited and the other legally promoted?

PROF. GÉZA HERCZEGH said that, if the law is capable of defending plants and animals and we accept its importance, then we should not question that an ethnic minority or a group of people with specific attributes are worth defending by international minority law.¹³ Whilst discrimination is prohibited, positive discrimination is allowed, or even supported by many countries. The question to be posed, of course, is: Why should it be allowed to infringe the right of equality? Positive discrimination has an historical and academic basis in many respects: we can understand this it by scrutinising the division of justice as defined by ARISTOTLE and the so-called maximum criteria applied by JOHN RAWLS.¹⁴ According to the "division of justice", equal situations should be treated equally, but different situations differently. This means that, under

¹⁰ Halmai, Gábor – Tóth, Gábor Attila op. cit. p. 417.

¹¹ Szemesi, Sándor op. cit. pp. 38-39.

¹² Szajbely, Katalin op. cit.

¹³ „Minden etnikum megőrzendő érték. Eltűnésük egyértelmű veszteség lenne a térség és a világ számára. Ha a jog ma már védi a ritka növényeket és a veszélyeztetett állatfajokat, mennyivel inkább kell védenie ennek a jognak – elsősorban a nemzetközi jognak – azokat az emberi közösségeket, amelyek hátrányos, sőt nem egyszer kifejezetten veszélyeztetett helyzetben vannak, ami eltűnésükkel járhat.” Kovács, Péter: *Nemzetközi jog és kisebbségvédelem*. Osiris Kiadó, Budapest, 1996 p. 13.

¹⁴ Halmai, Gábor – Tóth, Gábor Attila op. cit. pp. 365-366.

certain circumstances, material equality should be promoted instead of formal equality. Positive discrimination is the next milestone on the way from the prohibition of discrimination towards equality: it is a new approach in social policy.¹⁵ The mission of positive discrimination can be seen in support aiming to create conditions to help an individual who is in a disadvantageous situation to achieve a situation equal to the majority. Positive discrimination aims at achieving equal conditions and this is the very core of positive discrimination: it can, therefore, be regarded as a doctrine of equal conditions.¹⁶ Bearing these thoughts in mind, it is, in my opinion, proved that positive discrimination does reflect the principle of equality: specifically, according to the principle, the state takes into consideration the different interests and aspects of its citizens to the greatest extent.¹⁷

2. Legal practice of different courts regarding positive discrimination

Taking this into consideration, it is clear that any positive discriminatory measure must be examined by the court to determine if it infringes the very core of the prohibition of discrimination and the right to be treated as a person with equal dignity or another fundamental right - and what is the rationale for the given measure. This essay will present the position of three different courts in discussing the legal argumentation for and against affirmative action directed by the state.

2.1 The issue of positive discrimination concerning case law of the European Court of Human Rights (ECHR)

Within the operation of the ECHR not all kinds of distinction are classified as discrimination. The issue of affirmative action aiming at equality can be based on the existence of *de facto* inequality.¹⁸ According to the opinion of the ECHR, the breaching of *de facto* equality or the different treatment of individuals being in different situation can facilitate discrimination.¹⁹ In the judgment passed in the Belgian linguistics case, the so-called rationality test had been applied: according to this principle a distinction does not violate Article 14 of the European Convention on Human Rights (prohibition of discrimination,

¹⁵ Szente, Zoltán op. cit. p. 17.

¹⁶ Zsigmond, Anna: Igazságos diszkrimináció vagy visszajára fordított rasszizmus. In: Új Pedagógiai Szemle. <http://www.oki.hu/oldal.php?tipus=cikk&kod=1998-10-vt-Zsigmond-Igazsagos> [2010.09.06.]

¹⁷ Kovács, Kriszta: Az igazságos kvóta. In: Fundamentum 2006/4. p. 5.

¹⁸ Szemesi, Sándor op. cit. p. 157.

¹⁹ Halmai, Gábor – Tóth, Gábor Attila op. cit. p. 376.

the European Convention on Human Rights hereinafter: Convention), if it is based on a reasonable ground and the given measure is in proportion to the desired aim.²⁰

Unfortunately, legal practice by the ECHR concerning positive discrimination is missing. The reason is that, by applying Article 14 of the Convention, we cannot argue that it prescribes positive discriminatory actions issued by the state.²¹ If the protocol of the Convention comes into force, the legal practice of the court will certainly change. By the preamble to the protocol, the rationale for affirmative action could easily be done. That is the reason why this protocol deserves to be called "the future path".²² Currently, we can argue at most for the possibility of positive discrimination, but certainly not for its necessity.²³

2.2 Positive discrimination concerning the case law of the Court of Justice of the European Union

The prohibition of discrimination had been prescribed in Article 12 of the Treaty establishing the European Community (hereinafter: Treaty) and the special types of discrimination (discrimination against women, discrimination in the labour market) had been stipulated also by the Treaty. In the Solange I case the court stated that the respect of fundamental rights is an integral part of the general principles of the law protected by the court.²⁴ In the Rutili case judges referred to the European Convention for the Protection of Human Rights and Fundamental Freedoms, while in the Elliniki Radiophonia case the International Covenant of Economic, Social and Cultural Rights was mentioned in the judgment. Moreover, the legal practice of the ECHR is taken into consideration in the adjudication of the Court of Justice of the European Union.²⁵

According to the legal practice of the Luxembourg Court, discrimination is considered to be non-discriminatory, provided that it is necessary and objectively grounded and complies with the principle of proportionality with regard to its aims.²⁶

²⁰ Chronowski, Nóra – Drinóczi, Tímea – Petrétei, József – Tilk, Péter – Zeller, Judit op. cit. p. 201.

²¹ Halmai, Gábor – Tóth, Gábor Attila op. cit. p. 417.

²² Szemesi, Sándor op. cit. p. 157.

²³ Magnago és Südtiroler Volkspartei kontra Olaszország (case number: 25095/94). Cited by Szemesi, Sándor op. cit. p. 168.

²⁴ Gombos, Katalin: Bírósági jogvédelem az Európai Unióban. Complex Kiadó, Budapest, 2009 p. 70.

²⁵ C-540/03. European Parliament versus Council of the European Union. Cited by Gombos, Katalin op. cit. p. 71.

²⁶ See C-222/84., Marguerite Johnston versus Chief Constable of the Royal Ulster Constabulary. Cited by Gombos, Katalin op. cit. p. 62.

The prohibition of discrimination is regulated by the following laws in the EU:

- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation,
- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,
- 2000/78/EC directive on establishing of the equal conditions with regard to employment and work.

The most important cases of the Court in this regard include the Marschall, Badeck and Abrahamson case, in which the legality of the positive discriminatory measures with regard to gender equality had been debated. The Court dealt with the issue of discrimination in the S. Coleman vs. Attridge Law, Steve Law case (2008) and the Defrenne case, also.

Taking into account the legal practice of the Court to date, it can be stated that assuring unconditional preference to women is considered as infringing the prohibition of discrimination. However, under certain circumstances, affirmative action can be lawful.²⁷

As we see, the case law of that Court has affected discrimination on the basis of gender (on the labour market) to date, due to the reason why the European Community was established: creating one economic entity. However, sooner or later we can expect legal disputes to arise from cases regulated by Council Directive No. 2000/43. The entry into force of the Treaty of Lisbon and the Charter of Fundamental Rights of the European Union are going to lead to a huge change in the legal practice of the Court: by virtue of the Treaty of Lisbon the value clause of the EU²⁸ has been expanded and the principle of equality has been accepted as a protected value.²⁹ Gaining a legal personality by the Treaty of Lisbon, the EU is able to join the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is worth mentioning, however, that, although the Charter of Fundamental Rights of the European Union has not been integrated in the Treaty on European Union, it is stipulated as having the same binding effect as the Treaty on the European Union.³⁰

²⁷ Kovács, Kriszta op.cit. p. 8.

²⁸ Article 1a

²⁹ Gombos, Katalin op. cit. pp. 69-70.

³⁰ Treaty on the European Union. Consolidated version. Article 6.1.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:EN:PDF> [2010.09.28.]

2.3 The Hungarian Constitutional Court and positive discrimination

The Constitution of Hungary stipulates the prohibition of discrimination (Article 70). The specific types of discrimination and equality are also fixed in the Constitution: the prohibition of sexism (Article 66) and equality before the law (Article 57). On the other hand, positive discrimination is permitted by Article 70/A (3) of the Constitution.

In the opinion of the Constitutional Court, positive discrimination is a matter for the state, although it cannot be referred to as a fundamental right.³¹ According to the Constitutional Court, positive discriminatory measures are considered to be lawful if a social aim or a fundamental right can be reached or ensured only in this manner and the measure is in proportion to the desired aim.³² By allowing positive discrimination in principle, the very essence of discrimination has to be examined in these cases also, since the requirement to be treated as an equal person must be complied with, under all circumstances.³³ According to the Constitutional Court, the clause of positive discrimination aims at achieving legal equality, but must not be seen as a measure equalizing the disadvantageous financial situation of certain citizens.³⁴

3. Discrimination in Kosovo pre-1999

Discrimination was always familiar in the history of Kosovo. The ruling nation in any given period of history capitalised on the situation, suppressing other ethnic groups and discriminating against them in every field of life. On the other hand, ethnic conflicts in Kosovo inevitably arise since this land and its cities play an important role in the identity of many nations.³⁵ It is also worth mentioning that, throughout history, Greater Serbia and Greater Albania have wanted to own Kosovo.

Kosovo has been a part of many states and empires: the Ottoman Empire, the Kingdom of the Serbs, Croats and Slovenes, the Austro-Hungarian Monarchy, the Nazi Empire, Greater Albania, Yugoslavia, Serbia and Montenegro and finally, Serbia. The name "crisis point" has been always a suitable term to be

³¹ Jakab, András (ed.): *Az Alkotmány kommentárja II. Századvég Kiadó, Budapest, 2009 p. 2546.*

³² Halmai, Gábor – Tóth, Gábor Attila op. cit. p. 420.

³³ Chronowski, Nóra – Drinóczi, Tímea – Petrétei, József – Tilk, Péter – Zeller, Judit op. cit. p. 204.

Decision No. 61/1992. (XI.20.) of the Hungarian Constitutional Court.

³⁴ Chronowski, Nóra – Drinóczi, Tímea – Petrétei, József – Tilk, Péter – Zeller, Judit op. cit. p. 207.

³⁵ Juhász, József: *A koszovói válság történelmi háttere.*

<http://www.balkancenter.hu/pdf/koszovo02.pdf> [2010.08.18.] p. 2.

applied to this territory. Interestingly, the only person who could solve the Kosovan conflict was TITO. He achieved it by treating Kosovo in a positive discriminatory manner, by applying the measures of positive discrimination.³⁶ These measures resulted in the disappearance of the temptation of separatism and Kosovan Albanians felt themselves as equal citizens within Yugoslavia.³⁷ When Milosevic came to power, conflict was resumed. Positive discrimination was followed by discrimination against the Albanians in Kosovo and autonomy was abolished in 1990. The conflict reached its height in 1998-1999, when discrimination was replaced by killing people in large numbers, as a consequence of which the international community decided to intervene.

4. Anti-discriminatory measures of the UNMIK administration. The legal framework of the Ahtisaari protocol regarding positive discrimination

The UNMIK (United Nation Mission in Kosovo) administration produced many results in respect of the protection of human rights due to their mandate. This essay will emphasise three of these in the field of the fight against discrimination and which are still in effect:

- a) *Law No 2004/3: Law against Discrimination* - coming into effect during the UNMIK administration in 2004 and still in effect. The aim of the Law is to prevent and combat discrimination and promote effective equality. The principles of the Law are: equal treatment, fair representation on the labour market and tolerance between ethnic groups. The Law has a binding effect on legal and natural persons and is applicable both in the private and public sectors (for example in the field of education, employment, social benefits).³⁸ The law accepts positive discrimination.³⁹ In case an agreement should infringe the law, it will be invalid, and any wrong caused by the discrimination can be challenged in court.⁴⁰ Moreover, the infringement will result in the levy of a penalty (up to €10,000) and the reparation of material and non-material damage.⁴¹ Implementation of the Law is overseen by the Ombudsman.⁴²

³⁶ The author means especially the Constitutional amendments from the years 1963 and 1974.

³⁷ Ibid. p. 8.

³⁸ Law No.2004/3. Article 4. <http://www.eulex-kosovo.eu/training/hrgi/docs/2.pdf> (Last drawdown: 18.08.2010.)

³⁹ Ibid. Article 6.

⁴⁰ Ibid. Article 7.1.

⁴¹ Ibid. Article 9.2.

⁴² Ibid. Article 10.

- b) *The appointment process*:⁴³ to ensure the professional eligibility and impartiality of the judges and prosecutors working in Kosovo, in other words to ensure equality in court), the UNMIK launched a Kosovo-wide review of the suitability of all applicants for permanent appointments as judges and prosecutors. An International Judicial and Prosecutorial Commission (IJPC) was established by UNMIK's Administrative Directive No. 2006/18 to lead this appointment process.⁴⁴ Applicants for judicial or prosecutorial posts have to meet criteria fixed in UNMIK regulations, pass a written test⁴⁵ and undertake an examination on the relevant code of ethics. Serving judges and prosecutors are not obliged to undertake any of these examinations, unless the IJPC requests it.⁴⁶ The appointment process consists of three parts, and begins with the selection of judges for the Supreme Court, Prosecutors for the Office of the Public Prosecutor of Kosovo and will end with selecting Judges and Prosecutors for Courts and Prosecution Offices of the First Instance.⁴⁷ The IJPC has the duty to make recommendations for candidates⁴⁸ and the process is still alive.⁴⁹
- c) *Anti-discriminatory and affirmative measures of the Ahtisaari proposal*: For many reasons the essay will not go into detail with regard to the Ahtisaari Proposal, but will take its role into account. It was, in fact, supposed to be the international agreement to resolve the conflict, including discrimination, in a comprehensive manner. On the other hand this proposal had been implemented under the Constitution of Kosovo, and, finally, the proposal superseded any other contradictory domestic law, with the Constitution being interpreted by virtue of the Ahtisaari Proposal.⁵⁰ We must, therefore, underline the relevant regulation set out in the Ahtisaari Proposal (from the point of view of this essay).

The Ahtisaari Proposal prescribes: ca) binding standards, which have to be implemented in the Constitution (minimum standards of the rule of law), cb) the prohibition of discrimination,⁵¹ equality in courts, equal legal

⁴³ UNMIK Administrative direction 2008/002. http://www.unmikonline.org/regulations/unmikgazette/02english/E2008ads/ADE2008_02.pdf [2010.08.18.]

⁴⁴ Administrative direction No. 2006/18. Article 1.1.

⁴⁵ Ibid. Article 3.1., 3.2., 3.4.

⁴⁶ Ibid. Article 2.6.3., 2.6.4.

⁴⁷ Ibid. Article 2.3.

⁴⁸ Ibid. Article 2.8.

⁴⁹ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo. 29 July 2010. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/464/08/PDF/N1046408.pdf?OpenElement> [2010.09.06.] p. 16.

⁵⁰ Constitution of Kosovo. Article 143.3. <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf> [2010.08.18.]

⁵¹ Letter dated 26 March 2007 from the Secretary General addressed to the President of the Security Council. General Principles 2.2. http://www.unosek.org/docref/Comprehensive_proposal-english.pdf [2010.05.21.]

protection, cc) annex which contains regulations concerning rights ensured for the communities (ethnic minorities), including collective rights,⁵² cd) human rights arising from certain international agreements in the Constitution,⁵³ ce) reserved seats in the Assembly reserved for ethnic communities, veto rights of the communities in the Assembly,⁵⁴ cf) international presence in certain Constitutional institutions: Constitutional Court, Kosovo Judicial Council, Kosovo Trust Agency,⁵⁵ cg) barriers in case of amendments to the Constitution,⁵⁶ ch) active obligation of the state to prevent discrimination⁵⁷ and promote positive discrimination, ci) enhanced competences of the Serb local authorities in the field of education,⁵⁸ cj) quotas in the courts concerning the ethnic composition,⁵⁹ positive discrimination in order to achieve the suitable ethnic composition of the given court reflecting the ethnic composition of the area,⁶⁰ ck) the appointment process,⁶¹ cl) annex dealing with protection of cultural and religious heritage: protection performed by the state, creation of protective zones,⁶² cm) the police should reflect the ethnic composition of the given area,⁶³ cn) international supervision led by the International Civilian Representative (ICR), co) an ESDP (European Security and Defence Policy) mission to ensure the rule of law,⁶⁴ cp) judicial review of privatisation and property issues.⁶⁵

5. The appearance of positive discrimination in the Kosovan Constitution

The Constitution of Kosovo is based on the Ahtisaari Proposal, to which the declaration of independence also referred.⁶⁶ According to the preamble to the Constitution, Kosovo must be a home to all of its citizens. The regulation

described below aims to serve this goal at many levels. The prohibition of discrimination is a constitutional value, although positive discrimination was not raised to this rank.⁶⁷ It is worth mentioning that the Constitution also names - separately - the principle of gender equality.⁶⁸

The equality of citizens is ensured by the Constitution through the rules of international law: international agreements and *ius cogens* norms of the international law supersede domestic law and are directly applicable, unless they are not self-applicable and the implementation requires their adoption by domestic law.⁶⁹ This article has to be interpreted together with article 22: according to these regulations, human rights ensured in international agreements are accepted as fundamental rights in Kosovo. The following rules of international law are binding in Kosovo, although only the most important are stressed: International Covenant on Civil and Political Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, Convention on the Elimination of All Forms of Discrimination Against Women, Charter of the United Nations, Convention on the Elimination of All Forms of Racial Discrimination, Universal declaration of human rights, Framework convention on the protection of national minorities.

The prohibition of discrimination and the issue of positive discrimination are laid down in the chapter named "Fundamental rights and freedoms" (Article 24). According to the Constitution, all citizens are equal before the law. Every citizen has the right of equal protection from the law without discrimination. The Constitution prohibits discrimination,⁷⁰ but allows positive discrimination.⁷¹

The above rules are ensured by a comprehensive institutional system and so this essay goes on to provide information concerning these special rules, which are fixed in different chapters of the Constitution. These rules have two purposes. On the one hand, they have their internal effect, i.e. by determining the ethnic composition in a given institution, they try to exclude the possibility of discrimination. On the other hand they also have an external effect by prescribing the responsibility of the given institution to combat discrimination.

Through the Consultative Council for Communities the representatives of the minorities have the opportunity to comment on legislative proposals to the

⁵² Ibid. Annex III.

⁵³ Ibid. Annex I. Article 2.1.

⁵⁴ Ibid. Annex I. Article 3.3., 3.7.

⁵⁵ Ibid. Annex VII. Article 2.2.

⁵⁶ Ibid. Annex I. Article 10.1.

⁵⁷ Ibid. Annex II. Article 2.1.-2.7.

⁵⁸ Ibid. Annex III. Article 4.

⁵⁹ Ibid. Annex IV. Article 1.1., 1.2.

⁶⁰ Ibid. Annex IV. Article 2.2.

⁶¹ Ibid. Annex IV. Article 3.1.

⁶² Ibid. Annex V.

⁶³ Ibid. Annex VIII. Article 2.2.

⁶⁴ Ibid. Annex IX. Article 2.3.

⁶⁵ Ibid. Annex VII.

⁶⁶ http://www.usatoday.com/news/world/2008-02-17-kosovo-independence-text_N.htm [2010.09.06.]

⁶⁷ Constitution of Kosovo. Article 7.1.

⁶⁸ Ibid. Article 7.2.

⁶⁹ Ibid. Article 19.

⁷⁰ "No-one shall be discriminated against on grounds of race, colour, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status." Ibid. Article 24.2.

⁷¹ Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled. Ibid. Article 24.3.

assembly and to advance complaints from the minorities, including any cases in which discrimination occurred.⁷²

It is also ensured by the Constitution that minorities are to be represented in the public service and public owned enterprises, although we can find no numbers for the proportion of ethnic minorities, in contrast, for example, to the statute in force in the South Tyrol.⁷³ Other provisions of the Constitution also specify nothing and refer only to multinational Kosovo and gender equality which must be observed as a principle in public service. Implementation is carried out by an independent supervisory board, whose tasks and competences are not regulated more precisely.⁷⁴

In the battle against discrimination and in support of positive discrimination the Assembly is without doubt the most important protagonist: as legislator, as the government's supervisory authority and as head of the public service.⁷⁵ By regulating the composition of the Assembly, the Constitution emphasises the role of gender equality.⁷⁶ We have to stress the importance of the Committee on Rights and Interests of Communities, which is a permanent Committee. However, this Committee has to prevent only discrimination against and to promote positive discrimination in favour of a minority in the classical sense, since the term "communities" means only ethnic, religious or linguistic groups according to Article 57. This means that other permanent, ad hoc or operational Committees can be vested with the authority to protect women or homosexuals according to Article 77 of the Constitution. These committees are an active part of legislation, entitled to make recommendation for Bills and to propose Laws.

The veto right of minorities is also a Constitutional barrier against discrimination. By virtue of this right, to adopt, amend or repeal certain laws, a majority vote by representatives of minorities who are present and entitled to vote is required: for example in respect of Laws on Education, Local Elections, and municipal boundaries.

Citizens can also help in fighting discrimination or can put affirmative action on the agenda by collecting 10,000 signatures.⁷⁷

The President of Kosovo is also involved in the battle against discrimination: he can protect the interests of the communities by a Constitutional or political veto.⁷⁸ The President is obliged by the Constitution to ask for the opinion of the Constitutional Court in case a proposed amendment to the Constitution infringes any fundamental right ensured by the Constitution.⁷⁹

⁷² Ibid. Article 60.

⁷³ Ibid. Article 61.

⁷⁴ Ibid. Article 101.

⁷⁵ Ibid. Article 65.1., 9., 14.

⁷⁶ Ibid. Article 71.2.

⁷⁷ Ibid. Article 79., 81.

⁷⁸ Ibid. Article 84.6., 9.

⁷⁹ Ibid. Article 113.9.

The government can help in the process of establishing the rule of law by initiating and implementing law and by guiding public services. At the time of the adoption of the Constitution the "founding fathers" also tried to support communities other than the Albanian in the composition of the government, in that at least two ministers must belong to these communities.⁸⁰

There are two points to be highlighted with regard to the judicial system. The one is the appearance of "Ethnic Proportionality" as a principle, by which the ethnic composition of judges reflects the ethnic composition of the given area; at least three judges at the Supreme Court and two at any other court are to belong to a non-majority community.⁸¹ This regulation is to exclude the possibility of discrimination in courts. The court is entitled, in ongoing cases, to turn to the Constitutional Court asking for its opinion whether the given law is in compliance with the Constitution.⁸² The Constitution stipulates gender equality as a binding principle to be in effect inside the judicial system also. The consequence of a judicial decision based on discrimination can be the removal of a judge from office.⁸³ The anti-discrimination authority in the judicial system is the Kosovo Judicial Council (KJC): this Council is vested with the competence to ensure the multi-ethnic character of the judicial system, its impartiality and gender equality. Additionally, its competence includes proceedings as a disciplinary authority against judges. The presence of the representatives of the communities in the Judicial Council is guaranteed, although⁸⁴ it is strongly criticised for the fact that eight of the thirteen members of the Council are elected by the Assembly (signifying political influence on the judicial system). The multi-ethnic character and gender equality are also among the main principles of the prosecution system, guaranteed by the Kosovo Prosecutorial Council.⁸⁵

The main institution protecting fundamental rights is the Constitutional Court. A number of institutions or persons are entitled to ask for an opinion from the Court about the compliance of a law or regulation with the Constitution: the government, the Assembly, the President of Kosovo, the Ombudsman and at least ten representatives of the Assembly.⁸⁶ Taking into consideration Article 64 of the Constitution,⁸⁷ conditions are set that any discriminatory action against the communities can be prevented by asking for an opinion of the Constitutional Court by the representatives of the communities. The citizens can use a constitutional challenge in case of

⁸⁰ Ibid. Article 93.3., 4., 7., 96.2.

⁸¹ Ibid. Article 103.3., 5., Article 104.3.

⁸² Ibid. Article 113.8.

⁸³ Ibid. Article 103.2., 104.4.

⁸⁴ Ibid. Article 108.2., 3., 6.

⁸⁵ Ibid. Article 109.4., Article 110.1.

⁸⁶ Ibid. Article 113.

⁸⁷ It grants 20 seats for the communities.

discrimination, provided that a fundamental right has been infringed, and that other legal remedies have already been exhausted. The composition of the Constitutional Court must respect gender equality; two of the nine judges can only be elected with the consent of the majority of the Representatives of the Communities.⁸⁸ The decisions of the Constitutional Court are very important in the battle against discrimination or while promoting positive discrimination, since these have an *erga omnes* effect.⁸⁹

The most common and most outrageous discriminatory actions are, firstly, carried out by force of arms, by the police, although their competences and their monopoly of force disguise this danger. A good answer, in a country where a national minority makes up a relatively big part of a population, would be for the ethnic composition of the police force to reflect the ethnic composition of the area. This was also implemented in the Constitution of Kosovo.⁹⁰

Despite initial impressions, the Ombudsman has some operational competences in this regard: he plays an important role in the struggle against discrimination. His task is to protect citizens against central and local government. Under his examination, all public authorities must comply with his requirements. He publishes his annual or other reports very quickly in the Assembly, where he has right to speak whenever he wishes.⁹¹ The Ombudsman may submit proposals in general or in specific issues in order to terminate an infringement of the law, and, as we have already seen, he is entitled to turn to the Constitutional Court.

The institutional system set up against discrimination was strengthened recently by the international community. The Ahtisaari proposal overrides the domestic law and so the Ahtisaari proposal is itself an obstacle to a discriminatory law. The realisation of the rule of law described in the Ahtisaari proposal is a task for all Kosovan authorities.⁹² Before the rule of law was fully implemented in Kosovo, the composition of many Constitutional institutions supported the Kosovan authorities against discrimination: the appointment of the judges and prosecutors takes place according to the UNMIK Administrative Directive No. 2008/02,⁹³ and until the international presence disappears, there are two international representatives on the KJC, three in the Constitutional Court, the Auditor-general is appointed by the ICR, the Governor of the Central Bank is appointed only with the consent of the ICR.

To prevent discrimination and help the refugees to return Kosovo, citizenship has been granted to all persons who had a permanent residence in Kosovo on

⁸⁸ Ibid. Article 113.7., 114. 1., 2., 3.

⁸⁹ Ibid. Article 116.1.

⁹⁰ Ibid. Article 128.4.

⁹¹ Ibid. Article 132., 135.1., 2.

⁹² Ibid. Article 143.1., 2.

⁹³ Ibid. Article 150.1.

the first of January 1998 and their direct descendants. The reason: most of these people left Kosovo due to the war and to the discrimination carried out by Milosevic.⁹⁴

Fundamental rights ensured by the Constitution are guaranteed by the double Constitutional barrier, which requires, in the case of an representatives and also a two-thirds majority vote by the Assembly members representing the Communities.⁹⁵ Additionally, an Amendment requires the approval of the Constitutional Court also.

6. The role of the European Union as a protagonist against discrimination in Kosovo

It is worth saying a few words about the document, on which the Mandate of the UN was based, taking into account the fact that it is still in effect. This is the United Nations Security Council resolution 1244 (1999) (hereinafter: Resolution). The Resolution was adopted to solve the situation in Kosovo resulting from systematic and radical discrimination. The mandate of the UNMIK Administration initiated by the Resolution was to maintain public administration and protect human rights.⁹⁶

International judges and prosecutors started work in Kosovo to eliminate discrimination in the judicial system and to apply the same law and standards for Albanians and Serbs alike.⁹⁷

The legal basis of the EU mission, which followed the UNMIK in Kosovo, is the Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo (EULEX). The mandate of the mission is, among other matters, to create a multi-ethnic, impartial judicial system and to ensure international and European standards during the EULEX mission.⁹⁸ The competences of the EULEX mission include all matters pertaining to the struggle against discrimination: upholding the rule of law, the so-called MMA (mentoring-monitoring-advising) function and protecting human rights and equality norms.⁹⁹

⁹⁴ Ibid. Article 155.2.

⁹⁵ Ibid. Article 144.2.

⁹⁶ Security Council resolution No. 1244 (1999), Article 11. (j).

<http://daccessdds.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement> [2009.10.12.]

⁹⁷ Hartmann, Michael E.: International Judges and prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping. United States Institute of Peace. 2003. Special Report. 1. <http://www.usip.org/files/resources/sr112.pdf> [2010.06.02.] p. 5.

⁹⁸ Joint action of the Council No. 2008/124. Article 2. <http://www.pascal-hector.de/GASP-Dateien/2008-Eulex-Kosovo-mit-Leiterernennung.pdf> [2010.05.21.]

⁹⁹ Ibid. Article 3.i.

6.1 The work of EULEX judges and prosecutors in the field of discrimination

The ethnic conflict culminated in the Kosovo war and the discrimination present before and after the war in every walk of life required an active approach from the international side. Consequently, EULEX, starting their operational work in 2008, had to target building the rule of law, abolishing discrimination and ensuring legal equality. EULEX judges, prosecutors and police officers had to become protagonists against discrimination. In terms of the competences of EULEX personnel, they are able to fulfil this expectation.

The competences of the EULEX judges and prosecutors are regulated by Kosovan law, EU law and international law also. According to Law No. O/L-053 (EULEX Law) adopted by the Kosovan Assembly on the 13 March 2008, EULEX judges and prosecutors may proceed only in certain cases. Taking into account the competences of the EULEX judges and prosecutors, the other rules of EULEX law (for example the information obligation prescribed for Kosovan prosecutors), the only conclusion to be drawn is that the purpose of these rules was to prevent discrimination.

By using their mentoring-monitoring-advising function, EULEX judges can prevent discrimination and in carrying this out, a useful tool can be the right to receive free copies of documents and the right to request in written form information in regard to any ongoing or closed criminal case.¹⁰⁰

The appointment procedure of EULEX judges aims to ensure the impartiality of the judicial system and equality before the law. In general, the appointment of EULEX judges is linked to special crimes, if there is a need to ensure the proper administration of justice, or to crimes in which the victim or premises or target of the offence appears to be selected for reasons of discrimination.¹⁰¹

It can also be considered an anti-discrimination measure which makes an appointment possible, if a request for the disqualification of a Kosovo judge is filed and impartiality can be only secured by appointing a EULEX judge.¹⁰² Discrimination must also be prevented in civil cases, which is why the competences of EULEX judges are extended to disputes where the impartiality of justice or a fair trial would otherwise be endangered. Discrimination may occur first of all during privatisation and in real estate cases, but EULEX judges can act in all cases when a claim submitted by a Serb cannot be adjudicated by a Kosovo Albanian judge or when the judge is unwilling to deal with the case correctly.¹⁰³

¹⁰⁰ Ibid. Article 2.4., 3.9.

¹⁰¹ Ibid. Article 3.3, 3.4.

¹⁰² The EULEX judge can be appointed even if the claim is rejected. Ibid. Article 4.1., 4.2.

¹⁰³ Ibid. Article 5.1. c) (ii).

In order to play a significant role in judicial panels and to prevent decisions being by a biased, EULEX judges must be in majority on the panels, and so in three-member-panels involving EULEX judges, these are in the majority and the presiding judge is also a EULEX judge, except when the president of the assembly of EULEX judges decides otherwise.¹⁰⁴

EULEX prosecutors can proceed within the SPRK (Special Prosecution Office of the Republic of Kosovo) or within the prosecution office to which they were assigned. The tasks of the EULEX prosecutors are to investigate and prosecute, and, on the other hand, to help, advise and monitor the work of the Kosovan prosecutors. EULEX judges are not integrated into the Kosovan prosecutorial system, and can be addressed only by EULEX Chief Prosecutors.¹⁰⁵

EULEX prosecutors work together with Kosovan prosecutors in mixed panels, and so there is structure is given to monitor the work of the Kosovan prosecutor. EULEX prosecutors are entitled at any time during the proceedings, with the consent of the EULEX Chief Prosecutor, to carry out any investigation or prosecutorial function, if the victim, premises or target of the crime appear to HEV been chosen for reasons of discrimination.¹⁰⁶

The EULEX prosecutor acts in the first part of criminal proceedings (with the EULEX police-officer), and so his role is important, since the impartiality of justice is ensured at this stage by him, and, due to his warning, by the EULEX judge. In describing this role, the following rules seem to be the most suitable. The EULEX Law stipulates the many information obligations of Kosovan prosecutors in cases in which EULEX prosecutors and EULEX judges can be involved:

- the Kosovo Public Prosecutor must inform the EULEX prosecutor within 72 hours about the content after the announcement of the first instance judgment, provided that the crime is laid down in EULEX law and that the court of first instance was a municipal court,¹⁰⁷
- the Chief Municipal Prosecutor must inform the EULEX prosecutor of any investigation or prosecution measures launched due to crimes laid down in EULEX law and provided that the court of first instance is a municipal court,¹⁰⁸
- the Chief District Prosecutor must inform the EULEX prosecutor assigned to the prosecution office before the case is assigned to a Kosovan prosecutor, provided that the EULEX prosecutor has

¹⁰⁴ Ibid. Article 5.2., 5.4., 5.5.

¹⁰⁵ Ibid. Article 7.1., 7.3., 7.4., 9.7.

¹⁰⁶ Ibid. Article 11.1. Compare with Article 3.4.

¹⁰⁷ Ibid. Article 9.4.

¹⁰⁸ Ibid. Article 9.5.

competence and that the crime committed is laid down in EULEX Law.¹⁰⁹

The aim of these rules is clearly to keep EULEX prosecutors informed to enable them to take over the investigation and to propose the appointment of a EULEX judge.¹¹⁰

To avoid discrimination and set limits to the willingness to indict, if the Kosovan prosecutor is unable or unwilling to perform his obligation, thus endangering the proper detection of the crime, or if the impartiality of the investigation or prosecution might be in danger, the Chief EULEX prosecutor is entitled to ask for the assignment of another Kosovan prosecutor or a EULEX prosecutor.¹¹¹ If the Chief Prosecutor of the given Kosovan prosecution office rejects this request, the Chief EULEX prosecutor and the Chief Public Prosecutor of Kosovo will resolve the problem together.

6.2 Other measures in the hands of the EU

Beside the work of the EULEX judges and prosecutors, the EU has other means to fight discrimination coming both from the Kosovan and the EULEX side.

1/ EULEX Programme Office – EULEX Programme report: EULEX were given a clear picture of discrimination in July 2009 in the report issued by the EULEX Programme Office. The report is connected to the so-called programmatic approach, which means that there is a group of staff members working separately from the other employees of the EULEX and which assesses the extent of the process of the rule of law in Kosovo and makes recommendations regarding further steps. There are two types of discrimination visible in the report. One is the small number of female employees and employees belonging to ethnic minorities in the justice system, the other being the deficiencies which makes such discrimination possible.

The first type is simple in the sense that it can be proved numerically: the number of members of ethnic minorities and women compared to the total number of judges and prosecutors is small. 31 judges belong to national minorities and 15 of these are Serbian. There are only five prosecutors belonging to a national minority of the 89 Kosovan prosecutors and 23.6 percent are women.¹¹²

¹⁰⁹ Ibid. Article 9.6.

¹¹⁰ Ibid. Article 3.2.

¹¹¹ Ibid. Article 12.1.

¹¹² EULEX PROGRAMME REPORT. July 2009.

<http://www.eulex-kosovo.eu/docs/Accountability/EULEX-PROGRAMME-REPORT-July-2009-new.pdf> [2010.08.18.] p. 87.

The second type involves systemic deficiencies which increase the possibility of discrimination. This possibility in the justice system depends on whether the justice system can be impartial and the prosecution effective: there are difficulties in both senses in Kosovo.¹¹³ The disciplinary committee of the KJC was not working in July 2009, and since that time there has been no authority examining discriminatory decisions made by judges. The appointment and promotions system for judges also showed deficiencies. The report reveals that there was no evaluation system of judges in Kosovo, although the KJC did try to set domestic standards with in this respect.¹¹⁴ It is also important to refer to the socialisation of judges since, according to the statistics, the majority of judges and prosecutors had studied law in the former Yugoslavia.¹¹⁵ The consequence of the practice of Kosovan prosecutors, according to which they prefer imprisonment to other coercive measures without reasonable grounds, can also be discrimination. The security of Kosovan judges and prosecutors is a problem which has not so far been resolved.¹¹⁶ This could lead also to a discriminatory decision being made by a judge, since, in the absence of security measures, everyone has the opportunity to move freely within the court building, to speak to the judge and to threaten him should he be dissatisfied with the impartiality of the judge. The case allocation system is also a serious problem to resolve, since, in practice, there is no working system and the judges themselves re-assign cases which they do not wish to handle.¹¹⁷ The situation is the same with regard to the prosecutors. Since the case allocation system is an essential part of the rule of law, we must stress its importance: without it, the case will not be assigned to a judge or prosecutor selected by objective criteria, i.e. influence cannot be excluded. The report of the EULEX Programme Office of 2010 describes positive steps,¹¹⁸ although it stresses that the problems of Kosovo cannot be easily solved.¹¹⁹ The disciplinary procedure is now fully operational.¹²⁰ There are positive steps made in respect of the case allocation system in order to make it a transparent and objective system,¹²¹ although the

¹¹³ Ibid. p. 14.

¹¹⁴ Ibid. pp. 92-93.

¹¹⁵ Ibid. p. 84.

¹¹⁶ Ibid. pp. 95-97.

¹¹⁷ Ibid. pp. 98., 102.

¹¹⁸ EULEX PROGRAMME REPORT 2010.

<http://www.eulex-kosovo.eu/docs/tracking/EULEX%20Programme%20Report%202010%20.pdf> [2010.08.18.]

¹¹⁹ Ibid. p. 5.

¹²⁰ Ibid. p. 26-27.

¹²¹ Ibid. p. 33.

problems still exist. The report stipulates that the completion of the appointment process will improve the situation. According to EULEX, it prevents the detection of the discrimination cases which the Kosovo Police do not register as criminal - the statistics of victims and perpetrators in respect of ethnic origin or the type of crime. Kosovan judges and prosecutors try to avoid sensitive cases.¹²² The crimes described in the report strengthen the conclusion that the Kosovan justice system is currently unable to maintain impartiality without international help.¹²³

- 2/ EULEX Human Rights and Gender Office: an institution with advisory, prevention and coordination functions. Its mandate is to ensure gender equality and human rights during EULEX activity. It provides lectures on human rights for EULEX staff.¹²⁴
- 3/ EULEX Human Rights Review Panel:¹²⁵ this investigates wrongs committed by EULEX staff. It is a channel for complaints which examines the alleged infringement and makes proposals to repair it, although it has no decision-making functions.
- 4/ EULEX KOSOVO Internal Investigation Unit: the internal disciplinary unit of EULEX, which investigates any unlawful actions by employees of EULEX. The investigations may lead to recommendations or disciplinary decisions which will be communicated to the relevant national or EU authority.¹²⁶

7. Conclusions

Kosovo is a unique case. It is described also as an unfinished state. To be a state where the rule of law applies, formal equality is not enough: this has been granted many times in its history, but without success. The struggle against discrimination must also be supplemented by affirmative action on the part of the state. The conclusion of the essay is that formal equality in itself in Kosovo cannot produce a real solution; affirmative action is necessary regarding the minorities. This is currently impossible without the help of the international community.

¹²² Ibid. p. 9.

¹²³ Albanian criminals are held to be war heroes in the cases which have been presented in the report. Ibid. p. 31.

¹²⁴ <http://www.eulex-kosovo.eu/docs/Accountability/EULEX-Accountability-05.01.2010.pdf> [2010.09.18.]

¹²⁵ <http://www.hrrp.eu/mandate.php> [2010.08.16.]

¹²⁶ <http://www.eulex-kosovo.eu/docs/Accountability/EULEX-Accountability-05.01.2010.pdf> [2010.08.19.]

Legal and Organisational Framework for AAI Systems

SCHVÉGER, Judit

ABSTRACT *In this paper I shall discuss the legal background of various organisational frameworks of identity federations using authentication and authorisation infrastructure (AAI) in a comparative way, mainly focusing on the European Union. After showing the basic notions in relation to identity management, identity federation and AAI systems, my objective will be to address organisational frameworks of commercial and non-commercial solutions to identity management mainly focusing on further education and academic communities. I shall also cover the two main approaches to cooperation among institutions: contractual relationship and setting up an independent organisational model.*

These theoretical models will be applied in a case study at the forthcoming Hungarian Researcher and Education Federation (HREF) or EduID,¹ which will highlight the legal and practical challenges the Hungarian research and academic community will have to deal with in sharing and protecting information. On the basis of the study, conclusions will be drawn from a Hungarian perspective.

1. Introduction

The success of an academic institution depends to a large extent on its ability to share information among its stakeholders. The size of its information community and the communication among the members of its network are indicators of its scientific activity. On the other hand, academic institutions are also immensely protective of their resources, especially of those available online. It is in the institutions' interest to ensure that their services and confidential information are available only to properly identified users.

In 4th November 2010, the Hungarian Research and Education Network² announced the launch of the Hungarian Researcher and Education Federation (HREF) or EduID, which is an AAI-based online platform for the Hungarian

¹ <http://www.eduid.hu/> [2010.11.30.]

² <http://www.niif.hu/> [2010.11.30.]

educational and research community.³ In this paper I shall discuss the legal background of various organisational frameworks of identity federations using authentication and authorisation infrastructure (AAI) in the EU and in Hungary also.

The recognition of the importance of web-services (e.g. online journal databases, e-books, e-learning study materials, wi-fi access, and other student related web services) as a current and future service delivery platform leads most of the universities worldwide to maintain and operate many of their own services through secure online platforms. Web-services are now considered a key service delivery platform for all higher education and academic institutions and most business entities.

In order to making available secured web-services not just for internal users but for users affiliated to another organisation belonging to a trusted circle, authentication and authorisation should be separated. According to this, only the user's "home" organisation is allowed to authenticate its own user, but the respective service providers (e.g. online journal database services) are individually entitled to verify if an authenticated user has permission to access specific resources.

Federated identity management can simplify the user's experience through the use of authentication and authorisation infrastructure (AAI)⁴ technologies such as single sign on (SSO)⁵ at multiple websites, thus enabling multiple services to be accessed as a single entity. The aforementioned federated identity method is used for creating an interoperable online identity that is valid and reliable for several service providers who belong to the same trusted cooperation. Such concept is quite similar to the one we have in our "real-world" for federated identities of individuals and nations - e.g. a passport is a global identity credential that attests for one's identity in a country or a driver's licence vouches for one's ability to drive a car and is also used as a proof of identity in certain cases.

Such an approach helps to reduce privacy risks but also requires a well-established relationship of trust among the parties, and so trust plays an important role in a federation.

In this paper I shall summarise the legal framework of different trust-based cooperation models among organisations, and especially among educational or

³ eduID: szövetség az egységes azonosításért, Bitport <http://www.bitport.hu/megoldasok/eduID-szoövetseg-az-egyseg-es-azonositastert> [2010.11.30.]

⁴ Authentication and authorisation infrastructures (AAI) are middleware systems consisting of a set of protocols that allow the delegation of authentication and authorization issues to different instances. In AAI systems authentication is executed by the user's home organization, while the authenticated user's are granted access to resources such users want to access by the resource owner service providers.

⁵ Single sign on is a process or a system that enables a user to access multiple computer platforms or application systems after being authenticated only once.

academic institutions having established and maintained a legal relationship in order to share their online resources.

I shall demonstrate, in respect of this highly digitalised environment, what types of trust-based organisational approach and legal forms have emerged from the need for securely sharing such resources. It is also important to underline in advance that privacy-related issues of federated identity will be further discussed in a separate, individual article.

In this paper I shall not distinguish between technological components and real organisations, and so an identity provider shall also mean an AAI server component and a home organisation such as a university where a user is affiliated as a student or lecturer.

1.1 Identity management

Identity in the social sciences is used as a term to describe the individuality of a person. Although a person's identity may cover several affiliations, such as his or her gender, social or cultural identity, in this paper I shall elaborate only the concept of digital identity in relation to authentication methodologies in the light of recently evolved digital technologies.

While digital identity attempts to express someone's representation by means of digital technologies, identity management (IdM) means the collection of technologies, rules and processes in relation to digital identities with the aim of establishing common and standard methodologies to provide access to protected resources. IdM typically refers to the management of an organization's application users, where steps in the security life cycle include account creation, suspension, privilege modification, and account deletion. Entities managed by an identity management process may also include users outside the organization, for example, customers, trading partners, or Web services. IdM also aims to effectively follow-up structural and personal changes in an organisation and, besides its internal organisational benefits, it also helps to establish a secure cooperation between two sovereign entities. Identity management has three main aspects, namely: (1) digital authentication management, (2) authorization management and (3) user life-cycle management or user provisioning.

1.1.1 Authentication management

Authentication is a process of substantiating a claim made by a person that such person should be allowed to act on behalf of the given individual.⁶ Authentication is also a key aspect of authorisation management, as a process of verifying or validating the identity of a user in order for him to acquire access to

⁶ Definition of authentication <http://en.wikipedia.org/wiki/Authentication> [2010.11.30.]

certain resources. The assurance of an entity's identity to another is usually based on central user databases, but due to the numerous and independent applications and web-services, users are required to identify themselves individually every time they use one of the services. In such a heterogeneous digital environment, with versatile services authentication and authorisation are usually separated, and authentication must precede authorization.

1.1.2 Authorisation management

In line with the above, authorisation, on the other hand, is a process of granting or denying access to a service or network resource. In identity federations, generally, the service providers are entitled to specify access rights for properly authenticated users. Most security systems are based on a two step process. The first stage is authentication, in which a user is required to prove his or her identity. The second stage is authorization, in which a user is allowed to access various resources based on his or her identity and the defined authorization policy.

1.1.3 User life-cycle management

A secure and continuously up-to-date identity management is crucial to provide partners - especially business partners such as external service providers - with accurate identity information about users. Therefore identity management systems are required to cover and follow the whole life-cycle of a user, from entering into an organisation as a student or staff member, through personal data or status changes, until the end of such affiliation to the said institution, as mentioned previously.

1.2 Federated Identity or Circle of Trust

Generally, federation is understood as a collection of independent organisations that have established a trust relationship with each other. This trust-based cooperation - by means of business agreements, cryptographic arrangements, exchange of technical parameters and identity interconnections - enables the distribution and share of identity information between independent entities within the circle of trust in order to grant properly identified users secure access to protected resources. A circle of trust is a trust relationship among a set of identity providers and service providers that allows users to be authenticated by a single federated identity and use single sign-on when conducting business transactions with providers within that set.

An identity management federation is a collaboration of credential issuers and online service providers who agree on relying on electronic identity credentials issued by each other at known levels of assurance. Members of an

identity federation agree to a set of policies for exchanging information about users and resources in order to enable access to, and use of, online resources and services while protecting the security of both the individuals and the resources.

Within an identity federation the "assurance level" of identification can be seen as a commonly accepted and agreed degree of trust among federation members. The assurance level describes the strength of the identification and authentication processes - i.e., it provides a basis for determining the degree to which a party to an electronic business transaction or any kind of online web-service process can be confident: (1) that the identity information being presented actually represents the person named in it (e.g., that the person who was identified as John Smith really was John Smith, and not an imposter), and (2) that the person identified in the credential is the person who is actually engaging in the electronic transaction (e.g., that it is really John Smith on the remote device who is seeking access to a company's system, and not someone who stole his password).

Identity documents are any documents that include, refer to or verify identity information. Identity credentials are documents with the primary function to associate a set of attributes with the identifiers of a single subject. An identity federation ensures that identity credentials - such as a set of personal information, by which users can be identified or by which authorisation is granted to certain applications and services - are acknowledged.

On the basis of this circle of trust we can define three types of federation model: (1) ad-hoc federation, (2) a 'hub-and-spoke' federation and (3) an identity federation network.

An ad-hoc federation is based on bilateral agreements of the respective federation members. Therefore a new federation partner has to enter into business agreements with other federation members with whom it wishes to cooperate. In certain cases it means that every federation partner has to establish and manage a trust relationship with every other federation partner.

In a 'hub-and-spoke' federation the drawback of multiple contractual relations is eliminated by a centralized component. A new federation partner need only establish a trust relationship with the central component which deals as a trust broker. By involving a central agent, complexity is much reduced. The main drawback for this kind of federation is the central participant, mostly one of the larger federation partners, which can overrule smaller federation partners. To avoid this, an identity federation network can set up a delegation of federation members' representatives empowered to decide about issues relevant to the federation.

Affiliation to an identity federation is achieved by becoming a member of this 'community' and so trust relationships amongst federation members are built through the trust to the community. The conditions for operating an identity federation are based on the trust federated partners share in each other's identity information. One of the main advantages of setting up an identity

federation is to receive identity information from an identity provider must not require an organization to establish a trust relationship with any party other than the identity provider, and must not require the adoption of any specific user authentication technology.

Setting up and becoming a member of an identity federation will reduce the cost of identity management by reducing duplication of effort, and so each individual's identity is almost always already managed by a trusted organization (such as the individual's home organisation e.g. its employer). An identity federation also enables the preservation of all parties' autonomy - an identity manager's choice of authentication technology should not impose that technology on parties who rely on its identity information.

An identity manager's choice of operating system, networking protocol, or database should not impose the same choice on its partners. However, one of the main advantages of an identity federation is the protection of individuals' privacy by respecting and strongly enforcing user preferences governing the use of individually identifiable information, observing governmental and regional privacy rules, seeking the user's consent for new uses, and implementing strong recordkeeping and accountability mechanisms to ensure that privacy practices are followed.

1.2.1 Commercial federations

Federated identity management in a business environment helps companies to lower their overall identity management costs, simplify the administration of users and to manage security and trust in a federated business relationship. The cost reduction brought with simplification of administration and user life-cycle management derives from the fact that companies are no longer coercing the management of users or identities which are not under their control. In commercial relationships the identity federation facilitates the setting up of business relationship between independent organisations by simply using an intermediary participant such as an identity provider - which enables the secure and reliable identity vouching of users.

Organizations jointly affiliate into circles of trust based on federation technology and cooperation or service agreements that define trust relationships between the parties. Federated identity solutions between business entities are usually implemented among employers who are the identity providers for their own employees and other external service providers. In order to provide external services to their employees, companies usually enter into service agreements with independent service providers who provide access to company-related services (e.g. company car, company affiliation travel agencies). Another business case example is the consumer banking circle of trust, in which the user's bank establishes business relationships with various other service

providers, allowing the user to sign in and authenticate with his or her bank-based network identity.

1.2.2 Academic and Higher Education federations

Access to services is becoming more and more independent of both the user's or service's physical location. Accordingly, there is a growing need, not just in commercial relations but also in the academic and research community, for identity federations and certification services, both of which are becoming more common.⁷ In most European countries, the main field of national and international collaboration is federated access and identity management, and such authentication mechanisms are provided by educational or research institutions. Cross-institutional and cross-border collaborations in the higher and further educational sector are common initiatives worldwide. Nevertheless, in some cases the whole educational sector has been involved in a common federated identity platform. In most countries identity federations are operated as national research and education network services (NREN), although such an example cannot be considered as a universal model.

1.2.3 Inter-federations

The purpose of cooperating at inter-federated level is to be able to rely on credentials issued by members of other identity management federations at known levels of assurance in order to extend online collaborations in electronic commerce or electronic government-related issues regionally or globally.

In Europe the GÉANT⁸ project is the pan-European data network dedicated to the research and education community. Since its co-foundation in 2000 by the European Commission and national research and education networks (NRENs), the GÉANT network and project (also known as GN3) is entering its third generation, along with associated development activities. It is intended that GÉANT interconnect with other regional research networks to create a single global research network. The GÉANT network is managed by DANTE (Delivery of Advanced Network Technology to Europe) which is a non-profit organisation that plans, builds and operates international networks to interconnect various NRENs in Europe and surrounding regions. DANTE was established in 1993 as a limited liability company owned by a number of NRENs and government agencies.

⁷ TERENA Compendium of National Research and Education Networks in Europe, 2009 Edition <http://www.terena.org/activities/compendium/2009/pdf/TERENA-Compendium-2009.pdf>. [2010.11.30.]

⁸ <http://www.geant.net> [2010.11.30.]

1.3 Participants

Federated identity management is based on business, technical and policy agreements that allow organisations to interoperate through shared identity management. In federated identities trusted cooperation is concluded among at least three stakeholders: (1) home organisations, (2) service providers and (3) operators of AAI components.

Participants are understood as real organisations having defined roles and operating AAI computer components in a federation. Participants in a federation may have three different roles, and so identity providers represent user communities and authenticate users, other participants control and deliver variety resources as service providers and, finally, certain organisations connect the above endpoints by operating AAI components. It is also important to note that certain stakeholders may take various roles, and so an identity provider may also provide services to its own or other organisations' users, while service providers are usually confined to deliver services by using identity credentials issued by home organisations. Providing identity credentials and authenticating users require strict and well-established procedures from the respective organisation.

Difference between identity providers and service providers is manifest in the organisational structure of a federation. Therefore a federation usually sets up a delegation composed by representatives of the federation members who decide about issues relevant to the federation. Nevertheless, while identity providers usually dispose of full authority to participate in such decision making bodies, service providers generally take part only as observers.

1.3.1 Identity Providers

Identity providers not only represent user communities, such as universities or research institutes, but possess the relevant resources and databases to authenticate users and also to provide reliable user identity credentials and attribute information, which can be queried by services providers. They provide a single digital identity and store identity data about the user in one location. The identity provider is responsible for authenticating the user and providing identity data.

1.3.2 Service Providers or relying party

Service providers are owners of online available resources. As relying parties they use identity providers to authenticate users who want to log in and use services of the respective service provider. Those partner organisations that only participate in the federation as service providers usually have fewer rights. Most federations do not grant partner organisations decision-making authority

and so such service providers are represented only as observers in delegated decision-making bodies.

1.3.3 Operators of central AAI components

Although all participants are required to implement AAI components and fulfil the jointly agreed and accepted technical requirements, central AAI components are also need to be maintained in order to gather and organise the federated identity as a whole. Such central AAI or federated components are maintained and operated by an independent third party, such as a federation operator.

Federation operators are AAI service providers and so they usually either conclude a service agreement with federation members and partners or provide services within the organisational framework of a legal entity such as an association or a company. The German federation, for example is formed as a non-profit association, while the InCommon, LLC, education and research federation in the USA (not specified in this article) is a limited liability company with the sole member of University Corporation for Advanced Internet Development, Inc. which is in fact a non-profit corporation.

1.4 Data Protection in Federated Identities

Securely sharing and protecting online resources is one of the main reasons for formulating a federated identity. In addition to the security of resources, federated identity members are also required to meet global standards in relation to privacy protection.

Users of cross-institutional online identity platforms are immensely vulnerable regarding their personal data. The organisational legal framework of an identity federation is also important in a privacy perspective, as it enables the enforcement of privacy policies and good practices amongst federation participants. Federated members and federated cooperation itself protect individuals' privacy by respecting and strongly enforcing user preferences which govern the use of individually identifiable information. Federated collaboration also protects user privacy by observing governmental and regional privacy rules, or by seeking the user's consent for new uses, and implementing strong recordkeeping and accountability mechanisms to ensure that privacy practices are followed.

European supra-national regulatory regimes, such as the 95/46/EC Directive on the protection of individuals with regard to the processing of personal data (Data Protection Directive) strongly affects and determines the members states' legislative background, including the Hungarian Data Protection Act (Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest).

According to Hungarian privacy protection principles, personal data can be processed if the data subject has given his or her consent or it is ordered by an Act or by a local government decree.

However, according to the Data Protection Directive, the legal basis of data management is defined in a wider perspective and the legal basis for data processing can also be assumed without consent if it is necessary for the performance of a contract, or the performance of a task in the public interest. The importance of online authentication systems can be noted in the agenda of the "Working Party on the Protection of Individuals with regard to the Processing of Personal Data". The "Article 29 Working Party" is a consultative body that is entitled to give advice on the privacy protection level in the European Union and third countries and to provide expert opinion and advise the European Commission with regard to privacy protection within the EU. The Working Party has recently adopted several recommendations on online authentication systems and data management issues. In 2001 the Working Party adopted Recommendation 2/2001 on certain minimum requirements for collecting personal data on-line in the European Union⁹ and in 2003 it also issued a guidance regarding on-line authentication systems.¹⁰ With a view to "the future of privacy" protection the Working Party also summarised its opinion on the legal framework for the fundamental right to protection of personal data in 2009, within a joint contribution to the consultation of the European Commission.¹¹

According to the expert opinions of the Working Party, on the one hand proper data management practice requires the consent of the data subject, but, on the other hand, such consent can be unambiguously formulated only on the basis of a transparent data management work-flow.¹²

⁹ Data Protection Working Party: Recommendation 2/2001 on certain minimum requirements for collecting personal data on-line in the European Union, 2001.05.17. <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2001/wp43en.pdf> [2010.11.30.]

¹⁰ Data Protection Working Party: Working Document on on-line authentication services, 2003.01.29. http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2003/2003-01-30-online-authentif_en.pdf [2010.11.30.]

¹¹ Data Protection Working Party: The Future of Privacy: Joint contribution to the Consultation of the European Commission on the legal framework for the fundamental right to protection of personal data, 2009.12.01. http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp168_en.pdf [2010.11.30.]

¹² On data management transparency further information can be found in OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data, OECD Data Protection Guidelines 1980. http://www.oecd.org/document/18/0,3343,en_2649_34255_1815186_1_1_1_1,00.html [2010.11.30.]

Contrary to the European Union, data protection in the United States is mostly regulated in a sectoral approach and data protection in the private sector is largely self-regulatory. As a result of this, the US Department of Commerce developed the 'safe harbour' system in consultation with the Working Party and finally with the European Commission. 'Safe harbour' system offers a method by which a US organisation can comply with the Directive. The EU approved 'Safe harbour' in July 2000. Organisations which sign up to the scheme are certified as offering 'adequate' protection under the terms of the Directive, thus enabling transactions between those organisations and European organisations to proceed smoothly and within the law.

Although both European standards and US privacy legislation set out certain exceptions, data management is for the most based on the consent of the respective data subject. With a view to the user's consent, it is vital to provide up-to-date user databases, as well as to agree on strict data maintenance and data retention policies. However one of the most important challenges in a federated cooperation is to respect and properly manage user preferences and previously given user consents.

2. Possibilities for formulating a cooperation model

Members of an identity federation may establish contractual relationships, although a loose association may also form an individual legal entity. Benefits of integrated cooperation also include the association's joint representation vis-à-vis non-member organisations.

As it is mentioned earlier, by accepting the appropriate and effective collaboration model, participants also agree to facilitate the development of a community-based common trust fabric that enables federation members to make appropriate decisions about access to information provided to them by other participants. By analysing academic and further education federations in the European Union, federation members are most likely to conclude cooperation or service agreements, rather than setting up companies or non-profit organisations. Furthermore, it can be expected that, in a corporate environment or amongst commercially independent organisations outside the educational and academic sector, the contractual model is also dominant.

The right choice for setting up an appropriate collaboration framework for federated identities depends on several factors, such as the legislative environment of the country, economic effects and costs of various cooperation models or previous relationships between participants.

2.1 Decision-making bodies

In line with my findings on the strengths and weaknesses of the different federation models, one drawback of a hub-and-spoke federation is the

centralised AAI component generally operated by the largest federation member. Because of its size and number of users, the central participant can overrule other federated participants.

3. Case Studies

3.1 SWITCH

The Swiss Academic and Research Network¹³ (SWITCH) is a national authentication and authorisation infrastructure in the tertiary education sector and available at almost all Swiss universities. The SWITCH foundation was established in 1987 and it not only manage .ch and .li country-code top-level domains for Switzerland and Liechtenstein, but also educational networks between and outside Swiss universities by connecting national Swiss university and academic communities to other European university networks.

The SWITCH foundation, as service provider of central AAI services, enters into contractual relationship with its participants. Thus rights and obligations of identity providers are set out in service agreements,¹⁴ while service providers conclude partner agreements, similarly to the above, as federation partners. Partner organisations possess restricted authority rights in the federation, they shall be regarded as federation participants without member-status, who deliver resources by using AAI central components, but they neither function as home organisations nor can they authenticate users as identity providers in any circumstances. Concerning the amendments of the service agreement between federated

Two consultative bodies¹⁵ were set up in order to facilitate the proper function of the Swiss federation. By representing federation members and SWITCH, the Advisory Committee functions only as a long-term policy-making and consultative body concerning federation management issues and inter-institutional federation projects and strategies. Meanwhile the Operation Committee has competence over technology related issues. The two consultative bodies assemble only once or twice a year.

3.2 UK Access Management Federation

In line with section 1.2.2, the JNT Association (JANET/UK), a UK based federation operator delivers its AAI service to a user community wider than others in Europe. UK federation's (UK Fed)¹⁶ AAI services are available to the

whole education sector from grammar schools to academic and research institutions. It is made up of identity providers such as local authorities, regional broadband consortia, universities and colleges. The most common service providers are publishers of online resources or e-learning related web-services. The administration of the federation has been delegated by JISC and BECTA to JANET(UK), which is the designated Federation Operator.

The UK Fed is sustained by the Joint Information Systems Committee (JISC) and the British Educational Communications and Technology Agency (BECTA), but federation services are provided by in collaboration of the Joint Academic NETwork (JANET) and the Edinburgh Data and Information Access (EDINA) in Edinburgh University. JANET and EDINA have entered into a cooperation agreement on the operation and maintenance of UK Fed. Although, there is a joint collaboration between JANET and EDINA, management of the UK Fed is delegated to JANET who is the federation operator of UK Fed.

Gaining access to AAI services and becoming participant to the UK federation require a legal agreement with JNT Association (JANET/UK). Application for membership of the UK Fed usually precedes de facto participation in the federation. Organisations eligible to join the UK Fed include all educational and research institutions, which cover all colleges, universities and research council funded establishments, and also includes local authorities with responsibility for the schools sector. Other publicly funded bodies are also eligible for membership, subject to support from the relevant authorities. As to service providers, UK Fed is also open to any commercial organisation which provides services to the educational and academic sectors, but their membership may require to be sponsored by a member organisation. It is also important to note that joining the UK Fed entails a contractual agreement with the federation operator, and so any organisation which wishes to join must be a legal entity.

UK Fed has also set up two consultative bodies for strengthening democratic decision-making methods within the federation. One of them, the Policy and Advisory Board, advises the JISC and BECTA, on federation policy, strategy, development and high-level operational issues. The Board, as strategic planning consultative body, is responsible for defining the overall policies and obligations for membership of the UK Fed. Membership of the Board is drawn from representatives of the funding bodies, initially JISC and Becta, and from interested communities (IT, Libraries, Schools, FE, publishers). JISC and Becta will each nominate three members to the Board and will agree the appointment of the Chair. Additionally, the federation operator will also nominate one member to the Board.

¹³ www.switch.ch/aaai [2010.11.30.]

¹⁴ https://www.switch.ch/aaai/docs/AAI_Service_Agreement.pdf [2010.11.30.]

¹⁵ <http://www.switch.ch/aaai/participants/committees.html> [2010.11.30.]

¹⁶ <http://www.ukfederation.org.uk> [2010.11.30.]

3.3 WAYF

The name of the Danish federation¹⁷ originates from an identity provider pre-selection online service called 'Where are You From', that is an element of AAI infrastructures. By enumerating all identity providers participating in the respective federation, WAYF services enables users to select their home organisation in order to be identified.

The Danish WAYF federation is a legal entity but federation participants are required to enter into formal contractual relationship with the Danish Agency for Libraries and Media and with Denmark's Technical University (DTU). The latter provides the legal basis of the WAYF secretariat, which conducts the day-to-day work of the federation. The federation is financed by three ministries (Ministry of Education, Ministry of Science and Ministry of Culture), the Danish research network¹⁸ and is also co-funded by the DK e-library.¹⁹

Aspirant identity providers are required to be a member of the Danish higher education and research community and also to fulfil technical and privacy requirements as set out by the WAYF federation.

It is also important to note that only service providers conclude formal service agreement with the WAYF federation, while identity providers sign only a data protection declaration.

The WAYF is in an introductory phase, and so it is free of charge to connect to the federation and benefit from the services of the Danish federation. At a later stage both the contractual and financial background of the federation will certainly be amended by its founders.

3.4 DFN-Verein

The German federation (Deutschen Forschungsnetzes) or DFN-Verein²⁰ was established as an association and entered into the registry of non-profit organisations at the local court. Members of DFN are higher education and research institutes as well as business entities. Besides their membership status, members also enter into a service agreement with DFN-Verein in order to gain access to DFN-AAI central services.

In the General Assembly of the association, the 300 (three hundred) members of the federation are represented. The operation of the DFN-Verein is conducted by an Executive Committee, elected from the members of the General Assembly. An Executive Board was also set up and its members are elected from the members of the Executive Committee. It is also worthwhile to

¹⁷ <https://www.wayf.dk/Institution> [2010.11.30.]

¹⁸ www.forskningsnettet.dk [2010.11.30.]

¹⁹ www.deff.dk [2010.11.30.]

²⁰ <http://www.dfn.de/> [2010.11.30.]

mention the Executive Board is supported by three thematic expert panels, namely the technology panel (TA), the operational panel (BA) and the panel for legal and security concerns (ArUS).

Federation members are also obliged to pay certain fees for the AAI services provided by the DFN-Verein. The members of DFN-Verein pay a membership fee and the general assembly stipulates the amount of the membership fee depending on the members' type of organisation. There are three types of fee category and, according to these categories, a lower price was determined for higher education institutions and for government-funded non-education (e.g. research) institutions, whilst a somewhat higher fee was established for private industry members. In every category the final amount of the membership fee depends on the number of users.

4. Hungarian Legal Background

4.1 Contractual model

A general principle of the Hungarian Civil Code (Act IV of 1959 on the Civil Code) is contractual freedom. In line with Article 200 of the Civil Code, freedom of contract means the freedom of individuals and business entities to make contracts without government restrictions. Since provisions as set out in the Civil Code on contractual freedom are permissive, parties to an agreement freely determine the contents of any agreement and by mutual consent they may deviate from the rules contained in the Civil Code, unless it is prohibited by law. It is also important to note that such freedom shall not result in arbitrarily determined contractual provisions against the law. Although relevant legal rules set out few limitations to contractual freedom, general prohibitions of the Civil Code shall also prevail. For example, Article 200 sets out that a contract shall be null and void if it is evidently contrary to good morals.

However, the Civil Code also requires the presence of elements that are indispensable to a contract. In line with Article 205, subsection (2) for the validity of a contract it is essential that an agreement is reached by the parties concerning all essential issues as well as those deemed essential by either of the parties. It is also important that contractual relations doctrine regarding the privity of contract have to be considered too. Privity of a contract means that only those involved in a contractual relationship would have standing to enforce it. In general a third party to a contract has no right to enforce it. With due regard to legal regulations and related case law on agent's liability for third parties' or subcontractors' actions, as well as other exceptions from privity of contract rule, it is hard to predict with certainty the outcome of court decisions dealing with third party claims against identity federations in Hungary.

4.1.1 Service and cooperation agreement

Bearing in mind that parties to an agreement freely determined the contents of any agreement, it is important to note that they are entitled to combine elements of several contract types into one single document also. In a federated environment, "hybrid" contract types are quite common. Thus federated participants usually enter into agreements which incorporate elements of cooperation and service agreements.

4.1.2 Civil law association

Article 568 of the Civil Code sets out the relevant rule on establishing civil law associations by a contractual relationship. By concluding articles of incorporation for the foundation of a civil law association, the parties shall undertake the obligation to cooperate in business activities in order to achieve their common goals. Parties to an agreement aiming at the establishment of a civil law association are obliged to place at common disposal their financial contributions necessary for the establishment of a civil law association. The parties shall be entitled to establish such entities, even without financial contributions, in order to promote their common economic interests and coordinate their activities to that end.

A civil law association is understood as a partnership arrangement between parties to a respective agreement. The relevant case law considers a civil law association as an atypical cooperation-agreement if articles of incorporation do not set out rules on the treatment of the profit or of the loss amongst contractual partners.

Civil law associations also have legal personality and so the right to acquire property or conclude contracts under its own name. In addition to this, and contrary to the establishment and registration of a business entity under Act IV of 2006 on business associations (Company Act), the foundation of civil law associations requires neither registration in the company registry nor in the registry of non-profit organisations maintained by the general courts.

4.2 Individual organisational model

4.2.1 Business entities

Provisions on companies established for pursuing business activities in Hungary are set out in the Hungarian Companies Act. This Act determines six different corporate forms which may serve for founders as a basis to carry out business activity in the country – the Unlimited Partnership (kkt), Limited Partnership (bt), Limited Liability Company (kft), Company Limited by Shares (either privately or publicly founded (zrt or nyrt respectively) and Grouping.

Only companies duly formed and registered under Hungarian law may undertake obligations and acquire rights in their own name. In line with the Act, companies duly formed by law have the right to acquire property, conclude contracts, file lawsuits or be subject to actions brought against them irrespective of whether they have legal personality or not.

With Hungary's Accession to the EU, it is now possible to establish a Grouping as a business entity under the Companies Act. The purpose of a Grouping is to facilitate or develop the economic activities of its members by pooling resources, activities or skills. Article 319 of the Companies Act also sets out that, unless otherwise provided by the Articles, its members are entitled to benefit and use the provided services of the grouping without compensation. This form of partnership vested with coordinating duties is sufficient for an education identity federation, although the administrative costs for establishing and maintaining such a legal entity are not considered a worthwhile investment – and certainly not in a newly established federation.

Although Hungarian company courts work fast and efficiently with regard to corporate registration matters, the costs of establishing a business and amending Articles of Associations in Hungary are unreasonable, considering the continuously expanding federated identity constantly seeking new members and federated partners.

Nevertheless, the Hungarian Civil Code sets out a broader perspective for establishing legal entities with a legal personality. According to Article 685, subsection c), economic organizations include state-owned companies, other state-owned economic agencies, cooperatives, business associations, professional associations, non-profit organisations, companies of certain legal entities, benchmarks, water management organizations, forest management associations, court bailiffs' offices, and private entrepreneurs. The provisions governing economic organizations are applied to state, local government, budgetary agencies, associations, public bodies, and foundations in connection with their economic activities, unless the law provides otherwise for such entities with legal personality. In line with these provisions, all legal entities listed in Article 685, c) of the Civil Code have legal personality, and so are entitled to acquire rights under its name.

4.2.2 Non-profit entities

Since the main purpose of establishing a federated identity in the educational sector rarely involves business activities, academic and research federations usually do not establish business entities and instead set up non-profit organisation.

Act II of 1989 on Societies, as well as Article 61-64 of the Civil Code, set out legal regulations concerning non-profit societies (in Hungarian "social entities"). Societies are voluntarily established self-governing organisations that

are formed for the purposes defined in their statutes, have registered membership, and organize their members' activities in order to achieve their objectives. In line with Article 62, societies may not be established with the sole and principal purpose of pursuing business activities. Considering the administrative costs of establishing non-profit organisations in Hungary, an important aspect is the obligation to register in the Court Registry of Non-profit Organisations. According to the general rules on such organisations, Article 54 also sets out that they may pursue economic activities with the aim of promoting their non-profit activities, although profits earned from business activities may not be distributed among its members.

5. Summary

The structure of an organization will determine the modes in which it operates and performs. The chosen organisational structure determines the rights and obligations of the federation as well as of its members. Depending on the organisational structure, whether it means a contractual relationship or a formal organisational structure between federated members, the acceptance of new members can be simplified or complicated. However, one of the most important reasons for selecting a suitable organisation is the external relationship of the respective organisation. Any federated identity needs legal personality to some extent in order to acquire rights and be able to represent the interests of its members effectively.

By analysing academic and further education federations in the European Union, federation members are most likely to conclude cooperation or service agreements, rather than set up an independent organisational framework, e.g. an independent company or non-profit organisation. The Hungarian legal environment does not merely support the setting up of a collaboration model for independent organisations on a contractual basis but also provides several options for the establishment of individual organisations. However, for a newly established federated identity it is feasible to establish a flexible and adaptable contractual framework with its future and recent members in order to be able to comply with any future changes.

A comparison of the regulation of *prædial servitude* in Hungary, Germany and Austria

SERÁK, István

ABSTRACT *The aim of the paper is to provide – as far as possible – a full overview of the system of the servitude, based mainly on the substantive rules of the civil codes of Hungary, Germany and Austria, besides the jurisprudence and the scientific literature of the three countries. The paper deals with the questions of the conceptual bases of this legal institute: the definition and the principles, the obligee and obligor, the subject matter, the creation and the abrogation, the protection and the enforcement of the servitude, and the legal servitude of passage, and the changes introduced in the new civil code of Hungary, the Act CXX of 2009 are also estimated in the last chapter. As result of the comparison the paper shows the similarities and the differences in the scientific achievements, in spite of the common legal terms and definitions of the civil codes. The Hungarian civil code took the system and regulation of the Austrian and the German civil codes into consideration by adopting a few of their rules, and, although, for example, the subject of servitude is more properly defined in Hungarian law compared to the others in question, the Ptk. (the Hungarian Civil Code) suffers from regulatory deficiency in connection with *prædial servitude* – which is remarkable, especially in the field of their formation and abrogation.*

1. Introduction

Prædial servitude is one of the eldest legal institutions of Private Law. They have remained constant in both purport and objective over the centuries, long after the time of the Roman Twelve Tables (where they were first mentioned). Although *prædial servitude* are a stable institution with a regulatory system with very much in common with Roman rules, they are easily applicable for the more modern needs of technical and economic interests, and they can be adopted not only in respect of two pieces of land or vineyards, but of any two estates in close proximity. Although the agrarian sector plays a significant role in the economy of today's Hungary, *prædial servitude* were more or less expunged, not only in everyday legal practice, but also in Hungarian jurisprudence and in its professional literature, apart from the textbooks used in legal Higher Education. This is why this institution was selected by the author

for comparison with the system and regulation of the German BGB and the Austrian ABGB.

2. Conceptual bases of praedial servitude

Due to the strong influence of the Roman tradition, praedial servitude is defined similarly in the three civil codes. According to Section 166 Paragraph 1 of Act IV of 1959 (the Hungarian Civil Code [Ptk]), a praedial servitude may be granted and held by the possessor of a real property on another person's real property to use the other estate in a specific way or to demand that the possessor of the servient tenement refrains from otherwise rightful conduct. The German BGB (Section 1018) speaks of servitude with the same content and the same phrasing, and, since it is regarded as part of the real property (according to Section 96 of the BGB) it cannot be transferred separately from the real property, whilst every right belonging to the estate also applies to the servitude.¹ In the Austrian ABGB, personal and praedial servitude are not precisely separated, and in Sections 472 to 474 praedial servitude is defined from the opposite direction - not as the rights of the dominant estate, but as the obligations of the possessor of the other piece of land to assign its use or refrain from a certain activity.

These legal definitions given by the codes are not interpreted in a highly uniform way by legal science, as almost every expert or university professor has his own interpretation, depending on which element of the definition he considers significant. According to the leading opinion of German legal literature, servitude establishes legal community between the possessors of the estates in question, as they are used in parallel to eke out the dominant land economically, where the interests of the parties are the same concerning the maintenance of the servient estate to conserve its consistence on one hand, but they are cross-interested concerning the way of use on the other hand.² The Hungarian legal literature, influenced by German law, brings the right of the possessor of the dominant to use the servient estate to an specified extent into focus.³ In the opinion of Endre Nizsalovszky, ownership of the dominant estate is broadened by those same rights which the possessor already has, and these rights are fully integrated into ownership.⁴ Since the lands are owned by several

¹ Dieter, Eickmann - Winfried, Pinger: *Immobiliarsachenrecht*. C. F. Müller, Heidelberg, 1988 p. 370.

² Dieter, Eickmann - Winfried, Pinger op. cit. p. 362.; Wilhelm, Jan: *Sachenrecht*. Walter de Gruyter & Co., Berlin, 1993 p. 611.

³ Mecsér, József: *Telki szolgalmak*. In: *Magyar Jogászegyleti Értekezések*. Franklin Társulat, Budapest, 1914 pp. 51-53.; Zoltán, Ödön: *A telki szolgalmak egyes kérdéseiről*. In: *Szövetkezeti Jogi Tájékoztató* 1981/7. pp. 26-28.

⁴ Nizsalovszky, Endre: *Korlátolt jogok*. In: Szladits, Károly (ed.): *A magyar magánjog V. Dologi jog*. Grill Károly Könyvkiadó Vállalata, Budapest, 1942 p. 517.

people, the economic function of servitude is to enhance utility⁵ - but this means not only rights, but also obligations on both sides, especially when accessories or equipment are used in connection with the servitude.⁶ The method of usage is not part of the definition, and so the extent of the right must be assigned in every case.⁷

Since praedial servitude applies to non-possessory interests in land, cases are limited in content and extent, and their limitations are defined by law to protect the interests of the parties. The majority of these restraints - which can also be called principles - are a heritage of Roman law. The first and most important is that the possessor of the dominant estate is obliged to respect the rights of the possessor of the servient and to refrain from any conduct, which may jeopardise their exercise. This principle, mentioned in Section 169 Paragraph 1 of the Ptk. and in the first sentence of Section 1020 of the BGB, is an abridgement of the obligee, and must be considered case by case. The German law completes this principle in Section 1023 of the BGB by declaring that the possessor of the servient estate can claim modification of the place where the servitude rights are allowed to be used if the usage at this place would needlessly restrain the rights of the possessor of the servient land. The principle that the servitude is part of the land and so cannot be transferred to somebody without the land itself, is also a general rule with Roman origins (Section 168 Paragraph 3 of the Ptk., and Section 485 of the ABGB, although the German code does not even mention it).

3. The obligee and the obligor of praedial servitude

In German legal science servitude comprises subjective real rights, as they bear a relation not only to the estate as the object of the right, but also to the person as its subject. This leads to correspondence between the two rights and also between a right and a piece of land, although the land is not a separate subject of the servitude, since the obligee can be only a natural person, and the subjective nature determines simply the scope.⁸ The servitude conceptually requires at least two pieces of land - which have been denominated respectively as dominant or servient since Roman times (from the phrases *praedium dominans* and *praedium serviens*) and their possessors - also at least two persons. The pieces of land are cohesive parts of the Earth's surface in the possession of the parties and are physically able to indirectly serve another piece of land, or to gain financial benefit from being served. The land can be seen as the indirect obligee of the servitude right, as it determines the whole

⁵ Lenkovics, Barnabás: *Dologi jog*. Eötvös, Budapest, 2001 p. 222.

⁶ Csongrád Megyei Bíróság, I. Gf. 40 303/1994/4.

⁷ Nizsalovszky, Endre op. cit. p. 538.

⁸ Dieter, Eickmann - Winfried, Pinger op. cit. pp. 367-368.; Wieling, Hans-Josef: *Sachenrecht*. Springer, Berlin, 1997 p. 388.

existence and usage of the right, being created to serve its objective interest, and the possessor of the land as the direct obligee is simply the actual user of the right.

According to Section 166 of the Ptk. the obligee of *prædial servitude* is the permanent possessor of the estate. This definition is quite recent compared to the German and Austrian civil codes, since the obligee in the German legal phrase is defined as the possessor in Section 1018 of the BGB and in Section 472 of the ABGB, but the Austrian code uses also the legal term of possession instead of ownership in connection with servitude in Sections 473 and 474. The concept of possession is more appropriate and also better fits everyday legal praxis, since the obligee of servitude rights on agricultural land is mainly the actual possessor, who is unlikely to be the same person as the owner. The servitude of passage is a unique right, since its user can be not only the owner or possessor of the land but any person connected with them, e. g. their relatives or visitors.

The servitude is, therefore, acquired by the simple fact that someone becomes the possessor of the dominant land and is entitled to use the servient land with no further legal action. The person of the obligee or the obligor can be taken into consideration only in a trial, where their statements are material besides the expert opinions of expert witnesses to help the court to decide over the amount of devaluation of the servient land.⁹

4. The subject matter of *prædial servitude*

4.1 The possible subject matter of *prædial servitude*

By creating a *prædial servitude* the right of usage on a certain part of the servient estate is divided between the parties. *Prædial servitude* can be created for almost every economic demand of the dominant estate, but their normal types are servitudes for agrarian or building purposes, for transportation and to take other benefits of the servient land.¹⁰ In Section 166 Paragraph 2 of the Ptk. an analogous typology is regulated, although other types, e. g. cellar servitude, are also mentioned – which can also be seen as a heritage of Roman law; only cable servitude is a product of the modern era. The ABGB enumerates in Section 475 Paragraph 1 the common types of urban and, in Section 477, *prædial servitude*; in the opinion of the Austrian commentaries, these are not complete enumerations and refer only to the character of the servitude.¹¹

⁹ BH 1987. 161.; BH 1996. 144.

¹⁰ Nizsalovszky, Endre op. cit. pp. 223-224.; pp. 532-537.

¹¹ Rummel, Peter (ed.): *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*. Manz, Wien, 1990 p. 582.

When creating a *prædial servitude*, it is possible for the parties to lay down a wide range of rights and obligations as the subject matter of the servitude, but they must take the interest of the other party into account. According to the considered dogma of German jurisdiction, the subject matter of a *prædial servitude* must be precisely defined, so a servitude e. g. for an abridgment against construction works for an unlimited period of time cannot be created, since the object is uncertain – though this does not mean that the obligee could not prohibit, with the protection of possession, any kind of construction on the servient estate, which impedes, restricts, or eliminates the exercise of his rights.¹²

In the opinion of FRITZ BAUR, the content of the *prædial servitude* should be regulated in the codes as a general rule, especially in the case of those which the obligees empower to an active proceeding, because the law must prevent the total j8drain of the rights of the obligor.¹³ The German code doesn't contain a rule for the possible subject matter of the servitude, not even with exemplified enumeration, it is mentioned only in a sentence of Section 1019 BGB that the *prædial servitude* must consist of a factual useful purpose for the dominant estate, but another sentence of Section 1019 of BGB limitates the exercise of the servitude at the same time, and declares, that the exercise of the rights must not exceed its necessary extent, which can be seen as a sort of a restraint against the creation of the *prædial servitude*, and it is a warranty against the arbitrary conduct of the obligee.¹⁴

4.2 The rights and obligations of the parties

The definitions of the civil codes and their elements are the main legal background for the rights and obligations of the parties. With the right to use another property and demand the restraint of the obligor, the Ptk. in Section 166 Paragraph 1, the BGB in Section 1018 and the ABGB in Sections 472 and 473 regulate expressly only the rights of the possessor of the dominant estate. Within these restraints, the obligor is entitled to every real right he is otherwise allowed to exercise over his land. The main obligations of the obligee are to respect the interests of the possessor of the servient estate (Section 169 Paragraph 1 of Ptk.), and to bear the costs of the equipments or instruments used during the exercise of the servitude (Section 169 Paragraph 2 of Ptk.). A few other sections of the Austrian code – especially Sections 483, 489, 491 or 494 – regulate "subsidiary obligations" for the obligee, e.g. the maintenance of the consistency of the servient land or its equipment.

¹² Glaser, Hugo: *Das Nachbarrecht in der Rechtsprechung*. Neue Wirtschafts-Briefe, Herne/Berlin, 1967 pp. 193-194.

¹³ Baur, Fritz: *Lehrbuch des Sachenrechts*. C. H. Beck, München, 1968 p. 274.

¹⁴ Dieter, Eichmann – Winfried, Pinger op. cit. p. 366.

The possessor of the servient estate has mainly obligations; the most significant of them is the obligation to assign the usage to a specific extent and to bear the exercise of the servitude rights. Besides this commitment, the possessor of the servient estate has also "subsidiary obligations" defined by the civil code in Germany and in Austria. In the German law he is entitled to keep his land – involving all necessary equipment or instrument – in good repair, considering the demands of the dominant land, though this entitlement is not enforceable before a court by the obligee (Section 1021 of BGB).¹⁵ It is similarly regulated in the ABGB, with only two exceptions. Among the rules of beneficial ownership, in Sections 508 and 515: the possessor of the servient estate is not liable for the maintenance of the path used by the obligee, and also not for gathering fruits which the obligee had forgotten.¹⁶

The gathering of each right and obligation of the parties in the real estate register is not necessary if the servitude is created by act; but in the case of contractually created servitude it is recommended by German jurisprudence, since the only guide to rights is the contract itself.¹⁷

4.3 Modification of praedial servitude in terms of object matter

As "perpetual" praedial servitude must serve the demands of the obligee with its whole content for an unlimited time, the code must regulate either potential changes in the demands of the dominant or those in the ability of the servient estate to be used, as in the general rule of the "*clausula rebus sic stantibus*", so the content of the servitude must be able to be changed when circumstances change. Only the German BGB regulates the modification of the praedial servitude (Section 1023) concerning only the place of exercise, and the charges on the possessor of the servient estate must not become more onerous.

Leading opinion in the German and Austrian law and jurisprudence is that changes in demands must not be result of an arbitrary decision of the obligee, and, in fact, are not so if based on local circumstances or for other relevant reasons.¹⁸ Section 484 of the ABGB explicitly forbids the arbitrary modification of servitude rights, and the German law also does not favour changes in a registered servitude right, although the parties are permitted to modify the rights by contract.¹⁹ Pinger considers that the strict rules for modification – even if the parties are of good faith and have respect – is an effect of the general rule

of the "*numerus clausus*" of real rights, since one side's profits always mean obligations of restraint of a just entitlement on the other.²⁰

The German code also regulates within the modification of the servitude the cases when either the dominant or the servient estates are legally divided. According to the first sentence of Section 1025 of the BGB, if the dominant estate is divided, the servitude is retained by each new part, although the charge on the servient estate must not grow with the increase in the number of obligees. When profit favours only one certain part of the dominant land, the servitude ends in respect of the other parts on the ground of the second sentence of Section 1025 of BGB. In relation to the division of the servient land, in Section 1026 of the BGB there are rules only for the case when a certain part of the former servient estate – and not the whole – serves the dominant one and belongs to only one newly established piece of land; in this case the servitude will remain on the one to which the part in question belongs.

The prohibition of a more onerous charge on the servient estate is, in the opinion of Pinger, a declaratory rule of the code, since the legal consequences of the division of the land must be defined in the concrete situation, and it would seem unjust to uphold a right such as praedial servitude without effective economic ground. In his example from a large piece of land with an existing building whose possessors are entitled to servitude of passage there is a separated part upon which another building stands, and the possessors of this building will also be entitled to servitude of passage, though this will increase the charge on the servient estate.²¹

5. Creation and abrogation of praedial servitude

5.1 Creation and abrogation in Hungarian law

Concerning the creation of praedial servitude, the Ptk. in Section 168 Paragraph 1 refers to Section 158, the rules of the creation of beneficial ownership over real estates. A praedial servitude can be granted by contract of the parties, act, or decree of the court or other authority. The Hungarian civil code emphasises in Section 158 that beneficial ownership of real estate – which is an applicable rule also for servitude – must be recorded in the real estate register. This means that, not only servitude granted by contract, but those created by official decree must also be registered. The registration of the servitude is not only an obligation which follows from the general rule of the publicity of real rights, but at the same time emerges as an product of the limitation of the right of use, and excludes the right of the possessor of the

¹⁵ Iro, Gert: Bürgerliches Recht IV. Sachenrecht. Springer, Wien, 2008 p. 221.

¹⁶ Koziol, Helmut – Welser, Rudolf: Bürgerliches Recht. Manz, Wien, 2000 p. 375.

¹⁷ Dieter, Eichmann – Winfried, Pinger op. cit. p. 365.

¹⁸ Wieling, Hans Josef: Sachenrecht. Springer, Berlin, 1997 p. 391.

¹⁹ Baur, Fritz op. cit. pp. 275-276.; Rummel, Peter op. cit. p. 579.

²⁰ Dieter, Eichmann – Winfried, Pinger op. cit. pp. 363-366.

²¹ Ibid. pp. 368-369.

servient estate to protest.²² It is mentioned in Hungarian jurisprudence that the dominant and the servient estates must be owned by different persons,²³ but what legally matters is that they are registered separately in the real estate register.²⁴

It is expressly mentioned in Section 168 Paragraph 2 of the Ptk. that a praedial servitude can be obtained by adverse possession under the condition that the possessor of the other real property has not protested against the use for ten years, and the possession of the obligee is not based on a favour of the obligor or is not allowed until withdrawal, as these cases shall not lead to adverse possession. The Royal Supreme Court of Hungary laid down in Principle Decision Nr. 37 that the main condition of adverse possession is to possess the right with the purpose of acquisition, which means the possession must be servitude-like, and so merely passing over a neighbour's land will not create servitude of passage. According to this decision, a right is possessed "servitude-like" if the possession is lawful and its purpose is recognizable to everybody. Consequently, this means that usage available to everyone will never lead to adverse possession.²⁵

Praedial servitude will die by a decree of the court, or if the easement's holder, despite his ability to do so, does not exercise the easement for a period of ten years, or, if he has borne being prevented from exercising it for the same period of time, the servitude (Section 170 of Ptk.) dies. However, it is also possible for the obligor to cancel the servitude right with a passive, counter-adverse possess. Servitude rights can be abrogated in a contractual way: the obligee can give them up by a disclaimer, both parties can terminate the servitude with a new contract and servitude granted by contract can die depending on the actual terms and conditions of the original contract.²⁶ The servitude will die if a part of the servient estate, necessary to exercise the right, becomes unusable by the obligee, or if the economic purpose justifying the servitude dies.²⁷ Although auction is a type of original acquisition of ownership, it will not abrogate servitude in the opinion of the Supreme Court.²⁸

The question whether the obligee is entitled to compensation after the servitude is abrogated, and if the answer to this question is yes, its extent must, in my opinion, be decided by circumstances, though, in the eye of DOROGHY, the obligee is entitled to full compensation at all times, since the servitude is

created not only for the purpose of necessity, but also for the more comfortable usage of the land.²⁹

5.2 Creation and abrogation in German law

Concerning the creation and abrogation of praedial servitude, the German BGB is an extraordinary civil code among the three in question, as there are no explicit rules mentioned in it, and so the legal tradition and the general rules of the system of real rights as a whole and their interpretation are the main guidelines for German legal practice and jurisprudence. On the ground of Section 873 of the German code, the general rules for the creation and abrogation of real rights should be applied also to non-possessory interests, with two necessary requirements prescribed in the second sentence: the agreement of the parties and the registration of the right in the real estate register. This means that the standard way of the creation of servitude in German law is a contract between parties who must agree over at least the subject matter in connection with both lands, although the registration of the right in the real estate registry is a deed for the servient side only. Although there are no definite rules in the German code, the creation of servitude by adverse possession or decree of the court or other authority is also possible.³⁰

A servitude can be cancelled in German law – applying also the general rules – by the disclaimer of the obligee, by deleting the right from the register (Section 875 of BGB), the supervention of a precedent or of a subsequent condition (Sections 158 and 163 of BGB), but unregistered servitude expires after thirty years.³¹ A speciality of German law is that not only the decree of the court or the authority mentioned neither in the code nor in jurisprudence as a possible way to cancel the servitude, but also the rarer types of abrogation usually found in the law books – e. g. the fusion of the two pieces of land or the incapacity of the relevant part of the servient estate to be used by the obligee.

5.3 Creation and abrogation in Austrian law

Section 480 of the ABGB indicates the contract, the rule of an act, and the decree of the authority the possible ways to obtain a servitude right – though the decree of the authority is mentioned in Austrian jurisprudence only in relation to legal servitude of passage, which is regulated through a special Act.³² The main conditions of the creation of praedial servitude are a legal title and a

²² Nizsalovszky, Endre op. cit. p. 538.

²³ EBH 2004. 1095.

²⁴ BH1984. 148.; BH 1996. 84.

²⁵ Rhorer, István: A telki szolgalm elbirtoklásának korlátai. In Magyar Jogi Szemle 1938/1. p. 21-22.

²⁶ BH2002. 356.

²⁷ Nizsalovszky, Endre op. cit. p. 226.; Rhorer op. cit. pp. 22-23.

²⁸ BH1983. 355; Legfelsőbb Bíróság Pfv. II. 829/2001/4.

²⁹ Doroghy, Kálmán: A telki szolgalmi jog terjedelmének és megszüntetésének kérdéséhez. In Magyar Jogi Szemle, 1924/1. pp. 49-54.

³⁰ Dieter, Eichmann – Winfried, Pinger op. cit. p. 369.

³¹ Wieling, Hans Josef op. cit. p. 388.

³² Iro, Gert op. cit. p. 226.

rightful *modus*; an appropriate legal title can be a contract or a will – to this point KOZIOL and WELSER quote Section 426 of the ABGB and the registration of the servitude in the registry in relation to the correct *modus*.³³ If the servitude is granted by contract, the rights of the parties will apply to the title,³⁴ but, without registration in the real estate registry, their agreement will remain only a simple contract concerning the use of the servient land and bind only the contracting parties, but not their successors (although registration can be claimed on the ground of the contract).³⁵ Though it is not mentioned expressly in the Austrian code, servitude can also be created in legal practice by adverse possession, but the leading opinion of the Austrian jurisprudence is that the future obligor must be aware of the exercise of the right, notably the aim and the subject matter.³⁶

The types of abrogation of the servitude mentioned in the ABGB are based mainly on the strong Roman tradition. It is common for all types of servitude to die if the servient piece of land falls into ruin (Section 525 of the ABGB), and if the economic purpose of the right dies.³⁷ The fusion of the ownership of the two pieces of land will not end the servitude according to Section 526 of the ABGB, since the leading opinion of Austrian jurisprudence is that servitude only exists without the union of the pieces of land in the real estate register.³⁸ The supervention of a precedent or a subsequent condition or a rescindment of immediate effect can also abrogate servitude created by contract.³⁹

6. The protection of praedial servitude

In German law the obligee of the servitude is the possessor of a right, and, according to Section 1029 of the BGB, he is entitled to every possible legal instrument for the protection of his possession, and the Austrian law provides an "*actio confessoria*" in Section 523 of the ABGB. Unfortunately, in Hungarian law, the Ptk. does not speak clearly about this, and it is mentioned in jurisprudence only by ENDRE NIZSALOVSKY that the possessor of the dominant estate is entitled to every instrument the possessor of a piece of land is entitled to when his possession faces illegal intrusion or influence, since he is the possessor of just a right, but not the whole servient land.⁴⁰ The plaintiff can apply for an order for the respondent to cease certain conduct, to give compensation, to make up leeway, to accept a ban by the plaintiff, to register a

³³ Koziol Helmut – Welser, Rudolf op. cit. p. 382.

³⁴ Iro, Gert op. cit. p. 223.; Koziol Helmut – Welser, Rudolf op. cit. p. 384.

³⁵ Rummel, Peter op. cit. p. 591.

³⁶ Ibid. p. 585.

³⁷ Koziol Helmut – Welser, Rudolf op. cit. p. 385.

³⁸ Iro, Gert op. cit. p. 233.

³⁹ Ibid. p. 234.

⁴⁰ Nizsalovszky, Endre op. cit. pp. 575.

right not yet registered or re-establish a right deleted from the registry.⁴¹ These are the rights of the parties applicable in formal trials, but they are also entitled to all means to protect possession.⁴²

In Austrian jurisprudence, the term plaintiff is used for the possessor of the dominant estate, and the term respondent to the possessor of the servient.⁴³ Since the registered real right has absolute effect, the defendant can be anyone who disturbs the possession of the obligee, and so not only the actual possessor of the land, but also a third party.⁴⁴ There is a difference between Hungarian and Austrian jurisprudence on the question whether every possessor or possessor of the land must sue or be sued if at least one of the pieces of land in joint ownership or possession of more than one person. Austrian jurisprudence answers yes to this question,⁴⁵ but the opinion of Hungarian jurisprudence is that a claim against one possessor or possessor is a claim against every possessor or possessor with only one exception: on recording the right in the real estate register.⁴⁶

7. Legal servitude and the servitude of passage

On the grounds of legal servitude, the possessor of the dominant estate is entitled to use the servient one without any procedure of formalising servitude. The Ptk. regulates only one legal servitude as a right, that of passage (Section 167) which is a breach with the former Hungarian tradition based on German law where the legal servitude of passage is a neighbour law (Section 917 of BGB).⁴⁷ The appropriate place of the legal servitude of passage is scientifically argued: in the German literature, Eichler's opinion is, that it is a part of property rights,⁴⁸ but, in the mind of Wieling, it is a personal legal servitude, as the person entitled is determined by the code.⁴⁹

For German judicial practice the servitude of passage is a right originating in the ability to use neighbouring land in exigency and which can be exercised fundamentally on the grounds of the need for normal, correct use of the land,⁵⁰ and this exercise is without limitation, but the interest of the neighbours must be

⁴¹ Iro, Gert op. cit. p. 232.; Nizsalovszky, Endre op. cit. pp. 575-577.

⁴² Nizsalovszky, Endre op. cit. p. 578.

⁴³ Iro, Gert op. cit. p. 232.

⁴⁴ Baur, Fritz op. cit. p. 277.

⁴⁵ Ibid.

⁴⁶ Nizsalovszky, Endre op. cit. p. 577.

⁴⁷ Bagi, István: Ingatlanjog. Szent István Társulat, Budapest, 2007 pp. 65-66.

⁴⁸ Eichler, Hermann: Institutionen des Sachenrechts. Duncker&Humblot, Berlin, 1957 p. 288.

⁴⁹ Wieling, Hans Josef op. cit. p. 346.

⁵⁰ Glaser, Hugo op. cit. p. 159.

taken into account.⁵¹ The servitude of passage can be exercised not only if the land has no connection to the road-system, but if the existing connection is inconvenient,⁵² and unfair or otherwise arbitrary behaviour by the neighbours can also justify it, if the land lost the connection as a result.⁵³ The German code regulates special cases in Section 918: if a piece of land is divided into two new pieces and one of these has no connection to the road-system, the possessor of this land can pass over the other. A speciality of German jurisdiction is that the rules of the legal servitude of passage are applied also to pipelines and cables.⁵⁴

Since the servitude of passage is a legal servitude, it can be exercised principally only as a footpath on the grounds of the decisions of the Hungarian courts, although the obligee can certify that his interest to approach his land by vehicles is more reasonable than the interest of his neighbour in the undisturbed possession of his estate.⁵⁵ The leading opinion of Hungarian jurisprudence is that the exigency must not be result of actionable conduct by the obligee.⁵⁶ The servitude of passage can also be granted if the approach over the neighbour's land is not the shortest but is reasonable.⁵⁷

8. Summary

The author has aimed with this paper to give an overview of the system of praedial servitude, from the questions of their conceptual bases and principles via their formation and abrogation and as far as a few specific fields. Praedial servitude is regulated very widely in Hungary, Germany and Austria, since the rules of all these three codes are based on stable and carefully worked out Roman law. The Hungarian civil code took into consideration the systems and regulation of the Austrian and German civil codes, with the adoption of a few of their solutions. Although, for example, the subject of servitude is more properly defined in Hungarian law compared to the other codes in question, the Ptk. (the Hungarian Civil Code) suffers from regulatory deficiency in connection with praedial servitude - which is remarkable - especially in the field of their formation and abrogation. Reviewing some opinions of German legal science, focusing especially on the legal servitude of passage,⁵⁸ the author is convinced that this legal institution should be regulated more finely, since it is more

necessary for the partners to enlist the services of the judicial system, if the rules in the code are not adequate.

The new civil code of Hungary, Act CXX of 2009, initiated a few changes in the system, although the majority of the problems indicated in the paper are not yet solved. The ways of formation in Section 4:188 and those of abrogation in Section 4:190 are irritating, compared with the rules of the present code, and so the simplified legal solutions found in the Ptk. are now more detailed, and, thanks to the more thematic structure, we can have a better overview of the whole regulation of this institution. However, besides these remarkable changes, several questions still remain unsolved. The definition should have been amended by the rule that the possessor of the servient estate is not obliged to cive pursuit, and other rules should have been added concerning the defence of the rights or the "dormant servitude". In the author's opinion, the regulation of the abrogation of servitude after the division of either the dominant or the servient piece of land should have also been adopted from the German BGB.

⁵¹ Ibid. pp. 161-164.

⁵² Glaser, Hugo op. cit. p. 159.

⁵³ Ibid. p. 166.

⁵⁴ Ibid. pp. 162-163.

⁵⁵ Győr-Moson-Sopron Megyei Bíróság Pf. 21 902/1999/3.; Baranya Megyei Bíróság I. Pf. 20 435/2001/7.

⁵⁶ Kolosváry, Bálint: A tulajdonjog. In: Szladits Károly (ed.): A magyar magánjog V. Dologi jog. Grill, Budapest, 1942 p. 155.

⁵⁷ Legfelsőbb Bíróság P. törv. I. 21. 197/1980.

⁵⁸ Wieling, Hans Josef op. cit. p. 346.

Participation Rights of the Works Council before the Integration of Temporary Agency Workers – the German Model

WALLAT, Judith Maria

ABSTRACT Nowadays the use of temporary agency workers is a daily routine in many companies. However, from the employees' point of view the use of temporary agency workers leads, in the long term, to a shift away from long-term work contracts in their company and thus endangers the jobs of the permanent staff. Therefore, works councils are trying to restrict the use of temporary agency work. The principle measure for doing so derives from the statutory right of the works council to be consulted before the integration of a temporary agency worker. The works council thus finds itself in the position that it can refuse to give consent to an individual's integration. As a consequence, the user company often institutes legal proceedings with the aim of persuading a court to give consent to its decision, in this way substituting the (otherwise necessary) consent of the works council. However, it has for a long time not been clear which objections of the works council are valid prevent the use of a temporary agency worker and which, on the contrary, are invalid. There has therefore been considerable legal uncertainty not only for those works councils which refused their consent for a specific reason, but also for the user companies which initiated the proceedings. In recent years several new decisions of the German Federal Labour Court (Bundesarbeitsgericht) and of some State Labour Courts (Landesarbeitsgerichte) clarified the legal situation in this context. The following article provides a comprehensive overview of the various factors relating to the necessary works council involvement when integrating temporary agency workers. In this respect, typical objections by such councils will be analysed in detail.

1. Introduction

In Germany, the comprehensive body of legislation containing rules covering the various aspects of temporary agency work is the Temporary Employment Act¹ the original version of which came into effect in 1972. It was

¹ Arbeitnehmerüberlassungsgesetz in der Fassung der Bekanntmachung vom 3. Februar 1995 (BGBl. I S. 158), das zuletzt durch Artikel 2 des Gesetzes vom 24. Oktober 2010 (BGBl. I S. 1417) geändert worden ist.

only in 1982, however, that, with the insertion of a new Section 14² also works constitution factors regarding the legal position of temporary agency workers were incorporated into this legislation. As, today, the use of temporary agency workers is a daily routine in many companies employees worry that the massive use of temporary agency workers will lead, in the longer term, to a shift away from long-term work contracts and so endanger the jobs of permanent staff. It is Section 14 of the Temporary Employment Act which is, therefore, very often referred to by the user companies' works councils when they try to prevent the use of temporary agency workers. This is due to the fact that Section 14 provides them with a statutory right to be consulted before the integration of a temporary agency worker. In the following paper the legal situation in Germany as to the content and scope of this statutory right will be analysed.

2. Section 14 of the Temporary Employment Act

Sec. 14, subs. 3 of the Temporary Employment Act states that the works council of the user company has to be involved according to Sec. 99 of the Works Constitution Act³ before the assignment of a temporary agency worker.

2.1 Purpose of the provision

This statutory provision accommodates the peculiarity of temporary agency work. Temporary agency work is characterised by a specific contractual relationship between the temporary-work agency and the user company and also by the *lack of an employment relationship* between the temporary agency worker and the user company. Unlike the situation under a contract to produce some specific piece of work,⁴ the user company is allowed to use the provided personnel according to the ideas and aims of the company just as if the temporary agency worker were its own employee. A temporary agency worker is fully integrated in the user company and performs his duties exclusively according to its authority.⁵ Employer's rights are, therefore, in some way divided. This firm integration means that the works council of the user company has a statutory right to be involved before the assignment of a temporary agency worker.

² Gesetz zur Bekämpfung illegaler Beschäftigung – BillBG – vom 15. Dezember 1981 (BGBl. I S. 1390).

³ Betriebsverfassungsgesetz in der Fassung der Bekanntmachung vom 25. September 2001 (BGBl. I S. 2518), das zuletzt durch Artikel 9 des Gesetzes vom 29. Juli 2009 (BGBl. I S. 2424) geändert worden ist.

⁴ Sec. 631 of the German Civil Code.

⁵ Federal Labour Court 25.1.2005 – 1 ABR 61/03, In: Neue Zeitschrift für Arbeitsrecht 2005/20 p. 1199.

2.2 Legal character of the reference

Sec. 14 subs. 3 is a short legal norm. It states that the works council must be involved before the integration of a temporary agency worker. However, it does not contain any information as to the way in which it must be involved or in respect of what factors. It is, for example, not clear from the regulation itself if the user company must seek positive consent from the works council or merely needs to provide (general or detailed?) information about the intended integration of temporary agency workers. In respect of these questions, however, the regulation refers to another norm in German labour law, which is Sec. 99 of the Works Constitution Act. This regulation is not designed for temporary agency workers but for workers in general. Via the reference in Sec. 14 subs. 3 of the Temporary Employment Act it is, however, also declared applicable to temporary agency workers.

Before taking a closer look at the exact form of the participation required by Sec. 99 of the Works Constitution Act, we need to look at a question which is not only of academic interest, but also has an important impact on the application of the participation right in practice. The problem in question is that Sec. 99 of the Works Constitution Act stipulates that the participation right is dependent on the existence of at least 21 permanent employees in the company. In smaller companies, therefore, the involvement of the works council before the integration of workers is not required. Sec. 14 subs. 3 of the Temporary Employment Act, on the contrary, does not contain such a restriction. It is, therefore, debatable whether the requirement of at least 21 employees is also applicable in a situation where a temporary agency worker is to be integrated in the company for a specific length of time. Many academics⁶ argue against the applicability of the requirement that the company needs to have at least 21 regular employees. According to this opinion, the works council would also be involved before the integration of temporary agency workers in cases where the user company has less than 21 employees. The more convincing opinion, however, argues in favour of applicability. The advocates of this latter opinion give two particular reasons. The first is that Sec. 14 subs. 4 of the Temporary Employment Act only intends to expand the *personal* scope of the works council's participation. In this respect it equates temporary agency workers with normal employees. It was not intended by Sec. 14 to broaden participation rights in general.⁷ This thought leads directly to the second reason. If the

⁶ Ulber, Jürgen: Arbeitnehmerüberlassungsgesetz – Basiskommentar zum AÜG, BUND Verlag, Frankfurt a. M., 2008, § 14 nos. 217-220; Wank, Rolf. In: Müller-Glöße, Rudi – Preis, Ulrich – Schmidt, Ingrid (ed.): Erfurter Kommentar zum Arbeitsrecht. C.H. Beck, München, 2011, § 14 AÜG, no. 18.

⁷ Thüsing, Gregor. In: Arbeitnehmerüberlassungsgesetz – Kommentar. C.H. Beck, München 2008, § 14 no. 147; Wensing, Hans-Hubert - Freise, Agnes: Beteiligungsrechte

requirement of at least 21 employees is not relevant when temporary agency workers are to be integrated, this would lead to the paradoxical result that the works council of a small company would indeed be involved before the integration of a temporary agency worker, but not before the integration of a normal employee. It is obvious that the interests of the permanent staff are more severely affected in the latter case.⁸

As to the required number of 20 employees, it is nearly undisputed that not only permanent staff, but also temporary agency workers who are entitled to vote for the works council of the user company according to Sec. 7 of the Works Constitution Act (i.e. after 3 months) and who are assigned to work regularly on permanent positions, have to be taken into account.⁹ The Federal Labour Court stated in this respect that a temporary agency worker occupies a permanent position in the user company when the position in question is generally occupied for at least six months.¹⁰

2.3 Perception of 'integration'

Before analysing the actual content of the provision, it is necessary to have a closer look at its central criterion - that of '*Übernahme*'. The term is different from that used in the general definition of temporary agency work which is '*Überlassung*' (assignment)¹¹. Due to this inconsistency in the wording under German law it seems necessary to use a separate word in the English translation also. In order to find a good translation, the meaning of the term used in Sec. 14 has to be identified. It is evident that in a comprehensive body of legislation the inconsistent use of terms does not occur by coincidence, and so it was the task of jurisprudence to interpret what is meant by the notion of '*Übernahme*' in the context of Sec. 14 subs. 3 of the Temporary Employment Act. According to the prevailing view of the courts and academics, the term has to be interpreted in the same way as the term '*Einstellung*' (employment) that is used in Sec. 99 of

des Betriebsrats bei der Übernahme von Leiharbeitnehmern. In: Betriebsberater 2004/41 pp. 2238-2245.

⁸ Hamann, Wolfgang. In: Schüren, Peter - Hamann, Wolfgang (ed.): Arbeitnehmerüberlassungsgesetz - Kommentar. C.H. Beck, München 2010, § 14 no. 146;

⁹ Hamann, Wolfgang op. cit. § 14 no. 148.

¹⁰ Federal Labour Court 7.5.2008 - 7 ABR 20/04, In: Neue Zeitschrift für Arbeitsrecht 2008/19 p. 1142.

¹¹ The English translation for the term "*Überlassung*" can be found for example in the English version of the EU directive on temporary agency work directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work). In Sec. 3 it is stated that "assignment" means the period during which the temporary agency worker is placed at the user company to work temporarily under its supervision and direction."

the Works Constitution Act.¹² It is a received opinion that the term '*Einstellung*' as used in Sec. 99 has only a factual component. It is about the *factual integration* of the worker into the user company, i.e. the moment in which the worker actually takes up activity.¹³ The term 'employment', however, cannot be used and, indeed, could neither be used in the original German wording of the law because it implies that there is a contractual relationship between the worker and the company in which he will take up activity. As explained earlier, this is not so in cases of temporary employment. The term therefore used in the present paper will be 'integration'.

It should be noted that, in the given context, the moment when the *legal act* leading to this integration took place is irrelevant. This means that the contract of employment between the temporary-work agency and the temporary agency worker or the contract between the temporary-work agency and the user company are not important here. The mere conclusion of these contracts does not yet have an effect on the legitimate interests of the permanent staff of the user company.¹⁴ Neither it is important for which period of time the temporary agency worker is to work in the user company. Hence, a short integration of just a few days will trigger the statutory participation right of the works council.¹⁵

There are however some situations in which, at first sight, it is not clear whether or not the measure in question constitutes integration in the sense of Sec. 14 subs. 3 of the Temporary Employment Act. We must look more closely and analyse recent case-law in this respect.

As to the *substitution* of a temporary agency worker during an ongoing assignment contract between the user company and the temporary-work agency, it is arguable whether the taking up of activity of the new worker constitutes integration leading to participation rights under the terms of Sec. 14. A substitution is not unusual. It can occur, for example, in a case where the worker originally assigned falls ill during his assignment, and the temporary-work agency is obliged to provide a substitute. Another example could be a situation where the assigned worker does not meet the quality expectations of the user company or behaves unacceptably. Even though it was earlier argued that the mere substitution of the worker does not require further participation by the

¹² Federal Administrative Court 7.4.2010 - 6 P 6/09, In: Neue Zeitschrift für Arbeitsrecht-Rechtsprechungsreport 2010 p. 389; Federal Labour Court 23.1.2008 - 1 ABR 74/06, In: Neue Zeitschrift für Arbeitsrecht 2008/10 p. 603; Federal Labour Court 17.6.2008 - 1 ABR 39/07, In: Arbeitsrechtliche Praxis, BetrVG 1972 § 99 Eingruppierung no. 34; Hamann, Wolfgang op. cit. § 14 no. 149; Thüsing, Gregor op. cit. § 14 no. 146; Von Tiling, Christian: Beteiligungsrechte beim Einsatz von Leiharbeitnehmern. In: Betriebsberater 2009/45 pp. 2422-2428.

¹³ Ibid.

¹⁴ Hamann, Wolfgang op. cit. § 14 no. 151.

¹⁵ Federal Labour Court 23.1.2008 - 1 ABR 74/06, In: Neue Zeitschrift für Arbeitsrecht 2008/10 p. 603; Wensing, Hans-Hubert - Freise, Agnes op. cit. pp. 2238-2245.

works council,¹⁶ nowadays this view cannot be upheld. The labour courts ruled repeatedly that it is important for the decision of the works council to know *exactly* which person will take up activity in the user company.¹⁷ This is based on the thought that it can be a Security risk for the permanent staff if the concrete person that is to work with them is insufficiently skilled or trained or does not speak and understand the language sufficiently.¹⁸

The *extension of the original assignment* is treated like a new assignment and in consequence requires the participation of the works council. The reason behind this is that regarding the interests of the permanent staff there is no difference if the same temporary agency worker performs his job in the user company beyond his original assignment or if the job is completed by a new temporary agency worker.¹⁹ This is also the opinion of the Federal Labour Court that clearly stated that his findings concerning the extension of a fixed-term work contract (*befristeter Arbeitsvertrag*) are also effective for the extension of an assignment on the basis of a temporary employment contract.²⁰

Another problem that in recent years has played a prominent role at the labour courts was the question in which moment the works council has to be involved when temporary agency workers are initially admitted into a *labour pool* on the basis of a framework agreement between the user company and the temporary-work agency. In such cases either the user company or the temporary-work agency decides at a later moment which specific worker from the pool is needed for a specific job. In line with the other labour courts' decisions in the context of the participation right of the works council, the Federal Labour Court ruled that the mere admission of a worker into a labour pool does not yet require the involvement of the works council.²¹ This is based on the fact that, at the moment of admission, the works council is not yet in the position to protect the interests of the permanent staff because, at this moment,

¹⁶ State Labour Court Lower Saxony 13.10.1999 – 13 TaBV 106/98, in: Juris (database); Wensing, Hans-Hubert – Freise, Agnes op. cit. pp. 2238-2245; Hunold, Wolf: Die Rechtsprechung zu den Beteiligungsrechten des Entleiher-Betriebsrats bei Einsatz von Leiharbeitnehmern. In: Neue Zeitschrift für Arbeitsrecht-Rechtsprechungsreport 2008/6 pp. 281-286.

¹⁷ Federal Labour Court 23.1.2008 – 1 ABR 74/06, In: Neue Zeitschrift für Arbeitsrecht 2008/10 p. 603; State Labour Court of Hesse 16.1.2007 – 4 TaBV 203/06, In: BeckRS 2007, 44175.

¹⁸ Hamann, Wolfgang op. cit. § 14 no. 154.

¹⁹ Ibid § 14 no. 152.

²⁰ Federal Labour Court 23.1.2008 – 1 ABR 74/06, In: Neue Zeitschrift für Arbeitsrecht 2008/10 p. 603; Federal Labour Court 7.8.1990 – 1 ABR 68/89, In: Arbeitsrechtliche Praxis, BetrVG 1972 § 99 no. 82.

²¹ Federal Labour Court 23.1.2008 – 1 ABR 74/06, In: Neue Zeitschrift für Arbeitsrecht 2008/10 p. 603.

it is neither clear for how long or for how many hours per day the worker will be integrated in which division of the user company.²²

3. Contents of the participation right

As explained above, the content of the participation right is defined by Sec. 99 of the Works Constitution Act. The *procedural method* prescribed in this regulation is as follows:

- The user company must comprehensively inform the works council about the intended integration of the specific temporary agency worker.
- The works council has to give an opinion about the integration in question within one week from the information.
- In case the works council explicitly consents to the integration or in the case that a one-week period elapses without any response on the part of the works council, consent is regarded as being given (Sec. 99 subs. 3). The user company is then permitted to integrate the temporary agency worker.
- In case the works council explicitly refuses consent invoking one of the specified reasons (Sec. 99 subs. 2) the user company has to institute legal proceedings at the labour court with the objective that the court gives the required consent instead of the works council (Sec. 99 subs. 4).

The *scope of the participation right* can be deduced from the list of reasons in Sec. 99 that entitle the works council to refuse consent, i.e. the works council must be supplied with all the information that is necessary for the decision whether to give or refuse consent. It is clear, however, that the general rules which apply in the context of Sec. 99 (these rules generally apply within the context of the integration of normal employees) have to be modified to a certain extent in the context of the integration of temporary agency workers, because the integration of a temporary agency worker does not aim at the conclusion of a contract of employment.²³ In this respect, for example, the works council does not need information that would be necessary for the conclusion of such a contract.

3.1 Information

The user company must *inform* the works council about the following aspects:²⁴

- the number of temporary workers;

²² Von Tiling, Christian op. cit. pp. 2422-2428.

²³ Federal Labour Court 17.6.2008 – 1 ABR 39/07, In: Arbeitsrechtliche Praxis, BetrVG 1972 § 99 Eingruppierung Nr. 34; Hamann, Wolfgang op. cit. § 14 no. 158.

²⁴ Hamann, Wolfgang op. cit. § 13 nos. 159-172.

- the beginning and the intended length of their work at the user company;
- their particular position, workplace and work schedule;
- their particular qualification;
- specific details of the particular persons, e.g. name, age, nationality etc. However, in case the user company itself does not yet know the particular temporary agency worker – a situation very possible under the terms of an assignment contract (*indeterminate obligation*) – the user company is not obliged to ask the temporary-work agency for the information.²⁵
- The organisational consequences of the integration for the user company, e.g. instruction duties, allocation of parking space etc.

The works council, however, has no right to be informed of the remuneration or the wage class classification of the temporary agency worker.²⁶ These factors relate only to the relationship between the temporary agency worker and his employer. His employer is the temporary-work agency and not the user company. It is irrelevant for integration in the user company whether the employer remunerates his employee according to statutory requirements.

3.2 Presentation of documents

In addition to the above factors about which the works council has a right to be informed, other documents must be presented to the works council in order to fulfil the duty laid out in Sec. 14 of the Temporary Employment Act. One of these is, according to the second sentence in Sec. 14 subs. 3, a written declaration which confirms on behalf of the temporary-work agency that it is authorized by the Employment Agency to place temporary agency workers at user-companies to work temporarily under the supervision and direction of the latter. The reason behind the requirement to present this declaration to the works council is that, under German labour law, the implementation of such a placement without a licence is illegal (so-called *illegal assignment*).²⁷ The consequence of this is, first of all, that the contract of employment between the temporary-work agency and the temporary agency worker is void. This consequence alone, however, would not have any effect on the user company, but the statutory provision on illegal assignment must always be read in connection with Sec. 10 subs. 1 of the Temporary Employment Act. This provision contains a *legal fiction* assuming that, in case a contract of employment is void due to a missing licence, there is instead an open-ended contract of employment between the temporary agency worker and the user

²⁵ State Labour Court of Baden-Württemberg 14.7.2006, In: Arbeit und Arbeitsrecht – Personalprofi 2007 p. 268; Hunold, Wolf op. cit. pp. 281-286; Wensing, Hans-Hubert – Freise, Agnes op. cit. pp. 2238-2245.

²⁶ Hamann, Wolfgang op. cit. § 14 no. 169; Wank, Rolf op. cit. § 14 AÜG, no. 22.

²⁷ Sec. 9 no. 1 of the Temporary Employment Act.

company. The temporary agency worker would in this way become a real employee of the user company. It is clear that this would be a situation with major effects on the permanent staff of the user company. As the declaration is always part of the assignment contract between the temporary-work agency and the user company, it is the prevailing opinion that not only has the declaration to be presented to the works council, but also the whole document of the assignment contract.²⁸

In contrast, the *contract of employment* between the temporary agency worker and the temporary-work agency is not concerning the domain of the user company and must therefore not be given to the works council.²⁹ The same is true of the *application documents* of the temporary agency worker.³⁰

4. Refusal of consent

According to Sec. 99 subs. 2 of the Works Constitution Act, there are six reasons for which the works council can refuse to give the required consent. This enumeration of reasons is conclusive, i.e. the refusal cannot be based on grounds other than those listed. In particular, the works council cannot refuse consent at its own discretion – for instance, if it does not consider the measure in question to be practicable or advisable.³¹

Due to the fact that, in temporary employment matters, the works council often tries to block the integration of temporary agency workers in general, over recent years some objections referring to the reasons enumerated in Sec. 99 have become commonplace. Such objections have been repeatedly examined by the labour courts in legal proceedings initiated by the user company with the aim of persuading the court to give the required consent instead of the works council (Sec. 99 subs 4). They will now be considered in detail.³²

²⁸ Federal Labour Court 6.6.1978 – 1 ABR 66/75, In: Arbeitsrechtliche Praxis, BetrVG 1972 § 99 no. 34; Hamann, Wolfgang op. cit. § 14 n. 167; Thüsing, Gregor op. cit. § 14 n. 165; Ulber, Jürgen op. cit. § 14 n. 232; dissenting opinion: State Labour Court of Lower Saxony 28.2.2006 – 13 TaBV 56/05, In: EzAÜG § 14 AÜG Betriebsverfassung no. 64; Hunold, Wolf op. cit. pp. 281-286; Wensing, Hans-Hubert – Freise, Agnes op. cit. pp. 2238-2245.

²⁹ Federal Labour Court 6.6.1978 – 1 ABR 66/75, In: Arbeitsrechtliche Praxis, BetrVG 1972 § 99 no. 34; undisputed.

³⁰ State Labour Court of Lower Saxony 19.11.2008 – 15 TaBV 159/07, in: Juris (database); cf. Federal Labour Court 18.12.1990 – 1 ABR 37/90, In: Arbeitsrechtliche Praxis, BetrVG 1972 § 99 no. 85.

³¹ Thüsing, Gregor. In: Richardi, Reinhard (ed.): Betriebsverfassungsgesetz mit Wahlordnung – Kommentar. C.H. Beck, München 2010, § 99 n. 183.

³² As to other objections that can be raised under Sec. 99 of the Works Constitution Act in the context of the integration of temporary agency workers: cf. Hamann, Wolfgang op. cit. § 14 nos. 183-217.

4.1 Rejection of temporary agency work as a matter of principle

Under Sec. 99 of the Works Constitution Act, the works council of the user company has no right to block the company's decision to make use of temporary agency workers instead of concluding employment contracts itself. This is due to the fact that it is generally accepted by the labour courts, as well as by academics, that the works council must respect the entrepreneurial decision. The employer can thus freely decide, i.e. in particular without being influenced by the works council, in which way he wants to fulfil the entrepreneurial tasks of his company. In this regards he himself has the choice whether to employ his own workers or have the tasks carried out through a contract to produce work (*Werkvertrag*) or a service contract (*Dienstvertrag*).³³ The State Labour Court of Lower Saxony ruled in 2008 that this freedom of choice applies in the same way also to the use of temporary agency workers.³⁴

4.2 Violation of the principle of equal treatment/equal pay

According to Sec. 99 subs. 2 no. 1 of the Works Constitution Act the works council is *inter alia* entitled to refuse consent if the integration violates a statutory regulation. In this respect it is, however, necessary that the integration itself violates the law.³⁵ As to the integration of a temporary agency worker, it is, therefore, necessary that his integration as such must be prohibited. This however is not only the case when a legal norm expressly stipulates that a specific activity (here: the integration) is illegal, but also when this purpose can be deduced from the specific formulation.³⁶

Over recent years, in many law cases works councils tried to justify their refusal of consent with the alleged violation of the *principle of equal treatment* (Sec. 75 of the Works Constitution Act) and the *principle of equal pay* (Sec. 3 subs. 1 no. 3/Sec. 9 no. 2 of the Temporary Employment Act). They based their argument on the fact that the temporary agency worker who is to be integrated in the user company does not have the same remuneration as the permanent staff.

³³ Federal Labour Court 13.3.2008 – 2 AZR 1037/06, In: Neue Zeitschrift für Arbeitsrecht 2008/15 p. 878.

³⁴ State Labour Court of Lower Saxony 18.2.2006 – 12 TaBV 142/07, In: BeckRS 2009, 72279; State Labour Court of Lower Saxony 20.2.2007 – 9 TaBV 107/05, In: EzAÜG § 1 Konzerninterne Arbeitnehmerüberlassung no. 18.

³⁵ Continual jurisdiction: Federal Labour Court 28.1.1992 – 1 ABR 45/91, In: Neue Zeitschrift für Arbeitsrecht 1992/13 p. 606; Federal Labour Court 14.11.1989 – 1 ABR 88/88, In: Arbeitsrechtliche Praxis, BetrVG 1972 § 99 no. 77.

³⁶ Federal Labour Court 21.7.2009 – 1 ABR 35/08, In: Neue Juristische Wochenschrift-Spezial 2010/2 p. 51.

Before examining in detail the two alleged violations of statutory regulations, the question arises of whether the works council is actually entitled to use its right to refuse consent with the objective of protecting the temporary agency worker. As mentioned earlier, the purpose of the right to refuse consent is primarily to protect the interests of the permanent staff in the user company.³⁷ It was decided by the Federal Labour Court, however, that the works council is nevertheless allowed to exercise this right also for the purpose of protecting the individual temporary-agency worker.³⁸ HAMANN correctly confines this right to those matters which are caused by the particular nature or by the duration of the intended integration in the user company.³⁹ The reason for this is that those other matters that affect the temporary agency worker but which are not related to his integration in the user company have to be protected by the works council of the temporary-work agency.⁴⁰

Sec. 75 of the Works Constitution Act stipulates states that the employer, as well as the works council, needs to ensure that everyone working in the company is treated according to the principles of justice and equity and must not be exposed to discrimination (*principle of equal treatment*). Behaviour contrary to this rule can only be assumed if two persons or two groups of persons are treated differently on the part of one and the same person.⁴¹ In the context of the use of temporary agency workers, it must be borne in mind that the permanent worker is to be remunerated by the user company while the temporary agency worker is remunerated by his temporary-work agency, of which he is a regular employee. Sec. 75 does not impose a duty on a company of such a kind that the employees of different employers have to be treated equally. As a consequence, the works council of the user company cannot justify the refusal of consent to the integration of a temporary agency worker with an alleged violation of Sec. 75 of the Works Constitution Act.⁴²

The *principle of equal pay* according to Sec. 3 subs. 1 no. 3/Sec. 9 no. 2 of the Temporary Employment Act obligates the temporary-work agency to provide the same basic working conditions to its employees for the time of their integration in the user company as apply to the permanent staff of that company. The basic working conditions also include wages. These legal norms

³⁷ Federal Labour Court 23.1.2008 – 1 ABR 74/06, In: Neue Zeitschrift für Arbeitsrecht 2008/10 p. 603.

³⁸ Federal Labour Court 28.9.1988 – 1 ABR 85/87, In: Neue Zeitschrift für Arbeitsrecht 1989/9 p. 358; Wensing, Hans-Hubert – Freise, Agnes op. cit. pp. 2238-2245.

³⁹ Hamann, Wolfgang op. cit. § 14 no. 185.

⁴⁰ Federal Labour Court 17.6.2008 – 1 ABR 39/07, In: Arbeitsrechtliche Praxis, BetrVG 1972 § 99 Eingruppierung Nr. 34.

⁴¹ Von Tiling, Christian op. cit. pp. 2422-2428.

⁴² Cf. Federal Labour Court 25.1.2005 – 1 ABR 61/03, In: Neue Zeitschrift für Arbeitsrecht 2005/20 p. 1199; State Labour Court Düsseldorf 30.10.2008 – 15 TaBV 248/08, in: Juris (database); State Labour Court of Lower Saxony 20.2.2007 – 9 TaBV 107/05, In: EzAÜG § 1 Konzerninterne Arbeitnehmerüberlassung no. 18.

include, however, the possibility of deviating from the principle of equal pay if, in a collective agreement, the parties have agreed otherwise. For the time being, in most cases such collective agreements exist and so that there is no violation of the principle of equal pay under the Temporary Employment Act. It has to be added, though, that, even if there was no such collective agreement or the collective agreement is void by law, i.e. the question of a violation of the principle of equal pay would have to be answered in the affirmative, this violation would not entitle the works council to refuse consent. Whilst, for a long time, the Federal Labour Court had not decided clearly how to answer this question,⁴³ in 2009 it expressly approved the position of a number of State Labour Courts in this respect.⁴⁴ It reasoned that the intention of the participation right in Sec. 99 is not to give the works council an instrument to comprehensively control the content of the assignment contract in question. The works council is only entitled under Sec. 99 of the Works Constitution Act to give or refuse consent to the integration in question altogether, but not to consent to parts of it and seek modifications to specific conditions.⁴⁵ It is, therefore, not enough that only single stipulations of the contract between the temporary agency worker and his employer are ineffective. Moreover, the Federal Labour Court emphasised that the legal consequences of a violation of the equal-pay-principle result from Sec. 10 subs. 4 of the Temporary Employment Act. According to this provision, the temporary agency worker has a right to full compensation from his employer, i.e. against the temporary-work agency, in case of a violation of the equal-pay-principle. The conceptual design of the Temporary Employment Act suggests that it shall not be the legal consequence of a violation of the equal-pay-principle to prevent the integration of the temporary agency worker in the user company. Indeed, such a consequence would even be contrary to the whole purpose of the Temporary Employment Act. Only if the temporary agency worker is integrated in the user company is it possible for him to enforce his claim to full compensation according to Sec. 10 subs. 4. If he were not integrated he would not have such a right.

⁴³ Cf. State Labour Court of Lower Saxony 18.2.2006 – 12 TaBV 142/07, In: BeckRS 2009, 72279.

⁴⁴ Federal Labour Court 21.7.2009 – 1 ABR 35/08, In: Neue Juristische Wochenschrift-Spezial 2010/2 p. 51; State Labour Court of Lower Saxony 18.2.2006 – 12 TaBV 142/07, In: BeckRS 2009, 72279; State Labour Court Düsseldorf 30.10.2008 – 15 TaBV 248/08, In: Juris (database); State Labour Court of Lower Saxony 26.11.2007 – 6 TaBV 32/07, In: Juris (database).

⁴⁵ State Labour Court of Lower Saxony 20.2.2007 – 9 TaBV 107/05, In: EzAÜG § 1 Konzerninterne Arbeitnehmerüberlassung no. 18.

4.3 Violation of Sec. 242 of the German Civil Code

In particular, in cases in which the temporary-work agency is not an independent company which is active on the general market, but belongs to a group of companies and in which the assignment of workers takes place only in companies within this group (so-called *intra-company transfer of temporary agency workers*),⁴⁶ the works councils often try to justify their refusal of consent with Sec. 242 of the German Civil Code. This provision states that an obligor has a duty to perform according to the requirements of good faith and taking customary practice into consideration.

As intra-company agencies are often merely designed to apply the popular collective agreements of the temporary employment industry without changing too much of the operational sequences in the user company, the works council consider this structure to be abusing the law and thus violating the requirement of good faith. The question whether (and, if yes, under what circumstances) such constructions are abusing the law is still a controversial issue.⁴⁷ In the context of the right to refuse consent under Sec. 99 of the Works Constitution Act, however, the Federal Labour Court⁴⁸ has recently clarified that this right cannot be based on Sec. 242 of the German Civil Code. Further, the Court decided that arguing that such a construction abuses the law when the temporary-work agency is just a front-man (*Strohmann*) also could not justify the refusal of consent. It explained that such circumstances could not lead to a ban on integrating the temporary agency worker, since the integration would correspond to his legal status in such a case.⁴⁹

4.4 Disadvantages for permanent staff members

Sec. 99 subs. 2 no. 3 of the Works Constitution Act entitles the works council to refuse consent if it believes - on a well-founded basis - that, in consequence of the integration in question, members of the permanent staff might be dismissed or that the integration might be to their disadvantage. The particular integration in question must causally determine the asserted disadvantage. As can be seen in the wording of this provision, it is not sufficient for the works council simply to state a belief or a presumption: it is, in fact, necessary that the works council brings forward facts which make the statement

⁴⁶ Cf. Zürn, Andreas: Arbeitnehmerüberlassung im Konzern. In: Arbeit und Arbeitsrecht 2009/10 pp. 590- 592; Däubler, Wolfgang: Die konzerneigene Verleihfirma. In: Arbeitsrecht im Betrieb 2008/10 pp. 524-528.

⁴⁷ As to the different opinions on this issue: Hamann, Wolfgang op. cit. § 14 n. 195.

⁴⁸ Federal Labour Court 21.7.2009 – 1 ABR 35/08, In: Neue Juristische Wochenschrift-Spezial 2010/2 p. 51.

⁴⁹ The legal consequence would be a contract of employment between the temporary agency worker and the user company.

conclusive.⁵⁰ In the context of the integration of a temporary agency worker, works councils typically claim the following disadvantages:

It has become a common approach on the part of works councils that they refuse consent to a particular integration because they believe that, by integrating lower-cost temporary agency workers in the user company, this would, in the long term, also reduce the wages of the permanent staff.⁵¹ They claim that, when the company makes use of temporary agency workers on a regular basis, the permanent staff will sooner or later represent the minority. As such, the former regular employees would feel pressurised to adapt to the new standard conditions of employment, i.e. also to accept lower remuneration. These alleged disadvantages, however, are not adequate to entitle the works council to refuse consent to the integration of a particular temporary agency worker, since there is no causal link between the individual integration in question and the alleged disadvantages.⁵²

According to Sec. 99 subs. 2 no. 3, the non-consideration of an employee of the user company who has only a fixed-term employment contract is also considered as a disadvantage if this employee is equally suitable to perform the work for which the person in question is about to be integrated for an unlimited period. The labour courts, however, do not recognise the argument that the integration of temporary agency workers generally reduces the possibility for those employees who have a fixed-term contract of employment in the user company and hope for an extension - or even wish to have a contract for an unlimited period.⁵³ According to the jurisdiction of the Federal Labour Court,⁵⁴ Sec. 99 subs. 2 no. 3 requires that an employee with a fixed-term contract and a person who is not yet working in the user company must actually compete for a permanent post - which implies that there must be a contractual relationship between the user company and the worker. There is, however, no such contractual relationship - and so no competition for a permanent post - when the company decides to use a temporary agency worker. As to the extension of a fixed-term contract of employment, the court pointed out that the employee has neither a legal right to have his contract extended or modified into a contract for an unlimited period, nor that the company must use employees of its own instead of temporary agency workers.

⁵⁰ Federal Labour Court 11.6.2002 - 1 ABR 43/91, In: Neue Zeitschrift für Arbeitsrecht 2003/4 p. 226.

⁵¹ Cf. State Labour Court of Lower Saxony 28.2.2006 - 13 TaBV 56/05, In: EzAÜG § 14 AÜG Betriebsverfassung no. 64.

⁵² State Labour Court of Lower Saxony 20.2.2007 - 9 TaBV 107/05, In: EzAÜG § 1 Konzerninterne Arbeitnehmerüberlassung no. 18.

⁵³ State Labour Court Düsseldorf 30.10.2008 - 15 TaBV 114/08, In: Entscheidungssammlung zum Arbeitsrecht-Schnelldienst 2009 no. 5 and 14.

⁵⁴ Federal Labour Court 25.1.2005 - 1 ABR 61/03, In: Neue Zeitschrift für Arbeitsrecht 2005/20 p. 1199.

4.5 Disturbance of the business climate within the company

It is often argued by the works council that the integration of temporary agency workers would disturb the *business climate* within the company since temporary agency workers are generally remunerated on a lower level than permanent employees. This argument, however, cannot be based on Sec. 99 subs. 2 no. 6 of the Works Constitution Act and so is not capable of entitling the works council to refuse consent.⁵⁵ Even though Sec. 99 subs. 2 no. 6 comprises a reason to refuse consent in case the integration in question leads to a disturbance of the business climate within the company, it is important to note that the cause for the disturbance must come from the individual person himself. The provision, therefore, does not apply to situations in which the works council worries about disturbances which may arise from by the *general* use of temporary agency workers, i.e. by any unspecified person.

5. Closing remarks

In the context of the participation right of the works council before the integration of temporary agency workers, it can be seen that a number of legal questions were recently answered by the Federal Labour Court. This Court confirmed in most respects the prior decisions of the various state labour courts. Whilst the labour courts in Germany generally decide in favour of the employee or the workers' representative, it is noticeable that, in the given context, the courts decided, in the majority of cases, in favour of the employer, i.e., in the given context, the user company. The typical objections of the works councils were, therefore, not considered as valid reasons for refusing consent according to Sec. 99 subs. 2 of the Works Constitution Act. The courts repeatedly underlined in their decisions that the participation right of the works council can only be used to prevent the individual integration in question due to its specific negative consequences for the permanent staff of the user company. It is, therefore, very clear that works councils cannot use the participation right to prevent the use of temporary agency work in general.

⁵⁵ State Labour Court Düsseldorf 30.10.2008 - 15 TaBV 114/08, In: Entscheidungssammlung zum Arbeitsrecht-Schnelldienst 2009 no. 5 and 14.

Search engines and legal research

ZÓDI, Zsolt

ABSTRACT *The paper seeks to understand the internal dynamics of the activity called 'Computer-Aided Legal Research' (CALR) from a philosophical point of view.*

It first gives a short overview of 'legal research' and shows its history in Common Law countries and on the Continent. It argues that legal research as a special activity is very deeply embedded in legal culture, which is – despite all differences – very similar on the Continent and in Common Law systems. The paper describes the differences between the legal research process of the Common Law and code-based systems and offers some comments on the East European situation.

The paper tries to argue, using the concept of the hermeneutic circle described in Gadamer's theory, that CALR, despite some spectacular changes in the 'technical side' of legal work, has not changed the deeper structures of this activity. This is traced back to the time of glossators, and later strongly influenced by the legal doctrine developed by universities and also strongly shaped by legal publishers. This whole mindset remained the same after the emergence of these databases, and, therefore, its basic pattern remained the same: the formulation of the problem with the categories of the doctrine which serves as a 'legitimate prejudice', than finding, evaluating and interpreting the sources. The difference between paper-based research and CALR is that, in the latter, 'search' as a central activity hides some of the steps which are performed by certain algorithms based on metadata and links. The paper briefly shows in an illustrative way some of these hidden features of the legal databases, the special sets of metadata, links, and ranking algorithms which represent this doctrinal knowledge.

The final part illustrates briefly how far removed from legal logic is Internet or 'Google-type' search - which can have a deep, even if as yet unclear, impact on the future of legal work.

1. Introduction

Lawyers have been using search engines for much longer than other professionals, or laymen. Americans have done so since the late '70s,¹ and, even

¹ Assessing the Influence of Computer-Assisted Legal Research: a Study of California Supreme Court Decisions, *Law Library Journal* 2005/97 p. 285.

for Hungarian lawyers, legal research is more or less equivalent to searching in an offline database - from the mid '90s, a time when Google did not even exist.²

Despite the fact that legal research and 'computer assisted legal research' are popular topics within legal literature, the phenomenon of 'search' (that is, using search engines) is mainly discussed from the viewpoint of legal publishers or librarians. Though I myself have been dealing with legal publishing (and, by implication, search) and databases for my 'bread and butter', this text approaches the field of 'legal search' from a slightly more theoretical viewpoint. It seeks an answer to several questions: What are the features of electronic research compared to using printed sources? How do lawyers use search engines? What is the role of 'search' within legal research? Is there a difference between general search and legal search? If there is, should there be differences in the ways in which search engines function? How has legal work changed since computers became ubiquitous? Is Google useful for legal work?

2. Legal research and legal publishing

2.1 Common Law and America

Legal science, in its early phases of development, revolved around reading certain authoritative texts. In its modern form, the teaching of legal research started in American universities at the beginning of the twentieth century.³ It was very strongly emphasized from the beginning that it is not purely knowledge of books and bibliographies⁴ (although even the subjects' name was, earlier, 'legal bibliography'). The 'introduction to legal sources' revealed a certain hierarchy amongst sources. Firstly, case reporters, then legal encyclopaedias, annotated reports and, finally, English sources⁵ were presented. Beyond that, however, the course had a minimum of two additional elements,

² Even ABAs Model Rules [i.e. the American Lawyers' Ethical Code] (1.1) is interpreted in a way that 'reasonably necessary preparation' required from a lawyer embraces the use of search engines. (see e.g. McDonough, Molly: In Google We Trust. In: ABA Journal, 2004/90 p. 32. and extensively: Margolis, Elle: Surfing Safari: Why Competent Lawyers Should Search on the Web. In: Yale Journal of Law & Technology 2007/10. According to this article, already in 2006, 42% of lawyers started their search with a fee-based system, and 25% with a free one. Whilst the use of fee-based systems is an absolute must, in the past 5 years certain basic searches by general search engines became a part of 'necessary preparation'.

³ Wren, C.G. - Wren, J.R.: The teaching of Legal Research. In: Law Library Journal 1988/8 p. 8.

⁴ The first classes was about to create a *map of the legal library* in students' mind. Roalfe, W.L. - Higman, W.P.: Legal Writing and Research at Northwestern University. In: Journal of Legal Education 1956-1957/9 p. 81.

⁵ Ibid. p. 84.

considered to be an integral part of legal research. First, as a starting point, a simplified factual situation was always used: this was a 'pre-cooked' case, which was given to the students. This was carefully selected from the point of view that it had a solution in one of the sources presented. Second, all the results of the resource work had to be summarized either in structured 'questionnaires', or in briefings of a maximum of 150 words - which also had certain formal requirements.

The first part of the legal research process (i.e. finding and analyzing sources) had three sub-steps: law-finding, the interpretation of the law-finding and updating the sources. ROBERT C. BERRING recognized that this process is very much influenced by the form and organization of the legal material itself, and later by the forms in which the law is presented⁶. The first organizer - who had a huge impact on how to conduct research in England - was BLACKSTONE. His main assumption was that common law is a 'seamless web'. (Later we will see that, on the continent the same idea was promoted by the glossators, and even the theoretical notion in the background was the same.) 'Before BLACKSTONE, law books were tools of a trade, disparagingly called "plumber's tools" (...) which existed to serve the craftsmen/lawyers. The Civil Law of Rome was the scholarly legal area; Common Law was a simple practice. BLACKSTONE attacked that premise, contending that Common Law was a fit area for study and was a thing of beauty and grace in its own right'.⁷ The idea, that legal principles once revealed in a decision by a court should be followed in similar situations in the future, i.e. the doctrine of the precedent itself became possible only when case reporters (Year Books from the end of the 16th century) started to be published. The systematization of Common Law - with the help of concepts of Roman Law - was given further impetus by the Chancellors, who developed the new body of law: equity. Those who were dealing with law, when realizing that their work would be published, started to align with previous reports, and so the form of reports started to influence legal practice, and practice started to determine the form of publication. This form was exported to America and became the standard. At the end of the 19th century a standard *numbering pattern* was introduced and statutes were created for the unification of the process, including the court's obligation to deposit copies of all written decisions, with the reporter.

Interestingly, the majority of standardization work at the peak of the industrial revolution was performed by a private publisher, the West Company. First of all, West introduced a standard for accuracy: organizing copies from every jurisdiction and verifying texts with the judge writing them. West introduced a *uniform format of reporting*, which guaranteed reliability through similarity. *Caption*, *'syllabus'* and *'head-notes'* appeared in the same form, and,

⁶ Robert C. Berring: Legal Research and Legal Concepts: Where Form Molds Substance. In: California Law Review 1987/75 p. 15.

⁷ Ibid. p. 16.

most importantly, West created a subject structure, and fitted all new cases into it.⁸ Lawyers liked the comprehensive way of reporting, and this resulted in the publication of even more decisions. 'Whether the gigantic growth in published cases was a response to an existing demand, or the demand was stimulated, is not relevant' – says BERRING. In my view there was interaction: each side stimulated the other.

This gigantic volume required external organization schemes. Secondary legal literature, centred on case reports, as we now term them, created 'metadata' on the content and the precedential value. It provided thematic grouping and, further, deeper internal structuring of the cases. This happened at the end of the 19th century. A good example is the SHEPARD's report. FRANK SHEPARD started to publish his 'citor' in 1873. The Shepard contains *what other cases, and 'authorities' are citing a particular case, (or a statute), what authorities are followed by the case, and, finally and most importantly, in what context (positive, negative, neutral) the case is followed.*⁹ The American Digest System, of which main part was the Key Number System, was introduced. It contained four hundred main topics with thousands of subdivisions, sometimes in a 3/4 level-deep structure. The idea was to provide a location within the structure for every possible legal issue. Until the mid 70's, the West Digest System, the thesaurus and the structure which was 'imposed' by a private publisher onto the American legal system, was the primary legal research tool.

Then, at the beginning of the 70's, computers appeared in the legal research world, and this produced a totally new situation.

2.2 Europe

The development of legal research and the interaction between legal profession, legal practice, legal science and legal publishing, at first sight seems totally different in continental Europe.

A special method, based on the explanation and comments of certain authoritative texts was established in the medieval university by the glossators. As BERMAN shows in his famous book,¹⁰ this method – the scholastic – followed the pattern of bible explanation. Its main assumption was that the text – the Digesta – is sacred: not only authoritative, but it is *coherent*, has an internal logic, even when it seems that there are controversies. The task of the scholar is, using the dialectic method, to fill the gaps and overcome the

controversies.¹¹ During this work, though they thought it already there, *they themselves brought high level structure* into the text and created new concepts and logical connections between certain legal institutions.¹² Enlightenment's great codes promoted this tradition of systematization and in Europe written statute law prevailed. These codes are built around Roman legal concepts, systematized by the legal science which promoted the tradition of the glossators. On the continent the *legal system itself, from the beginning*, had an internal high-level structure, influenced by theory, based on Roman law – interpreted by the universities, where knowledge was rooted in the method and theory of glossators and generations of university professors.

In code-based systems, finding the relevant primary source is, therefore, simply not a question in most cases. However, this primary source will certainly be, both in its wording and in decisive power, a rather general one, and one which should be interpreted by secondary sources. From the time of the birth of the major codes, the queen of these secondary sources was the Commentary. In a certain way the path of the development of legal publishing seems to be the opposite of what happened in America. As we saw, there the huge number of published cases generated a need for systematization and theory-making, finally producing legal thesauri, systems of citing numbers, the structuring of cases and the standardization of these structures. The internal hierarchy among rules was determined by practice itself: citators, like Shepard, showed the authoritative power of a certain rule, and the head-notes of legal publishers represented a higher level of abstraction, on which cases could be compared.

On the continent, codes were the cornerstone of the legal system, and they themselves provided the basic theoretical structure for systematization. Their structure provided a 'legal thesaurus'. *Regulae* survived in the form of general clauses, helping the 'top down' interpretation of certain legal amendments. The authoritative power of the rules within the system was pre-defined – which is the doctrine of the '*hierarchy of sources*'. Finally, explanations were made by scholars in Commentaries. Courts accepted these explanations, and the system was, therefore, closed. Judicial decisions themselves for a long time were filtered by the commentators and were afforded authoritative power through the work of the scholars, and not by other courts. Legal publishing was primarily a Commentary publishing business. On the continent theory creation was the first step, law-making the second and, finally, the explanation and systematization of cases the last.

⁸ Ibid. p. 21

⁹ http://law.lexisnexis.com/literature/Shepards_%20Citations_Service_Overview.pdf (last visited 2010-11-13)

¹⁰ Harold J. Berman: *Law and Revolution, The formation of the Western Legal Tradition*. Harvard University Press, Cambridge, Mass, and London, 1983 p. 131.

¹¹ Szabó, Béla: *Doktor alkotta jog, Communis opinio doctorum és más jelenségek*. In: *Ius humanum, ember alkotta jog*, Bíbor Kiadó, Miskolc, 2001 p. 125.

¹² They, for example started to differentiate between rules, and principles, and used Digesta's 50.17. section, and the 220 statements collected here, as a 'principle', which had a higher authority than a 'normal rule'. This systematization proved to be very popular in practice. Some say, that Accursius's *Glossa ordinaria* had a higher authoritative power in practice than the text itself.

In Eastern Europe, legal research and the role of 'doctrinal knowledge'¹³ were slightly different. Though these legal systems were considered to be 'normal' code-based systems, (being in slightly different ways the sub-variant of the German *Rechtssysteme*), this is certainly only true within serious limits in legal practice and legal research process. Whilst in Western Europe the legal research followed a top-down pattern, and lawyers always first tried to define their problem in the – originally theoretical – framework of codes, and code-chapters, their East European colleagues used a whole range of lower level norms, decrees, ordinances of different state organizations. They did this despite their training, which still remained Roman law, code, and theory centred.

The starting point for legal research is the simplification and reduction of facts by means of certain concepts. This is common in all of the three fields mentioned above. There is some factor which makes European and American legal research the same: the *doctrinal knowledge* behind the legal discourse, behind the way in which databases are used, the way in which legal texts are interpreted. This activity creates a structure, and 'practitioners (...) know that the body of doctrine provides the 'language' for the discourse of legal decision-making, and that they cannot be successful in the without speaking that language fluently.' This language then connects the practitioners, scholars, and the institutions: politics, (law-making), the courts, other governmental organizations and, finally, universities. BÓDIG¹⁴ points out the *justificatory role of this knowledge*, but I believe that it has a further function, namely that it helps to capture the meaning of the texts and so represents a 'fore-structure' for legal research.

However, whilst, in common law, these concepts were distilled from judicial practice, on the Continent they were the concepts of the Codes, derived from Roman law, and the internal structure of the activity, the order of steps taken from this point on, is different. A Common law practitioner finds or constructs a network of cases with an internal structure – linked and hierarchical. He also checks the authoritative power of the cases included in the network.

The Continental lawyer, on the other hand, starts by placing the case somewhere in the structure of the codes. Is this a criminal issue? Is this a civil matter? If yes, than do the parties have a contractual relationship? – and so on. Up to this point Eastern and Western lawyers work similarly. Then, however, in Eastern Europe – instead of finding relevant commentaries, cases, or cases mentioned in commentaries, – they look for lower level executive ordinances, or even ask for 'interpretative opinion' from one of the innumerable state organizations.

¹³ I use here Bódig's expression for this special type of knowledge. Bódig, Mátyás: Legal Theory and Doctrinal Scholarship. In: The Canadian Journal of Law and Jurisprudence 2010/6 p. 483.

¹⁴ Ibid. pp. 494-499.

2.3 The emergence of legal databases

The story of legal databases has often been written.¹⁵ In the mid-seventies, driven mainly by the needs of lawyers and of business, large legal databases emerged. These were, at first, limited to state codes and a certain group of cases. Very soon, however – by the end of the 1970s – they covered all legislation and certain secondary sources, and became a very profitable business. This business drive, in itself, was a huge stimulus, but in addition two competitive systems emerged, giving still further impetus. Lawyers, instead of using indices, the Western National Reporter System, ALR, and so on, all being restricted to the structure of a legal Thesaurus, started to use full-text search. This became standard by the end of the 1980s and had a very important impact on legal research.

Interestingly, in Europe, retrieval systems and legal databases¹⁶ did not play any role (actually did not exist) until the beginning of the 1990s. Nearly all projects that had anything to do with legal databases and computer-aided search were initiated and driven by governments and/or academic institutions. They practically all failed. My assumption is that, if there had been a mass demand from the legal profession, things would have happened differently. However, to put it simply: European lawyers did not need computer-aided legal research. Surprisingly, therefore, full-text, database-oriented, (i.e. not book-imitating), advanced, retrieval systems emerged and became wide-spread in *Eastern Europe*.

The need and the direct driver of this was the dramatic change that went on at that time in the region, resulting in a shocking increase in legal instruments issued and hopeless efforts to keep pace with the constantly changing legal environment. Even access to the actual text of the law became an everyday challenge.

For decades before this, in Eastern Europe the main source of primary legal documents had been the Official Gazette. Secondary material was practically the whole range of official gazettes of the different ministries or other organizations.¹⁷ There were also certain compilations published from time to time, and, for the most important codes, commentaries were also there. Legal publishing also mainly concerned publishing these collections. When the law-making process accelerated, the immediate response was to import the loose-

¹⁵ For Lexis see http://www.lexisnexis.com/anniversary/30th_timeline_fulltxt.pdf (last visited 2010-11-13)

¹⁶ Here I distinguish between retrieval systems and legal databases. Legal database in a broader sense everything which has a legal content and is digital. Retrieval system is organized as a database, and has special features like, point in time, boolean search, special legal metadata, and so on.

¹⁷ Even in the beginning of the 2000 the number of Branch Gazettes were well beyond 40, and the volume of different ordinances exceeded the amount of normal laws.

leaf (binders with changeable pages) concept, but it soon became clear that 30 binders and thousands of pages cannot be handled per year. The situation – in fact all over Eastern Europe – was exploited by *engineers*, who approached the whole problem from an IT point of view. For them, 'law' was a set of well structured texts, with certain special features – for example, that legal documents all have unique identifiers, time versions, special connections to other laws, a uniform internal structure, hierarchy, special procedures and uniform language of change and so forth. These people were not bound by legal culture, publishing traditions and the traditional way of legal research. They set up databases which had little to do with either Western legal publications or with big American systems.

2.4 Legal research and the hermeneutical circle

Legal research is embedded in other legal activities, in Europe termed the 'application of law', which traditionally embraces the following steps:

- Analysis of facts, ('creating the story');
- Obtaining information on norms – i.e., retrieving legal regulations, both primary and secondary;
- Interpretation of sources, including checking the 'authority of sources' (validation);
- Conclusion and decision-making, (or any action taken) based on the conclusion.¹⁸

Legal research is considered to be the 2nd and 3rd phase - when lawyers search for primary and secondary sources: legal provisions that have binding power, and some other with an argumentative, i.e. supportive function. Within this it is practical to differentiate between two levels of complexity.

If we are, say, looking for the exact minimum wage in 2010, or the lowest personal income tax rate in 2009, either we know the sum or we check. Any lawyer will readily say that we can even use Google for that purpose. It gives an enormous number of results, and there are many sites with nothing to do with law: websites of local municipalities, or articles from daily newspapers. However, if the broader context for the term seems to be 'official' (and not, say, part of a joke, or a poem), it is good enough. Finding the minimum wage seems

¹⁸ This process, in another context (Suikerbuijk, Hans: Information retrieval Workflow of a Professional – Conference on Online Re-conceptualization within Wolters Kluwer, Amsterdam, 2010.10.16.) looks like this: a) question in context, b) problem formulation c) information source selection d) query formulation e) information retrieval (= search) f) document (hitlist) relevancy assessment g) analysis (interpretation) of documents and synthesis of potential outcomes h) Formulation of advice or action, i) communication of action, storage, etc.

purely technical knowledge¹⁹ - knowledge where the question has only one definite answer, and, to be even surer, this is a pure number. Its scope is also simple, since it is valid from the 1st day of the year until the last. It cannot, therefore, be open to any debate or interpretation. The Law contains many of these rules: traffic rules, tax regulations, technical regulations, percentages, sums, ratios, formulae.

Is this legal research? Maybe not in the classical sense, but it definitely is so, if the amount is defined by government decree. It is to find an answer to a simple legal question. This type of knowledge is, of course, rather technical, requiring no in-depth legal knowledge. In filling out a form, we are only selecting certain values from dropdown lists, and pushing radio buttons is another example of the same 'technical knowledge'.

However legal cases are normally much more complicated. If an employer wants to dismiss an employee by way of an extraordinary dismissal – i.e. avoiding severance payment – because of a private letter that has been sent by the employee from his computer, this case and the problems that should be sorted out during finding relevant sources is definitely closer to our perceptions of legal research.

The process surely starts with finding the primary source regulating the case, but already the first step raises certain questions which should be answered in advance. Was the relationship between employer and employee a labour contract? Or was it another type, and was, say, only the working space ensured? What if it turns out that there was no labour contract, even though the factual basis is that there was? And so on.

Here we have something which GADAMER²⁰ (actually further developing SCLEIERMACHER's, and DILTHEY's concept)²¹ terms 'the hermeneutic circle'.

¹⁹ In this section I use the theoretical framework of Gadamer for the hermeneutical circle. In his famous book (Truth and Method, Continuum, 2004, London, New York, pp. 310-336.) this theory is closely connected with another, namely with the one about types of knowledge. Following Aristotle, Gadamer differentiated between episteme, (scientific knowledge of the unchangeables), tekhné, (the technical knowledge of 'doing' things, craftsmanship) and phronesis, (prudentia), the knowledge of application of rules, the right way to act in individual situations. This latter is one of the cornerstone of Gadamer's philosophy, as he states, that the legal hermeneutics, where phronesis should be used 'is no special case, but is, on the contrary, capable of restoring the hermeneutical problem, to its full breadth, and so re-establishing the former unity of hermeneutics, in which jurist and theologian meet the philologist' (Ibid. 385.) Thus Gadamer regards legal work, legal interpretation as a role model for the methodology of social sciences.

²⁰ Ibid. p. 269.

²¹ A good summary of Gadamer's hermeneutical philosophy, and its relation to the legal thinking is Bódi, Mátyás: Megértés, racionalitás, gyakorlati ész: jogfilozófiai reflexiók a gadameri hermeneutikáról. In: Ius humanum, ember alkotta jog, Bíbor Kiadó, Miskolc, 2001 p. 223.

Originally this concept captures the idea that 'a person who is trying to understand a text is always *projecting*. He projects a meaning for the text as a whole 'as soon as some initial meaning emerges in the text',²² and then going along this fore-meaning is confirmed or modified, and used again as a basis of understanding, finally reaching a point when the text is understood. The whole process is, therefore, a circle, which finally reaches a point when the text becomes 'so persistently audible, that it breaks through what the interpreter imagines it to be'.

This is about texts in general, but lawyers' work is special. GADAMER himself mentions that, if a legal historian writes an article, (or to apply it to our example – someone prepares a presentation on extraordinary dismissal under labour law) it is basically, methodologically, the same as the work of a lawyer, and *only differs in that lawyers interpret the texts and the factual situation from the viewpoint of the case, 'and for the sake of this present case'*.²³ This changes the meaning of 'hermeneutical circle': it becomes an interaction *between the case and the text*. The case, (the problem, the goal) should be interpreted, understood with the help of legal concepts defined in legal norms, and the legal norm should be interpreted and individualized to the particular case and situation.

This seems to be a 'reversed' *circulus vitiosus*, which has no beginning, (which is the first, a case which is told by legal words, or the law which is interpreted with the help of the factual situation). But actually it is not. First of all, the *language itself* is a common basis for starting the whole process. Second, moral sentiments, culture, common ethical background of the players provide a firm basis for starting this 'legal discussion'.

However, it is still true that the process we see here is a distinctive one. Events in the world are often told in legal terms, which helps lawyers to find relevant sources. Reading these texts – and reading and interpreting the connected secondary sources – shape how we 'tell' these stories and so forth. Finally we have a story told in legal language, and certain sources, texts, prepared, selected, and interpreted in the context of the case. To put it another way, facts are understood, interpreted, and put into a certain order in the light of the legal norm *used by the words, and used by legal regulation fitting the internal logic of these rules*. The legal norm is also understood, interpreted, and converted into concrete steps of action in the light of the case, within the framework of the limitations of the story, and the set of words that have been created before and all in the restrictive scope of the norm.²⁴ In our example the text of the law says that the extraordinary dismissal is valid if the employee 'wilfully or by gross negligence commits a grave violation of any substantive

²² Gadamer op. cit. p. 269.

²³ Ibid. p. 322.

²⁴ Ibid. p. 269.

obligations',²⁵ we might at the end of our legal work, finding enough secondary sources, say that writing three emails about an important internal company project to one of our friends who is now working for the competition, is a 'grave violation' of the employment contract.

Understanding the language, and having a good sense of moral judgment are definitely not enough to form a correct legal interpretation. *What we need is a network of concepts which lawyers mainly learn at their universities and, later, during their work*. These concepts are sometimes explicitly mentioned by codes, but sometimes are developed by 'legal scholarship' and written in textbooks.²⁶ Concepts of individual branches of the law (public law, civil law) are not recorded anywhere in codes but are categories of this legal science. Five preconditions for a valid claim to damages (tort liability – as taught in universities for more than a hundred years), are not written anywhere in this form. Of course sometimes these concepts can be found in the text of the law, but sometimes not, or, as in the case of the law of damages, not entirely in the form in which it is taught. These concepts can be on a very diverse level of abstraction. Branches of law, human rights or concepts of 'legal entity' permeate the whole legal system, while 'unjust enrichment' has a limited scope. The important thing here is that these phrases are, on the one hand, special in the law, and, although they do not form a comprehensive system, are still, in some ways, interlinked with each other. These are the terms that are represented in legal thesauri, (category trees), keyword lists, and any other 'content oriented metadata', that are in different specialized legal databases.

This hidden network of concepts is not necessarily logical and complete in the mathematical sense, but it does fulfil a practical role: it drives the movement within the circle toward an end, helping in categorizing, casting light on something, whilst pushing other factors into the background. Sometimes they drive our way of thinking towards simple dichotomies. In the example mentioned above a contract is *either a labour contract or not*. If it is not a labour contract, it can be one of many types, but both will be 'civil', and it can certainly not be neither one thing nor the other.

In computer assisted legal research the hermeneutical circle's central point is the *process of search*: the interaction of man and machine, when the lawyer poses a question to the machine, and the machine retrieves certain texts. The whole process has three elements: the search string, (search terms which we use), the hidden algorithms which the machine uses for selecting the 'right' answer for our search strings, and, finally, the presentation of the results.

What does exactly happen when we search? What influences the process? Is there a difference between a normal search and legal research?

²⁵ Act XXII of 1992 – on the Labour Code, section 96(1) a)

²⁶ In the German legal culture this type of knowledge is called 'legal dogmatics'. In common law it is 'conceptual legal theory' Bódog uses the expression of 'doctrinal scholarship' for the discipline dealing with it.

3. Search in legal databases

3.1 The formulation of the search string

One should define problems in a way that makes it possible for the machine to retrieve texts. For any problem, we first *deconstruct into elements (thereby simplify) transfer and re-build it in legal wording* which is composed of a network of interdependent concepts. For a search, the result should not be more than two phrases, each containing 3-4 words, which are maybe (in good old legal databases) connected with Boolean operators, (AND, OR, NOT). Taking our example, we can take the following words as elements of a search: breach of labour contract, AND private email, AND legitimate causes of extraordinary dismissal. We see here all the phenomena that have been discussed in association with the hermeneutic circle. When we face a case, our whole education and culture will be in play. The categories we use for the description are already pre-determined by the legal regulations that we learned at university, and so already restrict the scope of possible outcomes. We use them for grasping and recounting the case in a language known by the search engine and the database behind it. If we do not, the results will be nothing but funny, no matter how good is the algorithm which was optimized for general search.

Legal research is special: we have seen that the goal of the search is to handle the *case*, which is playing a different role than, say, the title or the topic of the paper we are working on. The case is a framework for the formulation of the search phrase, *but* at the same time the ultimate goal is to decide it. When we formulate the search phrase, we do it using a special language: the '*doctrinal network*' as a hidden pre-structure helps to deconstruct the case into elements.

Actually, what we do here is the same as has been done for a long time by *index-makers*. We *reduce* the complex problem to certain terms. Using the previous example: if we were looking for a solution, we would type the 'causes of extraordinary dismissal' to the search box. We might add (using the good old Boolean operators 'AND private email').

Before search engines and electronic databases came to be part of legal work, lawyers either used indices as a starting point for legal research, or, as was typical for Continental lawyers, in most cases, they somehow simply 'knew' to which code to turn. It was often said that Law School itself is for teaching which Law should be looked up. There is a grain of truth in this saying: one of the most important functions of the Law School was to create and teach a *set of notions* which finally created a structure and which later become integral to the mindset of students, serving as a framework of 'pre-understanding'. Most importantly this meant to read and understand the codes, from which other legal regulations are derived. This is exactly what was developed by the universities of the 11th century. However, part of that work was also to teach not only the law, but the way 'life' can be told in legal

language, i.e. forming an impression of what is relevant to the law and where it ends: showing the border where morals, taste, and the domain of normal behaviour starts.

Finally, when we formulate a question, this is also influenced by the *role* within the legal system. Our question will be strongly influenced by the fact that are we supposed to *decide* the case as a judge, *fight for a certain outcome as a barrister*, draft a contract. Due to the results we want to achieve (a good decision with defensible reasoning, or the optimal result from the situation) but also because of the audience we are supposed to write or to talk to.

3.2 Text in the machine – meaning and understanding

We all know that search engines do not *understand* the text, but handle it as a set of characters. A frequently occurring word will mean for the machine that the relevant part of the text is dealing with the topic. If the distance of two words is small, this will mean, for the algorithm, that the two words have a connection. The closer they are, the more valid is the connection. *All of these tricks*, and many more which will be discussed later, concern *imitating understanding*, i.e. finding *technical, quantitative ways* to bring the machine as close as possible to *reproduce the meaning*, and 'understand' the text. It can be defined as the problem quantity and quality. Programmers, when building up taxonomies, endless sets of metadata and other 'knowledge representation' tools, are trying to reach exactly this, reach the point when the machine finally 'understands' the text. Many think that here is something like what GADAMER mentions in the first pages of his book with the example of meteorology. Meteorology deals with physics, the difference is only that its data is incomplete, and therefore its predictions are uncertain.²⁷ What if this is the case with law too? If law is a set of rules, and we 'create a structured scheme of standardized descriptors' and 'extract the relevant descriptor values',²⁸ then, finally, we can obtain a database which would correctly predict the outcome of a new case. Quantity can become quality at a certain point.

Not surprisingly, however, these attempts brought little in the way of tangible results. What worked and became popular were those databases which did not attempt to make *predictions*, but tried to retrieve texts as *accurate and relevant* as possible, thus *supporting* legal search, and not *trying to do the legal job*. Within the systems, there are very many "tricks", as I mentioned above. Breaking up the texts into small pieces, labelling these parts (sometimes with dozens of labels), and creating links (connections) are these tools. These metadata, links, and structures, all reflect certain parts of 'doctrinal knowledge'

²⁷ Gadamer op. cit. p. 4.

²⁸ Ashley, K.D., and Brüninghaus, S.: Computer Models for Legal Prediction 46 Jurimetrics, 2006 Spring, p. 309

– the long tradition dating back to the glossators, developed by generations of professors and practitioners and influenced also by legal publishers.

To make machines think and understand the meaning of the text seems hopeless, *but these metadata and links which are applied in these databases, and attached to different levels to the texts can help legal work by supplying surprisingly good answers – even so good that one might think that machines can think.*

3.3 Metadata and links

What makes an expert system special, and sometimes so valuable that lawyers can pay thousands of dollars to have access, is not only that it contains documents not accessible on the public internet. It is becoming a commonplace in legal publishing that pure primary legal documents and content will, at some point, be a commodity, but it is the added knowledge mainly represented in metadata and links, which makes a system valuable.²⁹ *Metadata* are ‘data about the data’, or about (normally) a set of data, which can be a document, or part of a document.³⁰ Metadata is normally grouped into two categories: objective, and subjective, (or content oriented, or meaning-descriptive metadata). Objective metadata is often further split into two subcategories. The first is technical metadata (which is primarily for computers to properly handle the relevant document and which can normally, therefore, be recognized by another program, and has nothing to do with the meaning: filenames, etc. are like this. The second, non-technical objective metadata, cannot be generated normally by computers, but has nothing to do with *meaning*: structure of the text, (titles, subtitles, issuer, or author of the text, validity of the document or the text chunk, modifier, just to mention some objective non-technical metadata.)

For us the most important metadata is the subjective variety and this is what makes an expert system. This, again, has two types:

- General content-oriented metadata: *ontologies, keywords, and summaries*. This enables us to define the (if-then) type of rules in connection with the two entities – documents and metadata. If a word is found in metadata – in keywords and in summaries – then relevance is higher, and all other document and fragments connected to metadata could be also relevant. The *thesauri* previously mentioned are of this type.
- Special content oriented metadata; in law the best known special content oriented metadata are in the citators, which give indications of *the level of authority*. Special links, representing special connections developed by

²⁹ Links, however, can be perceived as a special type of metadata (that contains the information that two or more locations that are connected, and sometimes a description about the type of connection)

³⁰ Baudoncq, Gert – Wauters, Nancy: Wolters Kluwer ELTB Metadata registry report, 2002, Internal Wolters Kluwer working material, 2002

the doctrine, (e.g a rule, and exception relationship) or *the definition of the concept* used are good examples also.

Content-oriented metadata is always generated by people, and is representing *the special expertise of the domain*, in our case legal knowledge. The specialized systems also represent the particular legal field’s internal expertise. One known European system of intellectual property for example has special metadata on figurative trademarks, describing the trademark by words. Therefore, the usage of these rules in relevance ranking gives much more correct results than the algorithms used by general search engines.

Metadata and links are the IT representations of the underlying legal theory and legal culture. Thesauri, indices, table of content, collections were used for a long time as separate tools as well as primarily for navigation, but, visibly, their importance outside the legal domain is marginal, because the primary research tool is the search-box. The search-box dominance seems to have affect the legal community also. In this topic the primary question is, what are the hidden, invisible considerations, embedded in relevance ranking algorithms.

3.4 Relevance ranking

When we search we want to get a *relevant* answer to our problem and in this sense all searches are the same.

Finding something on the internet is almost entirely dependent on the relevance ranking of search engines. If interpretation presupposes certain prejudices, then, in the course of relevance ranking, when the search engine ranks the result of a query, this should be somehow also composed with a help of a set of prejudices. If we have a short look on these rules it may bring us closer to the understanding of the nature of research.

Google is using certain algorithms for relevance ranking,³¹ and though these are not disclosed, groups of experts are continuously testing these, and publish the results, so these rules are more or less visible. The parameters that are influencing relevance ranking are grouped into 10 groups, each containing 10–20 ‘principles’. This means more than 200 rules, and makes Google a very complicated system. However there is a consensus within the experts that the 6 most important factors are the following:

- 1/ Keyword-focused anchor text from external links
- 2/ External link popularity
- 3/ Diversity of link sources
- 4/ Keyword use anywhere in the title tag
- 5/ Trustworthiness of the domain based on link distance from trusted domains
- 6/ Existence of substantive, unique content on the page

³¹ <http://www.seomoz.org/article/search-ranking-factors#ranking-factors> (Last visited: 4th Nov 2004)

This all means that, if we search anything in Google, the first results we will get are those that are considered to be important by other pages: and if these pages, linked to the page, are themselves popular, (visited by many people), and considered to be 'authoritative' (trustworthy) that is even better.

Here we see something interesting: visibly, Google seems to set the same criteria for 'importance', or authority as GADAMER, since it ranks higher the pages that are considered to be important by – the more the better is – other pages. If others are accepting you as 'important', expressing this with the very fact, that they qualify you as an expert with affixing to you such labels, and visiting frequently: this is the definition of authority. The existence of the sought term on the page, in the title, or in the root domain is secondary, as is the existence of lengthy content on the topic. What counts is acceptance by others.

Relevance ranking in certain legal databases was not a question at all, because it presented the results – no matter how frequently the word was used, or cited -, based on a 'legal resource hierarchy'. A certain rule typically has a governmental decree, and occasionally a ministerial decree as an executive norm, which, explicitly mentions the particular legal regulation, but typically only once.

We might think that with judicial decisions the situation might be closer to reality, (i.e. the legal regulation cited by lot of court cases is more important, – authoritative – than other regulations. However, if we see where are the places to which many case referring we find the general clauses, (basic principles), or rules like the general rule of damages in civil code. In general: in code-based legal systems, all amendments of the legal system are equally important. There are no 'more authoritative', 'more convincing' rules of law, than other. To go even further: one life-situation (relation) should be, (at least theoretically) regulated only by one legal rule. Normally and ideally, therefore, within the legal system, a search for a solution of a problem should have one result. Relevance ranking should play no role at all. If there are more answers to a search string, the question is not formulated properly.

Contrary to this pattern, legal search engines (but not Google) rank results on the basis of the following factors. *Frequency* – the more the text contains the search string, the more relevant it is. *Position* of the searched term – the more important part of the law contains the search-string (title, subtitle, footnote, annex) the more relevant it is. *Distance* of the searched terms, (in case of more words) – the closer they are the more relevant it is.

The presentation of the results is again different from general search engines presentation:

- 1/ Hierarchy amongst different legal documents is represented by sectioned result lists. Legal databases do not display all the results on one page and in one bulk. One can see the results only in sections. This is because of the normative power. Primary material has always a priority over secondary. Different sources treated differently. An essay written by an expert is less important than a semi-norm of a particular instance. A court

decision is always more important, (even in the code based systems) than an article. It is not the mass sentiment that decides on importance. This hierarchy is reflecting the internal legal normative hierarchy.

- 2/ Content plays a greater role than in Google. The occurrence of phrases is weighted, but by location and frequency. Google also knows these algorithms but considers them 'less important'.
- 3/ In most of the systems, result lists can be sorted by different viewpoints, such as most cited, legal hierarchy, time, issuer, etc.

The concepts are represented in the legal databases - as mentioned above. The most important and oldest representation structure is 'ontology'. Thesauri have a long history, as the representation tools of reality.³² In law, a normal thesaurus starts from the level of a branch of law, (civil law), than a field of law, (law of contracts), than broader legal institutions (sale contract), and then narrower legal institutions and concepts, (right of redemption in sales contract).

Legal thesauri (legal ontologies) are the primary knowledge representation tools within the law. They can be very different in levels of complexity: it can be a simple topical tree, as it is described above, but a very complicated network of concepts, where not just the concepts themselves are interdependent, but the relations between the concepts are also representing a structure. (In a simple tree, two rules can be only in only in an ascendant – descendent, i.e. relationship, but if we add the 'executive rule', or 'exception' - as two new dimensions, than this will bring two new. They can be used simply as a navigation tool, as a form of Table of Content within law, but they are used in a more sophisticated way, like building up intelligent FAQs,³³ and – of course – for relevance ranking.

4. Summary and conclusion

It is clear that retrieval systems have changed certain technical aspects of lawyers' work.

Databases themselves changed our *approach to 'text'*. In electronic databases, texts lose their physical existence. As a conclusion, text is no longer a book, an article in a journal, a case in the case report, or a commentary to a particular section in law, *but a set of characters*, a few sentences on a screen. Documents are not perceived any more as having a beginning, a corpus, and an end, an internal structure, a 'line', a 'story', which is organized into chapters,

³² Artificial Intelligence, (Hungarian Edition, Russel-Norvig: Mesterséges Intelligencia, Panem-Prentice Hall, Budapest, 2000. p 270.); The Artificial Intelligence and Law journal devoted two special issues on the topic in 2007 (issue 2, and 3.)

³³ Benjamins, et al.: Ontologies of Professional Legal Knowledge as the basis for Intelligent IT support for Judges. In: The Artificial Intelligence and Law Journal, 2004/12 p. 360.

parts and sub parts. This is no longer visible and reading is much less sequential than before.

Retrieval systems try to *counterbalance* this with many tools and tricks: sophisticated printing functions,³⁴ multiple layer table of contents,³⁵ customizable result lists,³⁶ highlighting,³⁷ or when explanatory texts are inserted into the text of the primary sources.

Another consequence is, partly as a result, precisely the opposite. If we work with printed sources, we simply do not see the numberless other occurrences of a word or a phrase we are looking for, which happens many times when we use a retrieval system. *This already generated* a strange need for the uniform use of simple words such as 'entrepreneur',³⁸ or 'room'. As a result, in the past few years there are increasing attempts to create a more uniform legal language, for example, by forms of definitions.³⁹

Despite all these remarks, in my view legal databases have still not changed legal work and legal culture radically. Theories behind the texts remain the same, and in many respects these databases are still – *though much bigger than before* – collections of law: bigger corpuses, but still corpuses of law. This, on the other hand, does not mean that this will remain like so post-Internet. We do not know what will happen. If we just simply compare how Google ranks retrieved information (see *infra*) we see startling differences. Legal texts are different from other authoritative texts. They claim obedience even if they are not popular, used and visited, cited and acclaimed by other documents, or users. From the viewpoint of a case, there are no less or more important documents and rules: this means that, since each and every case is different, sometimes the least important, shortest legal text could be the relevant one, having decisive power. The *lex specialis derogat lege generale* principle is contrary to the principle of Google, for which frequently visited 'important' texts, (say the

³⁴ Some systems, for example enables the user to directly print the content of the result list, or to put the found, and annotated texts into one 'bag', and then offer the adjustment of the format of printing in different ways. One of the most popular one is the one which follows the tradition of the glossators – the texts of the secondary materials shown inserted to the text of the primary source.

³⁵ In many systems the same set of documents is organized into two-three trees: typical is that there is one topical TOC, and another representing document types.

³⁶ Sorting of the result lists are very popular: one can select from date of issue, document type, frequently cited, or other professional parameters, like issuer, or primary-secondary resources.

³⁷ Highlighting primarily helps to find the searched term, but this function exists in a form when the text and the TOC is synchronized, and one can see where is she actually within the text.

³⁸ These are real examples told by professionals.

³⁹ Definitions were nearly unknown in the Hungarian legal system before the emergence of the retrieval systems. They became extremely popular after 1990. This can be a coincidence but I do not think so.

Civil Code or a leading case) are always more important than executive decrees.

In Google, if we type in any legal expression, nine times out of ten it will 'interpret' our question that we would like to know *the definition of the term*, and very probably the first hits will be from Wikipedia. Lawyers, however, during their work are typically not looking for definitions, but would like to see rules which connect with their case.

Lawyers do not like any information which is acquired from an unknown body of information. Neither do they like the fact that, as a result, they receive fragments, without knowing their origin, connection to other texts and *reliability*. If we use search terms, and receive a small chunk of a text, then the 'underlying theory' – which is represented either in legal indices or in the text of the law itself (from where the text gets its authority) is simply not visible.⁴⁰ Moreover, however huge they are, databases behind the legal retrieval systems *still have an end*, and the data included shows a uniform structure. This is not true for the Internet. The Internet is endless; it has no structure, and no content-oriented (i.e. no technical) format standard.

Tradition, as mentioned before, plays an important role in each interpretation. Google is mainly *against* tradition. You can easily disappear from Google indices, if you do not update your site, or if someone starts to be more visited – for whatever reason. Tradition is, amongst others, the whole range of layers of connotations attached to a word. For Google, a particular meaning which was once part of this range of meanings is not important. Google hopelessly lives in the present. If we define tradition as 'hidden structure' (as we did before) the situation is even worse. Google has no hidden structures such as thesauri, or topical restrictions. Google does not know that contract of inheritance as a topic, or legal institution is a part of 'Succession by Will' as a topic, and is a part of 'Succession' and also a chapter in the Hungarian Civil Code. So, public will, as a search-string, has more IN common with the 'contract of inheritance', than, say, public transportation.

It seems that, in the legal domain, we still insist on the glossators' method. We simply need the assumption that a text has an underlying logic, reason, justice and an understandable structure. Database logic fits Common law better than Continent, but original database logic, even in America, was based on the knowledge-organizing work of earlier generations of lawyers. In Code Law systems this is even more evident.

The question, whether computers made our life happier than before can be translated into the legal domain as the question of whether legal databases make legal work easier.⁴¹ In my view, legal databases made lawyers' work easier in

⁴⁰ Katrina Fisher Kuh deeply analyzes this change. Fisher Kuh, Katrina: Electronically Manufactured Law. In: 22 Harvard J. L. & Tech 2008 p. 241.)

⁴¹ Susskind, Richard: Transforming the Law. Oxford University Press, New York, 2000 p. 161.

some respects, but *have not changed that radically*. This is no longer true for *Google*. We do not know it yet, but Internet and Google might also change legal culture. We must rely on Google's ranking algorithms, but we do not know these algorithms. The researcher will get answers from these systems and from the web to any stupid question.⁴² We are supposed not to know and need a 'pre-structure' and this phenomenon will be very interesting for our children. My generation was socialized on theories of a legal system, branches of law, codes, and commentaries and legal institutions. Compared to this, the new term where people, if they wish to know anything, then 'Google it' might be better or worse, but it will certainly not be as it was - and we do not know its effects on the realm of law.

⁴² My favourite example is the 'Metal umlaut' in Wikipedia

FORMER VOLUMES OF STUDIA IURIDICA

1. *Halász Pál*: Az államfogalom meghatározásának néhány kérdése
2. *Kauszer Lipót*: Hozzászólás a házassági vagyonszövetség 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. *Szotáczy Mihály*: A jogi akarat osztálytartalma
7. *Földvári József*: A visszaesés értékelése a büntetőjogban
8. *Benedek Ferenc*: A iusta causa traditionis a római jogban
9. *Loşonczy István*: Adalékok a tartós és állapot-bűncselekmény kérdéséhez
10. *Kocsis Mihály*: A másodfokú büntetőbíráóság ítélő hatalma
11. *Rudolf Lóránt*: A kollektív szerződés főbb elvi kérdései a szocializmusban
12. *Kovácsics József*: Község szervezetünk problémái Baranya megyében
13. *Csizmadia Andor*: A nemzeti bizottság létrejötte és jogállása 1944-45-ben
14. *Halász Pál*: Az államformátan 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 szervezetről a rabszolgatartó athéni demokráciában
21. *Szotáczy Mihály*: Az egyéni érdek és az osztályérdek viszonya a tárgyi jogban
22. *Kauszer Lipót*: A jogügyletről

23. *Rudolf Lóránt*: A kötelelem 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. *Husztly Lajos*: A hozzátartozó a polgári jogban
27. *Vargyai Gyula*: Jobbágyszabádkítás 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 engedelmisségi 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
35. *Vargyai Gyula*: A legitimisták és szabad királyválasztók közjogi vitájáról az ellenforradalmi államban
36. *Ivancsics Imre*: A szakszervezetek szerepe az ipar irányításában és az igazgatásában
37. *Nicolae Tatmir*: A munka nemzetközi szervezete – *Berthold Braunstein*: Szabadság és szükségsszerűség a büntetőjogban
38. *Szamel Lajos*: Az államigazgatás társadalmasításáról
39. *Kazimierz Opalek*: Általános jogtudomány – *Franciszek Studnicki*: A jogszabályok kommunikációs problémái
40. *Csizmadia Andor*: A pécsi egyetem a középkorban
41. *Andor Csizmadia*: Die Universität Pécs im Mittelalter (1367-)
42. *Andor Csizmadia*: L'université de Pécs au moyen âge (1367-)
43. *Román László*: A munkáltatói jogok természetéről

44. *Pap Tibor*: A házasságon kívüli leszármazásra vonatkozó jogalkotás fejlődése – *Budvári Róbert*: A házasságon kívül született gyermek jogállása és a természettudományos tárgyi bizonyítás fejlődése
45. *Heinz Paul*: Az anyagi felelősség szabályozása a Német Demokratikus Köztársaság munkajogában – *Gerhard Riege*: Az állampolgári jog fasiszta eltorzítása
46. *Takács Béla*: A vállalatok összevonása és az összevonások gazdasági hatása
47. *Hoóz István*: A népesedéspolitika néhány elméleti kérdése
48. *Rechtshistorikerkonferenz in Pécs (1965)*: Die Freiheitsrechte und die Staatstheorien im Zeitalter des Dualismus
49. *Kocsis Mihály*: A jogforrások ügye a büntetőeljárásban
50. *Molnár István*: Élelmiszer-termelés – földvédelem
51. *Bibliográfia*: Az egyetem oktatóinak és tudományos dolgozóinak szakirodalmi munkássága 1945-1966.
52. *Kislégyi Dénes*: Az incestus tilalma
53. *Hoóz István*: A népesedéspolitikai intézkedések és a gazdasági helyzet hatása a születési arányszámokra Magyarországon a két világháború közötti időszakban
54. *Fesztl Nándor* – *Tamás Lajos*: Az új gazdasági mechanizmus polgári jogi vonatkozásainak néhány problémája
55. *Gerhard Haney*: A jog és erkölcs
56. *Vargyai Gyula*: A katonai közigazgatás és az ellenforradalmi állam keletkezése
57. *Páll József*: A szerződés teljesítésének megerősítése a PTK-ban
58. *Révész Károly*: A visszaesés problémája a büntetőjogban
59. *Román László*: Munkajogunk néhány kérdése a gazdasági mechanizmus reformjának tükrében
60. *Csizmadia Andor*: A 600 éves jogi felsőoktatás történetéből (1367-1967)
61. *Vargha László*: Über die Faktoren, die das Ergebnis einer Handschriftenvergleichung hauptsächlich beeinflussen können
62. *Földvári József*: Die deterministische Begründung der strafrechtlichen Verantwortlichkeit
63. *Rudolf Lóránt*: Az adásvétel szabályozásának fejlődése a kizsákmányoló társadalmakban

64. *Molnár István*: A munkamulasztásból eredő kártérítés néhány kérdése a termelőszövetkezeti jogban
65. *T. Pap – R. Halgasch*: Die Rechtsverhältnisse zwischen Eltern und Kindern in der sozialistischen Gesellschaft
66. *Antal Ádám*: Problemü goszudarsztvennopravovüh i adminisztrativnopravovüh dogovorov v Vengerszkoj Narodnoj Reszpublike
67. *Román László*: A szervezeti jellegű belső szabályzatok természete különös tekintettel a kollektív szerződésre
68. *Vargyai Gyula*: Nemzetiségi kérdés és integráció. Adalékok Jászi Oszkár nemzetiségi koncepciójának értékeléséhez
69. *Judi István*: Munka és erkölcs
70. *Markos György*: A megyei tanácsi szervek tervező tevékenysége
71. *Tremmel Flórián*: A bizonyítás és a bizonyíték fogalma a büntetőeljárásban
72. *Antal Ádám*: Hauptzüge und zeitgemäße Probleme der territorialen Koordinierung in der Ungarischen Volksrepublik
73. *Molnár István*: A földtulajdon és a földnyilvántartás kapcsolata
74. *Bruhács János*: Az ENSZ kísérlete Namibia (Délnyugat-Afrika) nemzetközi státusának rendezésére
75. *J. Dehaussy*: A nemzetközi jog forrásai és a jog nemzetközi forrása – *E. Melichar*: A közigazgatási jogtudomány fejlődése Ausztriában – *K. Opalek*: A jog motivációs hatása
76. Current problems of socialist jurisprudence
77. A Magyar Tanácsköztársaság államáról és jogáról (1919-1969)
78. *Csizmadia Andor*: A pécsi egyetemalapítás 600. évfordulójára (1367-1967)
79. *Páll József*: A házastárs öröklésének néhány kérdése a haszonélvezeti jogra tekintettel
80. Entwicklungsfragen der Verwaltung in Mitteleuropa. Red. Andor *Csizmadia*
81. *László Román*: Einige theoretische Fragen des Zusammenwirkens der Gewerkschaft und des sozialistischen Unternehmens
82. Bibliográfia: Az egyetem oktatóinak és tudományos dolgozóinak szakirodalmi munkássága 1967-1971.

83. *Antal Ádám*: Verfassungsmäßigkeit und Verfassungsschutz in der Ungarischen Volksrepublik
84. *Tibor Pap*: Les exigences sociales et la modification de la loi de la famille
85. *Ottó Bihari*: L'organisation de l'État socialiste - une organisation de l'État moderne
86. *József Farkas*: Der subjektive Geltungsbereich und der objektive Umfang der Rechtskraft im ungarischen Zivilprozeß
87. *József Farkas* (Red.) Wissenschaftliche Konferenz über die Hauptfragen des sozialistischen Vertragssystems
88. *Ferenc Benedek*: Die conventio in manum und die Förmlichkeiten der Eheschließung im römischen Recht
89. Bibliográfia: A Pécsi Tudományegyetem Állam- és Jogtudományi Kara oktatóinak szakirodalmi munkássága 1972-1976.
90. *László Román*: Über die Rechtsstellung der Arbeitgeberorgane, insbesondere in der Unternehmenorganisation
91. *Antal Ádám*: L'activité gouvernementale en Hongrie
92. *Ferenc Benedek*: Eigentumserwerb an Früchten im römischen Recht
93. *József Farkas* (hrsg.): Beiträge zu den rechtlichen Fragen des Umweltschutzes
94. *Andor Csizmadia, Alajos Degré, Erika Somfai Filóné*: Études sur l'histoire du droit de mariage de Hongrie
95. *Ádám Antal, Benedek Ferenc, Szita János* (szerk.): Jogtörténeti tanulmányok. Emlékkönyv Csizmadia Andor hetvenedik születésnapjára
96. *József Földvári*: Einige Bemerkungen zum neuen ungarischen Strafgesetzbuch
97. *Emil Erdösy*: Der technische-wissenschaftliche Fortschritt und die strafrechtliche Verantwortlichkeit
98. *Lajos Tamás*: Das Verantwortlichkeitssystem der Investitionsverträge
99. *László Vargha*: Die Teilrechtskraft im ungarischen Strafverfahren
100. *Ádám Antal, Benedek Ferenc, Farkas József* (szerk.): Kauser Lipót Emlékkönyv
101. *Lajos Szamel*: La responsabilité de l'administration pour le dommage causé

102. Bibliográfia: A Pécsi Janus Pannonius Tudományegyetem Állam- és Jogtudományi Kara oktatóinak szakirodalmi munkássága 1977-1982.
103. László Kiss: Possibilité de décentralisation de la législation administrative en Hongrie
104. Ádám Antal (szerk.): A 100 éves Kislégyi Nagy Dénes tudományos, oktatói és költői életművéről
105. Ádám Antal (szerk.): Jubileumi tanulmányok 40.
106. Antal Visegrády: Die Rolle der Gerichtspraxis in der Entwicklung des sozialistischen Rechts
107. József Farkas: The main questions of Hungarian international civil procedure law after the codification of private international law
108. Lajos Tamás: Kommissionsvertrag - als einer der Rechtsrahmen für eine Kooperation
109. Ádám Antal (szerk.): Dr. Holub József és dr. Irk Albert pécsi professzorok munkássága
110. János Bruhács: Le régime international de la navigation sur le Danube
111. Ádám Antal (Red.): Die Promotion zum Ehrendoktor von Prof. Gerhard Haney und Prof. Gerhard Hoffmann an der Janus Pannonius Universität
112. Miklós Kengyel: Rechtsschutzanspruch und die Rechtsschutzbedürfnis. Beiträge zur Theorie des Klagerechts
113. Harro Otto: A népesedéssel kapcsolatos orvostudomány büntetőjogi határainak megvonására irányuló megfontolások a Német Szövetségi Köztársaságban - Erdősy Emil: Gondolatok a magzatelhajtás büntetőjogi szabályozásának kérdéséről
114. Ádám Antal (szerk.): Dr. Faluhelyi Ferenc tudományos, oktatói és tudományszervezői munkássága
115. László Kecskés: Staatliche Immunität und Verantwortlichkeit für Schäden
116. József Farkas: Die zivilprozeßrechtliche Stellung der Ausländer in Ungarn
117. Die Promotion von Prof. Dr. Harro Otto zum Ehrendoktor an der Janus Pannonius Universität
118. Ádám Antal (szerk.): Tanulmányok Szamel Lajos tiszteletére
119. Ádám Antal (szerk.): Szamel Lajos és Kulcsár Kálmán a Janus Pannonius Tudományegyetem díszdoktorai

120. Antal Ádám: Tendances du développement de l'ordre constitutionnel de Hongrie
121. Antal Ádám: Le contrôle de la constitutionnalité des actes administratifs et gouvernementaux en Hongrie
122. Bibliográfia: A Janus Pannonius Tudományegyetem Állam- és Jogtudományi Kara oktatóinak szakirodalmi munkássága 1983-1990.
123. Hamza Gábor, Kajtár István, Zlinszky János (szerk.): Tanulmányok Benedek Ferenc tiszteletére
124. Korinek László (szerk.): Tanulmányok Földvári József tiszteletére
125. Bibliográfia (Összeállította Ádám Antalné). A Janus Pannonius Tudományegyetem Állam- és Jogtudományi Kara oktatóinak szakirodalmi munkássága 1991-1996.
126. Petrétei József (szerk.): Emlékkönyv Ádám Antal egyetemi tanár születésének 70. évfordulójára
127. Gábor Hamza, István Kajtár, Attila Pókecz Kovács, János Zlinszky (hrsg.): Iura antiqua – iura moderna. Festschrift für Ferenc Benedek zum 75. Geburtstag
128. Petrétei József (szerk.): Emlékkönyv Bihari Ottó egyetemi tanár születésének 80. évfordulójára
129. Szerkesztési hiba folytán a sorozat 129. száma nem jelent meg!
130. Fenyvesi Csaba, Herke Csongor (szerk.): Tanulmányok Erdősy Emil professzor tiszteletére
131. A PTE Állam- és Jogtudományi Kara oktatóinak szakirodalmi munkássága 1997-2002. (Bibliográfia) Összeállította Ádám Antalné
132. Fenyvesi Csaba, Herke Csongor (szerk.): Emlékkönyv Vargha László egyetemi tanár születésének 90. évfordulójára
133. Korinek László, Köhalmi László, Herke Csongor (szerk.): Emlékkönyv Ferenc Zoltán egyetemi adjunktus halálának 20. évfordulójára
134. Korinek László, Köhalmi László, Herke Csongor (szerk.): Emlékkönyv Irk Albert születésének 120. évfordulójára
135. Nóra Chronowski (ed.): „Adamante notare.” Essays in honour of professor Antal Ádám on the occasion of his 75th birthday
136. Balogh Ágnes, Hornyák Szabolcs (szerk.): Tanulmánykötet Erdősy Emil professzor 80. születésnapja tiszteletére
137. Tremmel Flórián, Mészáros Bence, Fenyvesi Csaba (szerk.): Orvosok és jogászok a büntető igazságszolgáltatásban. Dezső László Emlékkönyv

138. *Gál István László, Kőhalmi László* (szerk.): Emlékkönyv Losonczy István professzor halálának 25. évfordulójára
139. *Fenyvesi Csaba, Herke Csongor, Mészáros Bence* (szerk.): Bizonyítékok. Tiszteletkötet Tremmel Flórián egyetemi tanár 65. születésnapjára
140. *Csefkó Ferenc* (szerk.): Ünnepi kötet. Ivancsics Imre egyetemi docens, decan emeritus 70. születésnapjára
141. *Kiss György, Berke Gyula, Bankó Zoltán, Kajtár Edit* (szerk.): Emlékkönyv Román László születésének 80. évfordulójára
142. A Pécsi Tudományegyetem Állam- és Jogtudományi Kara oktatóinak szakirodalmi munkássága, 2003-2007 (Bibliográfia) Összeállította Kajtár Istvánné, Karoliny Eszter, Saághy Ferencné
143. *Csapó Zsuzsanna* (szerk.): Ünnepi tanulmánykötet Bruhács János professor emeritus 70. születésnapjára
144. *Zsolt György Balogh et al.* (eds.): Selected Essays of Faculty of Law University of Pécs
145. *Chronowski Nóra, Petrétei József* (szerk.): Tanulmányok Ádám Antal professor emeritus születésének 80. évfordulójára
146. *Andrássy György, Vogl Márk* (szerk.): Az emberi jogok és a nyelvek
147. *Zsolt György Balogh et al.* (eds.): Essays of Faculty of Law University of Pécs
148. *Fenyvesi Csaba, Herke Csongor* (eds.): Pleadings. Celebration volume of Professor Tremmel Flórián's 70th Birthday