STUDIA IURIDICA CAROLIENSIA

1.

Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar

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Kiadja a Károli Gáspár Református Egyetem Állam- és Jogtudományi Kara

Contents

Preface

Dear Reader,

On behalf of the Faculty of Law of the Károli Gáspár University of the Hungarian Reformed Church I would like to suggest and recommend this booklet introducing our Faculty to you. This is our initial attempt in compiling it in foreign languages and if successful, we will plan to publish it on an annual basis.

By way of introduction, I shall say a few words about the history of our Faculty. In Hungary, at the start of the 18th century, protestant legal education had a high regard for old traditions when protestant legal academies were established in several parts of the country including Sárospatak, Máramarossziget, and Debrecen. These academies were in existence until the first half of the 20th century. In 1831 the Protestant Legal Academy, the legal predecessor of the Faculty of Law of the Károli Gáspár University of the Hungarian Reformed Church was founded in Kecskemét. It was in 1949, during the communist era, that the Protestant Legal Academy in Kecskemét was also closed down, and the protestant legal faculty could be re-instated again only in 1998, after the political changes were made. Our Faculty currently operates as an institution maintained by the Hungarian Protestant Church and is accredited as a legal education provider. Students may apply for an academic and PhD program at our Faculty. The current enrollment in our academic program exceeds nine hundred.

As the historical introduction indicates, 2006 is a special event for us as it marks the 175th anniversary of the establishment of our Faculty. Furthermore, I'd like to devote a few words in this booklet to our Dear Reader, who will find 16 essays with 13 compiled in English, 2 in German and one in French. Each is followed by a summary in either German or English. The authors are all professors, lecturers and researchers of the Faculty of Law of the Károli Gáspár University of the Hungarian Reformed Church. As illustrated in the table of contents, the diversity and the comprehensive array of themes covered in this initial booklet, allows for you, the Dear Reader to familiarize yourself with extensive subject matter belonging to various branches of law.

It is our hope that this booklet will enrich the Dear Reader with useful and valuable insights and that you will anticipate our next publication in 2007.

Budapest, February 2006

Dr. Gábor MÁTHÉ
Dean

Vorwort

Sehr geehrte(r) Leser/Leserin!

Erlauben Sie mir, dass ich Sie im Namen der Juristischen Fakultät Gáspár Károli Universität der Reformierten Kirche in Ungarn recht herzlich begrüße, und Ihre Aufmerksamkeit auf unseren fremdsprachigen Band lenke, welchen Sie gerade in Ihrem Hand halten. Diese Publikation erscheint in diesem Jahr bei erster Gelegenheit, darauf folgend werden wir uns jährlich mit einem neuen Band melden.

Einleitend möchte ich Ihn/Sie über das Geschichte unserer Fakultät kurz erzählen. Der reformierte, rechtliche Unterricht hat ganz alte Traditione in Ungarn; reformierte Rechtsakademien öffneten sich ab der 18. Jh. an mehreren Punkten des Landes, wie in Sárospatak, in Máramarossziget, in Debrecen. Diese Institutione waren bis die erste Hälfte der 20. Jh. tätig. Die reformierte Akademie in Kecskemét wurde im Jahre 1831 gegründet, diese ist der Rechtsvorgänger der Juristischen Fakultät Gáspár Károli Universität. Auch die reformierte Akademie in Kecskemét kam in der Zeit der kommunistischen Diktatur, im Jahre 1949 zur Schließung. Danach nur nach der Wende, in Jahre 1998 könnte die Tätigkeit der Juristischen Fakultät wiederstarten.

Unsere Institut ist jetzt von der Reformierte Kirche in Ungarn erhalten, als staatlich anerkannte Institut tätig, wo akkreditierte Juristbildung lauft. An unserer Fakultät findet auch Grundausbildung und Doktorbildung statt, die Zahl der Studierende an das Direktstudium ist mehr als 900 Personen. Wie es schon sich ausgestellt hat, das Jahr 2006 ist für uns ein Festjahr, wir feiern die hundertfünfundsiebzigjähriges Jubileum der Gründung unserer Fakultät.

Nach dem kurzen Geschichte unserer Fakultät soll auch paar Worte über diesen Band fallen.
Die Leser können insgesammt 16 Aufsätze finden, davon 13 ist auf Englisch, 2 auf Deutsch und 1 auf Französisch, nach allen Artikeln können Sie eine inhaltliches Zusammenfassung auf Deutsch und auf Englisch finden. Die Autoren dieses Bandes sind alle, ohne Ausnahme die Lehrer und Forscher der Juristischen Fakultät Gáspár Károli Universität der reformierten Kirche in Ungarn.

Die Artikeln sind reich an Themen, die Leser können sich mit den verschiedensten Themen der Rechtszweige bekannt machen, wie es sich schon aus der Herumstöberei des Inhaltsverzeichnises herausstellt.

Ich veranlasse mich, dass dieser Band, welchen der/die Leser/Leserin in Ihrem Hand hält, wird nützliche, wertvolle Minuten für alle schaffen, und gern werden Sie unseren neu erscheinenden Band im Jahre 2007 lesen.

Budapest, Februar 2006

Dr. Gábor MÁTHÉ
Dekan

Dr. László CSINK, Ph.D.

associate professor, Head of Department of Statistics and Information Technology of Law

European Research and Development from a Financial Aspect

In order to study the development of knowledge-based society, DG Research has elaborated two complex indicators.[1] One is called the investment into knowledge-based society (KBS), and the other one is the operative effectiveness indicator of KBS. The first indicator includes several sub-indicators, including the R&D budget per capita, the relative number of researchers compared to population, the number of science and technology PhD's, the educational budget, spread of lifelong learning and the influx of e-government into public administration.

In this paper, the main objective is to use some of the above criteria to compare the R&D activity of the European Union with that of the USA and Japan. In some respect, Hungary's performance is analysed as well.[2]

The first overall attempt to devise statistical features for the analysis of R&D was worked out by OECD experts in 1963 in Frascati, Italy.[3] In the following, all undefined indicators are those of the Frascati Manual.

The R&D Budget

In 2001, the EU-15 – the EU countries before the latest enlargement – spent 143 Billion € (PPS 87 Billion €) for research and development. Compared to the above, the R&D 175 Billion € for research and development, which meant 147 Billion € in 1995 Purchasing Power Standard. In 2001, the USA spent 315 Billion € (PPS 234 Billion €), while Japan used up R&D expenditure

1 Towards a European Research Area – Science, Technology and Innovation. Key Figures 2003–2004. Luxembourg: Office for Publications of The European Communities, 2003. (KEYFIG, 2003)

2 The interested reader may find more details in: László CSINK :Európai Uniós tudományos igazgatás a pályázatok szemszögéből. Bookmaker Kiadó, Budapest, 2005. ISBN 963 86642 5 8, pp. 1–166.

3 Frascati Manual 2002: Proposed Standard Practice for Surveys on Research and Experimental Development. OECD Publishing, 16 Jan 2003, 256 pages.

of the EFTA countries[4] (10 Billion €, PPS 7 Billion in 2001) and the new EU embers and candidate countries (5 Billion €, PPS 9 Billion € in 2001) was negligible.

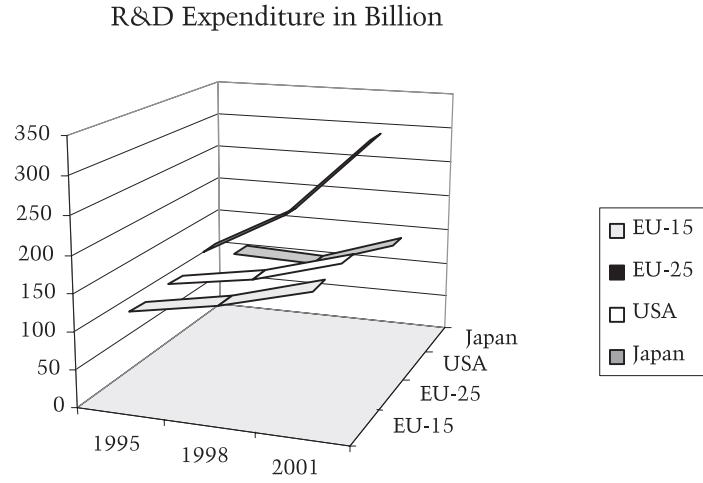
The tendency in R&D expenditure shows that the difference between the EU and the USA is growing. In 2001 the difference was 140 Billion € (PPS 87 Billion €) for the USA.

One can draw the following conclusions based on Figure 1:

- The difference was continually growing in the pertinent period, with the greatest change in 2000-2001 (21 Billion €).
- EU-15 achievement was favourable compared to Japan.
- The growth rate of R&D expenditure is higher in the USA (4,8%) than in the EU-15 (4,5%).
- Considering the R&D intensity, which is the ratio of GERD[5] to GDP, the EU-15 reached a 1,98% record in 2001. Although this is the highest ever achievement of the EU-15, it is still lower than that of the USA (2,8%) or Japan (3,06%).

Figure 1 R&D Expenditure in the Period 1995-2001 in Billion €

	1995	*1998*	*2001*
EU-15	124	143	175
EU-25	126	145	178
USA	141	202	315
Japan	109	104	143



Source: KEYFIG (2003)

Taking into account the 10 new members, the R&D intensity of the EU-25 decreases to 1,93%. The reason is that both the total GDP and the GERD are very low in these countries. There is a great variation among the examined countries. Israel leads the field with 4,8%; the second,

4 Iceland, Lichtenstein, Norway and Switzerland.
5 GERD= Gross Expenditure on R&D

third and fourth places are filled with Nordic countries, Sweden (EU), Finland (EU) and Iceland (EFTA), respectively. Better than EU average are Germany, Denmark, France and Belgium. Considering the new EU members, Slovenia (1,6%) and the Czech Republic (1,3%) are the best. Under 1% perform three EU-15 countries, namely Spain, Portugal and Greece. On the other hand, the growth rate of R&D intensity is reasonable in all three cases.

Table 1 R&D Expenditure Compared to GDP, the Growth rate of R&D intensity

	R&D/GDP (%)	*Rate of Intensity (%)*
Israel	4,81	11,1
Sweden	4,27	4,8
Finland	3,49	5,2
Iceland	3,11	10,6
Japan	3,06	2,0
USA	2,80	1,8
Switzerland	2,63	-0,9
Germany	2,50	1,8
Denmark	2,40	5,5
France	2,20	0,4
Belgium	2,17	3,8
EU-15	1,98	1,5
Austria	1,94	2,6
Netherlands	1,94	-1,7
EU-25	1,93	1,3
UK	1,84	0,3
Luxembourg	1,71	-
Norway	1,62	-0,3
Slovenia	1,57	2,5
Czech Republic	1,30	3,0
Ireland	1,17	-2,3
Italy	1,07	0,5
Spain	0,96	4,0
Hungary	0,95	7,0
Estonia	0,79	8,8
Portugal	0,77	4,4
Lithuania	0,69	5,1
Greece	0,67	15,3
Slovakia	0,65	-12,1
Poland	0,65	-2,3
Turkey	0,64	9,2
Bulgaria	0,47	-9,2
Latvia	0,44	0,8
Romania	0,39	-9,2
Cyprus	0,27	5,5

Dates of data: Greece 1999, Italy, Netherlands, Luxembourg, Switzerland, Turkey 2000, Germany, France, Austria, Portugal, Finland, UK, Iceland, USA 2002, other countries 2001. *Source:* KEYFIG (2003)

It is interesting to analyse the R&D expenditure from the point of view of sources. The sources emanate from enterprises, the government or other national and foreign sources. The role of enterprises is highest in Japan (73%). This rate is 66% in the USA, while it is 56% for the EU. This difference is clearly an important issue. Since the Additional national and foreign sources do not play a substantial role, practically the reverse order is true if we compile a list according to the government participation: EU 34%, USA 29%, and Japan 18%.

Within the EU Sweden and Finland are the nearest to Japan, in both countries the business sphere has a role of about 70% in financing research and development. Belgium, Germany and Ireland follow with about 60%. Among the dominating economies in the EU, France and the UK are under the average. Italy, Austria Portugal and Greece are at the end of the list. Looking at the new EU members, only Slovakia reached the EU average, Slovenia and the Czech Republic perform higher than 50%; all the other countries are rather weak. Hungary's performance is less than 35%.

In Table 3 I investigate how the R &D intensity ((R&D)/GDP) and the enterprise research investment (V/K) is proportioned to government expenditure. It is interesting to note that in each case in which the R&D intensity is higher than the EU average, the enterprise funding contribution exceeds the government support. This fact is indicated in the E>G column.

At the same time, (R&D)/GDP and E/G have a strong, 75% correlation. This shows that the best way to improve the growth of R&D intensity is to support enterprise R&D investments.

Funds Spent on Basic Research

Basic research has a vital role in R&D, namely to work out the foundations of applied research. On the other hand, to get an image of future applications we need to analyse basic research. In the 1990's, basic research was effaced in several countries versus applied research, presumably due to short-term economic interests. There is a great diversity, however, in the EU countries from this respect. Some areas, like biotechnology and nanotechnology are very promising from the point of view of future applications.

Unfortunately data after 1995 are insufficient. Only six EU countries (Denmark, Spain, France, Italy, Netherlands and Portugal), four new members (Czech Republic, Hungary, Poland and Slovakia) and three EFTA states (Iceland, Norway and Switzerland) produce the necessary data, in addition to the USA and Japan.

Table 2 The R&D expenditure from the point of view of sources (*)

	Enterprises (%)	*Government (%)*	*Other national sources (%)*	*Foreign sources (%)*
Japan	73,0	18,5	8,1	0,4
Sweden	71,9	21,0	3,7	3,4
Switzerland	69,1	23,2	3,4	4,3
Ireland	66,0	22,6	2,5	8,9
Belgium	66,2	23,2	3,3	7,3
Finland	70,8	25,5	1,2	2,5
USA (**)	66,2	28,7	5,1	-
Israel	63,9	28,8	3,5	3,8

	Enterprises (%)	*Government (%)*	*Other national sources (%)*	*Foreign sources (%)*
Germany	66,0	31,5	0,4	2,1
Denmark	58,0	32,6	3,5	5,3
EU-15 (***)	56,1	34,0	2,2	7,7
EU-25 (***)	55,8	34,4	2,2	7,6
UK	46,2	30,2	5,6	18,0
Slovenia	54,7	37,1	1,0	7,2
Netherlands	50,1	35,9	2,6	11,4
Iceland	46,2	34,0	1,5	18,3
Slovakia	56,1	41,3	0,7	1,9
France	52,5	38,7	1,6	7,2
Norway	51,7	39,8	1,4	7,1
Czech Republic	52,5	43,6	1,7	2,2
Spain	47,2	39,9	5,2	7,7
Romania	47,6	43,0	1,2	8,2
Austria	39,0	42,1	0,3	18,6
Turkey	42,9	50,6	5,3	1,2
Italy	43,0	50,8	4	6,2
Latvia	29,4	41,5	–	29,1
Hungary (*)	34,8	53,6	0,4	9,2
Portugal	32,4	61,2	2,0	4,4
Greece	24,2	48,7	2,4	24,7
Poland	30,8	64,8	2,0	2,4
Estonia	24,2	59,2	3,9	12,7
Bulgaria	24,4	69,2	1,1	5,3
Cyprus	17,5	66,5	6,6	9,4

(*) The sum does not always yield exactly 100%.
(**) Without capital investment.
(***) Without Luxembourg, Lithuania and Malta; an estimated value.
The dates of sources: Italy 1996, Belgium, Denmark, Greece 1999, Austria, USA 2002, France, Ireland, Netherlands, Switzerland, Bulgaria, Cyprus, Estonia, Lithuania, Turkey 2000, all other countries 2001.
Source: KEYFIG (2003)

Table 3 R &D intensity and enterprise research investment

	(ReD)/GDP (%)	*Enterprise (%)*	*Gov. (%)*	*E/G*	*E>G?*
Israel	4,81	63,9	28,8	2,22	yes
Sweden	4,27	71,9	21,0	3,42	yes
Finland	3,49	70,8	25,5	2,78	yes
Iceland	3,11	46,2	34,0	1,36	yes
Japan	3,06	73,0	18,5	3,95	yes
USA	2,80	66,2	28,7	2,31	yes
Switzerland	2,63	69,1	23,2	2,98	yes
Germany	2,50	66,0	31,5	2,10	yes
Denmark	2,40	58,0	32,6	1,78	yes
France	2,20	52,5	38,7	1,36	yes

	(R&D)/GDP (%)	Enterprise (%)	Gov. (%)	E/G	E>G?
Belgium	2,17	66,2	23,2	2,85	yes
EU-15	1,98	56,1	34,0	1,65	yes
Austria	1,94	39,0	42,1	0,93	
Netherlands	1,94	50,1	35,9	1,40	yes
EU-25	1,93	55,8	34,4	1,62	yes
UK	1,84	46,2	30,2	1,53	yes
Norway	1,62	51,7	39,8	1,30	yes
Slovenia	1,57	54,7	37,1	1,47	yes
Czech Republic	1,30	52,5	43,6	1,20	yes
Ireland	1,17	66,0	22,6	2,92	yes
Italy	1,07	43,0	50,8	0,85	
Spain	0,96	47,2	39,9	1,18	yes
Hungary	0,95	34,8	53,6	0,65	
Estonia	0,79	24,2	59,2	0,41	
Portugal	0,77	32,4	61,2	0,53	
Greece	0,67	24,2	48,7	0,50	
Poland	0,65	30,8	64,8	0,48	
Slovakia	0,65	56,1	41,3	1,36	yes
Turkey	0,64	42,9	50,6	0,85	
Bulgaria	0,47	24,4	69,2	0,35	
Latvia	0,44	29,4	41,5	0,71	
Romania	0,39	47,6	43,0	1,11	yes
Cyprus	0,27	17,5	66,5	0,26	

(R&D)/GDP and E/K correlates: 0,75
Source: KEYFIG (2003)

Comparing the above countries, the Czech Republic (40%), Poland (38%) and Hungary (29%) lead the list. One may note, however, that the overall R&D expenditure in these countries is quite small compared to the more developed countries, so this leading position may be misleading.

The list of EFTA countries is lead by Switzerland with 28%. The EU-15 group is lead by Portugal, then come France, Denmark and Italy in the 22-28%- region. The USA and Japan produced 21% and 12%, respectively. In the period 1997-2001, the USA increased its basic research funding with about 50%, while in the same period the overall R&D expenditure increased with only 24%.

Table 4 Basic Research Funding versus Total R&D funding and to GDP in 2001

Ratio of Basic Research Funding	*to total R&D (%)*	*to GDP (%)*
Czech Republic	40,3	0,53
Poland	37,9	0,2
Hungary	29,3	0,19
Switzerland	28	0,74
Portugal	27,8	0,18
Slovakia	25,7	0,16
France	23,6	0,52

Ratio of Basic Research Funding	*to total R&D (%)*	*to GDP (%)*
Denmark	23,1	0,43
Italy	22,2	0,22
USA	20,9	0,59
Spain	20,5	0,16
Iceland	17,8	0,47
Norway	16,6	0,25
Japan	12,4	0,37
Netherlands	9,6	0,19

Data usually apply for 2001, except for Netherlands 1995, Italy 1996, Denmark, Iceland, Norway, Portugal 1999, Switzerland, Estonia., France, Hungary and Japan 2000.
Source: KEYFIG (2003)

If one compares basic research expenditure to GDP, then the sequence is Switzerland (0,7%), USA (0,6%) and the Czech Republic (0,5%). Hungary performs under 0,2%, as well as Netherlands, Portugal, Slovakia and Spain.

The relatively high ratio of basic research funding versus total R&D expenditure in Poland and Hungary would be a favourable phenomenon, if the reason did not lie in the weakness of the business sphere. In Poland and Hungary the enterprise research funding is rather low (31% and 35%, respectively), as the innovative enterprise sphere is under-developed.

Regarding state-financed research, the USA spent 1,05% of its GDP, while the similar ration in the EU was 0,77%, in spite of the fact that in the USA the government's share of R&D financing was 29%, while it was over 34% in the case of the EU-15. The EU-25's 0,76% is nearly the same as that of EU-15, due to the underdeveloped situation of the new members. Within the EU-15 group, France is the closest to the USA with 1,03%, above the EU average, but Finland, Sweden and Germany are under 1%. Considering the yearly growth rate after 1997, Luxembourg (25%), Spain (13%) and Ireland (12%) are worth mentioning. In these countries the governments made effective steps in order to lay the foundations of knowledge based society. Slovakia, Switzerland, Iceland, Lithuania, Denmark, Romania and Estonia produced a negative growth rate.

The Business Sector's Role in R&D Financing

The participation of the business sector in R&D Financing is important because this sector is the one that is capable to develop new or considerably renewed products and commercialise them. At the same time, this is the sector where economic growth and the establishment of new jobs is realised. Therefore, R&D financing by enterprises is considered by many experts to become the basis of competitive economy in the future. The European Council wishes to increase this ratio to 2/3.

As we have pointed out, the relative enterprise research financing (E/G) strongly correlates with the total R&D financing relative to GDP. On the other hand, E/G shows a medium weak negative correlation[6] (-42%). This negative correlation may be linked to the fact that the business sphere is more interested in the financing of applied research.

6 This correlation is not exact, as the dates of data are different for some countries regarding E/G and basic research versus total R&D, respectively.

On the other hand, the correlation between enterprise research funding and the relative basic research funding versus GDP has a correlation of cca. 64% (59% without the USA). This leads to the assumption that there are specific areas of basic research which are attractive to enterprises so these are welcome for investment. Figure 2 shows that, in spite of the ambition of several European countries, the EU is unable to get close to the USA and the lead over Japan is rather small. The expenditure between 1995 and 2001 was increased by 50% and 130% in the EU in the USA, respectively. In the period 1995-1998 in Japan, this indicator decreased somewhat, but then a revival came to increase the budget to 105 Billion € for 2001. The data in EU-25 do not differ much from those of EU-15, as in the new members' countries the role of the business sector is small.

The drawback described above is not due to the big companies, as you can see from Table 5. During 1998-2002 the indicators of the USA and Japan decreased somewhat, and the EU's performance progressed from 28,1% to 31,3%. The fact that the rate of R&D financing of the "best" firms decreased in the USA in the examined period does not contradict to the 3,1% yearly increase in global business research funding; it simply means that their increase was somewhat slower. However, the 7,1%- increase of EU-15 seems to be a promising sign.

Figure 2 The Business Sector's Role in R&D Financing 1995-2001
(Billion ECU/EURO)

	1995	1998	2001
EU-15	78	91	114
EU-25	79	92	116
USA	101	151	234
Japan	76	74	105

Estimate by DG Research, without Luxembourg and Malta. *Source:* KEYFIG (2003)

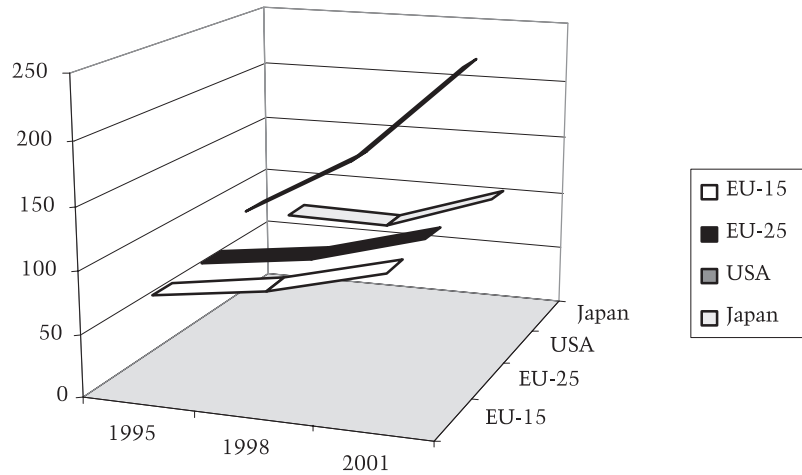


Table 5 R&D Financing by the "Best" 300 Companies

	Number of enterprises	*Their proportion versus total R&D%*		*Average yearly increase of R&D investment%*	
	2002	*1998*	*2002*	*1998-2002*	*2001-2002*
USA	127	42,8	40,9	3,1	-12,6
Japan	73	22,7	21,7	3,2	4,0
EU-15	81	28,1	31,3	7,1	7,1
Belgium	2	0,1	0,2	19,3	16,1
Denmark	2	0,2	0,3	11,2	9,0
Finland	1	0,6	1,3	24,5	24,5
France	22	5,9	6,8	8,2	0,0
Germany	24	11,9	12,4	5,4	19,5
Ireland	1	0,6	0,1	-27,4	-10,0
Italy	3	1,2	1,1	1,4	2,9
Sweden	5	2,1	1,7	-1,0	-16,8
Netherlands	6	1,4	2,5	19,5	3,2
UK	15	4,1	5,0	9,5	0,3
Other countries	19	6,3	6,1	3,5	14,0

Source: KEYFIG (2003)

Table 6 Geographic Distribution of Total Business Research Financing in 2000

	In EU	*In USA*
By EU-15	89 907	15 200
By USA	11 462	158 358
	EU/USA	
	1,33	

Data are meant in Billion €, 2000-PPS. *Source:* KEYFIG (2003)

The data of Table 6 refer to worldwide data of R&D investments and do not convey information on where these investments were effectuated. It is clear that all parties try to invest to their own areas (shaded data). The investment ratio versus another area or country is favourable if it is less than one, as it shows that there is more money influx than egress. This means that the EU/USA rate is unfavourable for the EU; more R&D investments go to the USA from Europe as the other way round; roughly 4 Billion € (2000 PPS).

In the period 1991-2000, although the investment of the USA in the EU increased in its volume, it decreased in percentage, from 80% to 72%; while the USA's interests increase din Canada and China. The main areas of business research financing were the IT-, the automotive- and medication industry, as well as biotechnology. The highest increase rate was produced by the software industry in the period 1998-2002. The EU-15 enterprises, however, tended to invest rather to the automotive industry and to the electronic sector in a higher percentage than US firms.

The rate of increase of industrial research financing in the period 1997-2001 showed various deviations. The EU-15 average was 5,6% (without Luxembourg), however the EU-25 produced only 1,7% (without Luxembourg, Lithuania and Malta). This difference shows that

the new members cannot fall in line within the near future. However, the Baltic States produce an outstanding achievement (Lithuania 59,7%, Estonia 27%, Latvia 13,7%); the Czech Republic (1,1%), Poland (0,4%) and Slovakia (12,5%) perform quite poorly. Hungary's performance is 10,5%, which is though not very good, but acceptable.

The question arises how innovative research could or should be supported. One possible answer to question is the support of innovative SME's [PAPANEK 2005].[7] The Hungarian Association for Innovation (Magyar Innovációs Szövetség) suggests that a central subprogram of the National Development Plan for 2007-2013 should be created for the organised support of innovative SME's, which is called the incubator project. The above paper raises various suggestions in that respect. In an earlier project [PAKUCS 2003],[8] the Hungarian Association for Innovation analyses the role of innovation in the Hungarian GDP. Although the percentage may be disputed – some experts put it to 64%, some to 45%, some others argue that GNI should be used instead of GDP – it is clear that innovation plays a crucial role in the economy, thus its support is also vital.

Table 7 Venture Capital Investment in Million € in 2002

	Seed enterprise	*Starting enterprise*	*Expansive phase*	*total*	*seed/exp*	*seed/total*
EU-15	292,43	2312,15	6502,35	9106,93	0,36	0,03
Czech Republic	0,00	0,49	28,18	28,67	0,02	0,00
Hungary	0,00	2,37	8,27	10,64	0,29	0,00
Poland	0,00	9,80	53,67	63,47	0,18	0,00
Slovakia	0,22	0,56	2,08	2,86	0,27	0,08
EU-15 plus the above 4	292,65	2325,38	6594,54	9212,56	0,35	0,03
USA	321,29	4310,82	14067,01	18699,12	0,31	0,02
Japan	-	4584,68	1311,84	5896,52	3,49	-

Source: KEYFIG (2003)

Another possibility is to ask support from the European Investment Bank.[9] The EIB spent nearly 200 million € in underdeveloped areas of Europe as well as the new member states. The support involved research, development, innovation; roads, bridges, railways; waste treatment, renewable energy schemes, housing and hospitals, among many other projects. The EIB has a very good credit rating (AAA), therefore it van borrow money on capital markets at a very advantageous rate. As the bank is a non-profit organisation, its long-term loans can be used effectively for development projects. Another useful tool to apply for is the financial guarantee from the European Investment Fund.

7 Gábor PAPANEK – János PAKUCS (eds.): Nemzeti Technológiai Inkubátor és Magvető Tőke Program. Magyar Innovációs Szövetség, Budapest, 2005. július 29.

8 János PAKUCS (ed.): Az innováció hatása a nemzeti jövedelem növekedésére (A GDP növekedés részarányából az innováció hatása) nemzetközi és hazai elemzés alkalmazásával. Magyar Innovációs Szövetség, Budapest, 2003. december.

9 Financing Europe's Future. European Investment Bank, 15 July, 2005. http://www.eib.org/publications/publication.asp?publ=181 [1. Nov, 2005]

The Innovation-2010-Initiative (i2i-2010, [I2I-2010]) of the European Investment Bank is based on the i2i (Innovation 2000 Initiative) programme started in 2000. The i2i-2010 aims at the realisation of the Lisbon and Barcelona objectives. For the period 2003-2006 20 Billion € was reserved for the project. The typical way of support is arranged in a venture capital scheme. Special emphasis was put on the innovative content of the supported projects. In 2002, 59% of all projects lay in the life sciences, 26% belonged to the sphere of education and 10% was used to support info-communication network projects.

It is an important objective of I2I-2010[10] to disseminate knowledge and to support the final phase of the innovative chain.

Conclusion

In this paper I tried to analyse European research and development from a financial aspect, based on the indicators of Frascati Manual[11] and KEYFIG, 2003,[12] using also results developed in CSINK, 2005.[13] I have compared the USA, Japan and the European Union – the "old" EU-15 as well as the enlarged EU-25 – and tried to determine Hungary's place as well. I hope that this paper may contribute to the better understanding of research and development financing issues and may help in fine-tuning the R&D expenditure policy.

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12 Towards a European Research Area – Science, Technology and Innovation. Key Figures 2003-2004. Luxembourg: Office for Publications of The European Communities, 2003.

13 László CSINK: Európai Uniós tudományos igazgatás a pályázatok szemszögéből. Bookmaker Kiadó, Budapest, 2005. ISBN 963 86642 5 8, pp. 1-166.

Zusammenfassung

Die Untersuchung der europäischen Forschungsentwicklung aus finanziellem Standpunkt

Für die Untersuchung der Entwicklung von wissenbasierten Gesellschaften schlägt die DG Research zwei komplexen Indikatoren vor, und zwar die Aufwendung in der wissenbasierten Gesellschaft, und die Untersuchung der operativen Effektivität. In diesem Artikel vergleichen wir die Leistungen der EU, der USA und von Japan nach den obengenannten Kriterien mit der Bestimmung von Ungarns Platz in diesem Wettkampf, und mit der Hoffnung, dass die aufgedeckten Zusammenhänge der Bildung der Forschungsentwicklungspolitik helfen können.

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Motion of No Confidence in the Member States of the European Union – A Comparative Study

On the classical basis of separation of powers, as it was drawn up by Montesquieu, the legislative and the executive powers diverge distinctly. As for this solution, the executive power is not about to perform the function of jurisdiction neither can it adopt laws, as these functions belong to other powers. Later this theory was interpreted differently. Instead of the rigid separation of powers the "checks and balances" system was given place. It did not emphasise the necessity of hermetical separation but declared that the constitutional guarantee of the rule of law was that powers balance and control each other.

The control should be attained both politically and judicially. Judicial forms of accountability can help to prevent the abuse of power and, besides, it is a requirement of constitutionalism. Namely, the rule of law excludes the idea of any exceptions of officials or others from the duty of obedience to the law that governs other citizens.[1] Political control roots in democracy, too. As the Redford model says: "democratic control should run through a single line from the representatives of the people to all those who exercised power in the name of the government".[2] The statement is especially remarkable because Redford dealt with the governmental system of the United States where political responsibility of the president as a chief executive does not exist in the same form as in Europe. The Redford model does not have a unanimous acceptance, it has been challenged in many ways. Deleon states that the model seems to be too simple and it is based on the presumption that governmental organizations are arranged hierarchically and are politically responsive.[3]

The main point of political responsibility is that the government is responsible to the parliament for its administration and for its policies. This solution links to the parliamentary form of government: in close meaning the basic model of parliamentarism materialises in the

1 Matthew FLINDERS: Mechanism of judicial accountability in British central government. In.: Parliamentary Affairs 2001. No. 1. p. 55.

2 Emette REDFORD: Democracy in the administrative state. New York, Oxford University Press, 1969. p. 70

3 Linda DELEON: Accountability in a "reinvented" government. In: Public Administration, 1998. No. 3. p. 541.

direct responsibility of ministers to the parliament.[4] In parallel, Marshall states: "the doctrine of ministerial responsibility is the most general principle of the system of parliamentary government".[5] The government, as the chief organ of the executive power can remain in office as long as it enjoys the confidence of the parliament. Were this confidence not granted, and this emerges in a motion of no confidence, the mandate of government would terminate.

The motion of no confidence is generally applied by the member states of the European Union, except for the Constitutions of the Netherlands, Luxemburg and Cyprus, which do not mention it.[6] However, significant differences can be found among the concerning regulations of the states. Not only parliamentary and (semi-)presidential states regulate the motion of no confidence differently but there is a large variety of solutions among those states which belong to the same form of government. The present essay would categorise the motions of no confidence in the member states of the European Union according to the following aspects:

1. who can be tested by the motion of no confidence,
2. who is entitled to initiate the procedure,
3. whether the motion of no confidence is constructive,
4. what majority is required to the efficiency of the motion,
5. what effect does the motion of no confidence have,
6. whether the motion of no confidence has a "remedy", i.e. whether it is possible that the government remains in office after an efficient motion of no confidence,
7. whether the constitution limits the number of votes of no confidence,
8. what procedural rules pertain to the motion of no confidence.

1. The basis of the motion of no confidence is the political responsibility, thus this institution can be applied by the legislative power against the executive power. However, the practices of the states are not unanimous in the question of against who the motion of no confidence can be launched.

As for one possible solution, the government as a single body has to enjoy the confidence of the parliament, therefore, only the government (or the prime minister, as the representative of the government) can be tested. Accordingly, other members of the government do not have political responsibility to the parliament, only to the prime minister. They do have accountability for their acts to the parliament, in a way of report, dispatch etc, but they cannot be removed from office, this right is delegated to the prime minister only. If the parliament is dissatisfied with the performance of the minister to such an extent that the whole government loses its confidence as a consequence, the motion of no confidence can be initiated against the government. Among the European states, this solution has been chosen by Belgium, the Czech Republic, France, Hungary, Ireland, Portugal and Spain.

This solution results in a collective ministerial responsibility and collective solidarity which are the motto of a Cabinet government. Ellis says that Cabinet governments have three criteria:

a) full and frank discussion in government;
b) loyal support and
c) all decisions are considered as being made by the government as a whole.[7]

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4 Attila VINCZE: "Kabinet-kérdés" – A kormány lemondási kötelezettsége a bizalom megvonása esetén. Magyar Jog, 2004/6. p. 339.

5 Geoffrey MARSHALL: Ministerial Responsibility. Oxford, Clarendon Press, 1998. pp. 1-3.

6 In many states, motion of no confidence is known as vote of no confidence with the very same meaning and function. This essay names the institution motion of no confidence hereinafter.

7 David L. ELLIS: Collective ministerial responsibility and collective solidarity. In.: Geoffrey Marshall (ed.): Ministerial Responsibility. Oxford, Clarendon Press, 1998. p. 53.

Obviously, collective responsibility in itself does not result in Cabinet government, however, it is an indispensable element.

According to the other solution, the ministers as the participants of the executive power, are individually responsible to the parliament, and not only to the prime minister. Therefore the motion of no confidence can be launched both against the government and against each and every minister. The purpose of this regulation is that such political situations may turn up when the parliament is dissatisfied with one of the minister's activity but the removal of the whole government does not seem to be necessary. Mainly Nordic countries follow this practice, like Denmark, Finland, Sweden, Lithuania, Latvia and Estonia but the regulation is the same in Austria and Greece, too. Poland can be affixed to this enumeration with the distinction that in any other countries the motion of no confidence is the same, regardless whom it is against, but in Poland the procedural rules are more severe if ministers are tested.

The question of who can be tested by motion of no confidence does not depend on the form of government. In both groups there can be found states with strong presidents (France on one hand and Finland on the other hand), parliamentary republics (Austria and Hungary), moreover monarchies (Belgium and Denmark) too. So the way states answer the above question is rather the consequence of national customs and tradition than an automatism deriving from the form of government. Naturally, the collectivity and the individuality of responsibility have other consequences which affect the status of ministers. For instance, if collective responsibility is to be a reality, then a Minister will not be able to express public disagreements with Government policy and remain in office.[8]

Finally, it is worth considering an unusual theory of collective responsibility by Brady, who declares that it has not only constitutional but ethical and managerial aspects as well. Furthermore, although collective responsibility does include ethical and constitutional considerations but it is evident that in practice it is primarily a managerial device. Consequently, it becomes the device of control with which the head of the government, in most countries: the prime minister, can protect the "team spirit" and the image of a united team, using the "all for one and one for all" motto.[9]

2. In every state the motion of no confidence can be motioned by a defined fraction of the deputies of the parliament. This does not exclude the possibility that the government be allowed to raise the question if it enjoys confidence, but that institution, the vote of confidence, is dealt with later. Although the states require different fraction, generally, the motion of no confidence is easier to launch than to get it across. The smallest fraction (1/10) is required in the French, Italian and Polish constitution, the largest (1/4) is in the Czech and in the Portuguese. The Portuguese regulation seems to be unique in the snese that not only deputies can launch the motion, but also parliamentary fractions, even if the fraction does not possess the quarter of the seats of the parliament.

3. The question whether the motion of no confidence is constructive is one of the most significant issues of the institution. The motion of no confidence deems to be constructive if it contains the name of the new candidate prime minister. It has the advantage that no interregnum may occur; in case of the efficiency of the motion it is evident who is entitled to form the new government. Primarily, the motion of no confidence is constructive in Germany, then its regulation was followed by Hungary, Poland, Spain and Slovenia.

In spite of this, other states have in mind that the constructivity of the motion of no confidence renders the political impeachment more difficult. It is not enough that the majority of the parliament does not support the government, they also have to agree who the new prime

8 David L. ELLIS: Supra 7., p. 53.

9 Chris BRADY: Collective responsibility of the cabinet: an ethical, constitutional or managerial tool? In.: Parliamentary Affairs 1999. No. 2. pp. 215-217. and p. 228.

minister will be. Therefore a government, which has opposition both on the left and on the right, may remain in office, even if the majority of the deputies do not support its activity. It is due to the situation when the opposing parties are unanimous in dissatisfying the prime minister's policy but they cannot concord in the candidate prime minister.

Naturally, those states where the motion of no confidence is destructive are also willing to avoid interregnum, so they put various rules to their constitutions. For instance, in Belgium the King is entitled to dissolve the parliament if it does not elect the new prime minister in three months after the successful vote on the motion of no confidence.

4. Implicitly the government in office enjoys the confidence of the parliament if the majority of the latter supports it. As a consequence, the motion of no confidence is successful if the majority of the deputies vote against the government.

Most of the constitutions require an absolute majority to the efficiency of the motion of no confidence, the government falls when more than half of all the deputies vote against it. Different regulation is applied in Austria and Greece where to the success of the motion simple majority is required. This forces the governing parties to take place on the vote, otherwise the opposition has an easier task. Furthermore, as for the Constitution of Greece the simple majority has to reach the two-fifth of all the deputies.

Special rules are applied in the Constitution of Italy. In most states where two chambers of the parliament exist, the government is normally responsible to the House of Representatives (first chamber) only. On the contrary, in Italy the government is responsible to both chambers, therefore not only the deputies but the senators can overthrow the government, even if it is supported by the majority of the House of Representatives.

5. The effect of a successful motion of no confidence is an essential problem of constitutional law. The Hungarian solution is unique, while in Hungary the mandate of the government terminates ipso iure with the efficient vote on the motion of no confidence and the candidate prime minister enters the office without any further act. This solution of the problem is so individual that authors outside Hungary rarely see other opportunity for a government defeated on a vote of confidence than to resign or request the dissolution of the parliament.[10] Unlike in Hungary most of the states apply further measures for the removal of the government after a successful motion of no confidence. In this respect, states can be categorised whether this measure is taken by the government or another organ.

It proves to be a general solution that if the motion of no confidence is voted by the required majority, the government has to resign. If it does not do so, it breaches the constitution and is responsible not only politically but judicially, too, which also causes the removal of the government. This practice is followed in Belgium, the Czech Republic, France, Ireland, Lithuania and Poland. The Czech regulation is remarkable among them, its constitution says that if the government does not resign despite its obligation, the president dismisses it.

According to other constitutions another organ's act not the government's is needed to the removal of the government. Typically this organ is the president. The act is named differently by the states. The president dismisses the government in Finland, Germany and Portugal, and recalls it in Slovakia. The Swedish regulation is also unique, as the right of dismissal does not belong to the head-of-state but to the speaker of the Riksdag (Parliament). It is unusual in the sense that the government is not dismissed by an organ which is not independent from the motion of no confidence but on the contrary the high representative of the parliament that approved the motion.

10 e.g. Philip NORTON: Government defeats in the House of Commons: Myth and reality. In.: Geoffrey Marshall (ed.): Ministerial Responsibility. Oxford, Clarendon Press, 1998. p. 36.

6. The success of the motion of no confidence does not necessarily lead to the removal of the government in some states. The motion shows only the tension between the parliament and the government which can be eased not only with the removal of the government but also with the reform of the parliament. In these states the president is entitled to dissolve the parliament in case it voted no confidence against the government. With some exceptions, the dissolution of the parliament is possible only in semi-presidential states; generally this right is delegated to that president who is independent from the parliament and bares no political responsibility. After having voted no confidence, the parliament can be dissolved in France, Ireland, Estonia and Malta. Practically, this right of the president is unrestricted, the only exception can be found in the Constitution of France which contains the limit that no dissolution can be ordered for one year from the re-election of the parliament. The president of Malta possesses the strongest power, who is only entitled (not obliged) to remove the government after the motion of no confidence.

For the parliament's dissolution specific rules are adopted in Sweden and Latvia. The speciality of the Swedish regulation is that the right of initiating the dissolution of parliament is not delegated to the head of state but to the government. So practically the government remedies its own removal. In Latvia presidents risk their own status with dissolving the parliament. If the president does order the dissolution of the parliament, a referendum will take place in which the citizens decide if they agree with the dissolution. And if most of the voters vote against the dissolution, the parliament remains in office and the president is deemed to be removed.

In parliamentary states the decision of the legislative body is final and no remedy is assured for the successful motion of no confidence, although Germany can be mentioned as an exception. The German Grundgesetz (Basic Law) gives the opportunity to the dissolution of the parliament.

7. The motion of no confidence is a basic institution of constitutional law, deriving from the separation of powers, with which the parliament can remove the government from office. However, due to the fact that launching the motion needs less deputy support than to get it across, the motion of no confidence can turn into the device of obstruction. It is conceivable that a political group initiates the motion; even if the government predictably enjoys the support of the majority of the deputies, in order to slow down the parliament's work with the debates and voting on the motion of no confidence. Using this device the opposition can delay or even hinder the adoption of a law, which is supported by the government but is undesirable for the opposition.

To avoid this, many states adopt regulations to their constitutions, which are to roll back the abuse of this right. A typical tool is limiting the number of motions of no confidence. Limitation is absolute in Estonia and in Spain. According to the constitution of Estonia, motion of no confidence can be initiated only three months after a former motion on the same basis. The Spanish regulation is even more severe, the motion of no confidence cannot be repeated in the same parliamentary session.

It is worth mentioning that with restricting the repetition of the motion of no confidence, the government may abuse powers. It is possible that the government initiates the motion against itself when the majority of the deputies vote for the government, and thus later the government do not have to fear of a "real" motion of no confidence. This formally legal, practically unconstitutional motion could be particularly useful before controversial decisions.

The restriction is relative in some other countries, thus the constitution is willing to reach the "seriousness" of the repeated motion of no confidence. The Constitution of Poland raises the required signatures for the motions (from 46 to 115) for the second attempt but this does not exclude obstruction because 115 deputies are only the quarter of the Sejm (House of Representatives). Stricter regulation is given in the Greek constitution, where the motion can

be repeated within six months only if the majority of all the deputies sign it. In parallel, the restriction is relative in France, too. French deputies are allowed to sign motion of no confidence three times in every ordinary session and once only in extraordinary sessions.

There are some other states which do not restrict the motion of no confidence. They proceed from the idea that in politics the balance of forces may alter quickly, therefore it is conceivable that the government loses the support of the parliament in no time, so it is necessary for the constitution to guarantee the possibility of initiating the motion of no confidence.

8. While examining the motion of no confidence one cannot get around the procedural rules. Among them the most important is that a defined time has to pass between the initiation of the motion of no confidence and the vote on it on the basis of most constitutions. Accordingly, many states determine the earliest and the latest possible dates of voting.

The reason of defining the earliest date of voting on the motion of no confidence is that it is not desirable to remove the government at a "first instinct", playing on the momentary dissatisfaction with the government. This period of time is usually two days (in Belgium, France, Greece, Germany, Estonia, Portugal and Slovenia), longer in Hungary (3 days) and it is the longest in Spain (5 days).

Elsewhere this period can be shortened. Two days is not required to lapse in Estonia if the government requests so, and in Slovenia the period can be shortened upon either the request of the two-third of the deputies or if the state is in war or in emergency. The reason of the "shortening" is different in the two states. As for the constitution of Estonia the government is the most affected by the motion of no confidence, so it is entitled to the allowance of appointing the voting to an earlier date. On the other hand, the reason of the pertaining regulation of the Slovene constitution is that in case the state is in exceptional circumstances or such a large majority requires prompt voting, the two-day-period may seem to be too long.

There is another point in defining the earliest date of the voting in those states where simple majority is needed for the efficiency of the motion of no confidence – in these states the government can grant the majority in the parliament during this time.

Defining the latest time of the voting in the constitution seems also to be necessary in order to keep the debate on the motion in reasonable period. The maximum time of the debate is the longest in Hungary (8 days) and it is shorter in Poland (7 days), Greece and Portugal (5 days).

Vote of confidence

The institution of vote of confidence is similar to the motion of no confidence, as they both concern the political responsibility of the government, i.e. whether it enjoys the parliament's confidence. The most important difference between the two is that the latter aims at the removal of the government, the former attempts to affirm it in office. As a consequence, the initiator of the two institutions are different; the vote of confidence is initiated by the government, the motion of no confidence is launched by deputies of parliament. Therefore, the statement saying that no difference can be found in function between the institutions seems to be incorrect. The vote of confidence is the most detailed in the German Grundgesetz; the Central European states, like the Czech Republic, Poland and Hungary, adopted it from this scheme. In Germany the federal chancellor may request vote of confidence (Vertrauensfrage) either on its own or linked to a proposal. Should the chancellor not be supported by absolute majority, then, unlike in other countries, the chancellor can propose the dissolution of the Bundestag and the declaration of new elections to the president, except the Bundestag elects a new chancellor in 21 days. It increases the constitutional importance of the institution that in Germany the parliament has no right to dissolve itself, so this could be the single opportunity of the chancellor to force new elections.

In the German public life the difference between the application and political aim of motion of no confidence and of vote of confidence appears expressively. It was a memorable case in 1972 when the Union Parties initiated the motion of no confidence against the social-democratic and liberal government of chancellor Willy Brandt and named Rainer Barzel, the president of CDU as candidate chancellor, whose support had also been granted by some liberal deputies. As the motion did not receive the required majority (two votes were missing), chancellor Brandt still remained in office but with the lack of absolute majority in Bundestag due to some liberal deputies who had left the governing parties. Then he initiated vote of confidence reassuring also his own party to vote against the government or to abstain and after having lost the confidence of the Bundestag, he asked the president for new elections, which he won with the best result of SPD ever since.

The second well-known case happened in 1982 when after a successful motion of no confidence the Bundestag removed Helmut Schmidt's government and simultaneously elected Helmut Kohl to become chancellor, which could happen due to the desertion of the liberal party. Kohl put the question of confidence and asked the new Christian-democratic and liberal majority to vote against the government in order that the German people could reaffirm it in elections. The Bundesverfassungsgericht (Federal Constitutional Court) found the procedure solicitous pleading that the loss of confidence and majority in Bundestag should be genuine, but did not declare the breach of constitution.

Furthermore, in every state the vote of confidence can be linked to a vote on a draft law, as it was taken place in 2001 when chancellor Schröder stated that the decision on the mission of German troops to Afghanistan is also a vote of confidence. He did it in order to "regulate" his coalition partner.

Vote of confidence is also used in francophone states; the French and Belgian constitutions contain this measure. To categorize the types of votes of confidence, Norton set up three distinct groups:

a) Explicitly worded votes of confidence. They can be motioned by the government in order to learn if it still enjoys the support of the parliament. The only aim of this type of motion is to defeat or to retain the government and does not link to any other political issue.
b) Motions made votes of confidence by the declaration of the government. This case occurs when a particular issue is so central to its policy that there would be little point in continuing in office if defeated upon it.
c) Implicit votes of confidence. This category does not deem to be a vote of confidence in a constitutional sense, while it does not result the fall of the government directly. However, politically this latter category proves to be just as important as the first two. With implicit votes of confidence neither the government nor the parliament questions the confidence but the issue is so essential to the government that it would be unable to govern any longer (e.g. the approval of the central budget).[11]

Conclusion

Political responsibility is a significant institution of European states, which links to the separation of powers to a great extent. Most of the European governments bear responsibility to the legislative power. Impeachment has many forms, the question of confidence is the strongest among them, as it may result the removal of the government.

11 Philip NORTON: Government defeats in the House of Commons: Myth and reality. In.: Geoffrey Marshall (ed.): Ministerial Responsibility. Oxford, Clarendon Press, 1998. p. 40.

The motion of no confidence is not a single field of law, the member states of the European Union use it distinctly. There is a difference in the collectivity of the motion of no confidence; some states allow the initiation of it against the government only, some others also against ministers. The difference, beside its constitutional aspects, is also in approach; some states interpret the government as a whole, some others focus on the members who form the government.

Another important difference is that whether the motion of no confidence is constructive or not. The constructivity was declared in the German public law first, and spread mainly in Central-European states.

The task of comparative law is to draw lessons that could be guideline for the future legislation. Although main streams can be found for instance the Germanic, the French and Scandinavian but due to the smack of distinctions it is quite seldom that states regulate this institution totally alike. Regulating or re-regulating the motion of no confidence is a slippery problem because it influences the relation of powers by all means.

Zusammenfassung

Misstrauensvotum in den Mitgliedstaaten der Europäischen Union – eine Vergleichsstudie

Die politische Verantwortlichkeit ist eine typische Einrichtung der europäischen Staaten, die in einem charakteristischen Zusammenhang mit der Theorie der Trennung der Gewaltenbereiche steht. Obwohl das Misstrauensvotum durch die meisten europäischen Verfassungen geregelt wird, ergeben sich unter den einzelnen Lösungen doch bedeutende Unterschiede. Die auf das Misstrauensvotum beziehenden Regeln werden durch den Artikel nach folgenden Gesichtspunkte verglichen:

– gegen wen kann man das Misstrauensvotum eingereich werden,
– wer ist berechtigt, das Misstrauensvotum zu initiieren,
– ist das Misstrauensvotum konstruktiv,
– welche Mehrheit ist zu einem erfolgreichen Misstrauensvotum notwendig,
– welche Rechtsfolgen hat das Misstrauensvotum,
– kann man das Misstrauensvotum „heilen" bzw. ist es möglich, dass die Regierung nach einem erfolgreichen Misstrauensvotum im Amte bleibt,
– senkt die Verfassung die Anzahl der Misstrauensvoten,
– welche Prozessregeln beziehen sich auf das Misstrauensvotum.

Weiterhin beschäftigt sich die Studie mit der Vertrauensfrage, die dem Misstrauensvotum bis zu einem gewissen Ausmaß ähnlich ist, doch auch wesentliche Unterschiede zeigt.

In den mitteleuropäischen Staaten wurde die Vertrauensfrage nach deutschem Schema geregelt – um dies zu demonstrieren werden Beispiele aus der Geschichte der deutschen Politik präsentiert.

Aus dieser Forschung ergibt sich, dass in der Regelung der politische Verantwortlichkeit wohl hauptsächliche Richtlinien existieren (z.B. das deutsche, das französische und das skandinavische Modell), aber aufgrund der nationalen und geschichtlichen Unterschiede kommt es nur selten vor, dass dieses Rechtsinstitut durch die Staaten in gleicher Weise reguliert wird.

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A new chapter in the hungarian law enforcement

1. Introduction

Nowadays the penal law is living its Renaissance, the "legal blood-transfusion" we are experiencing in this area can be observed in almost every domain of the regulations regarding law enforcement and provision enforcement. We are talking about nothing less than a co-ordinational process spanning a legal domain with a great historical past, a change induced by international expectations and by the pressing demand of modern law enforcement. The effective, constitutional functioning of the institutions which are essential for the operation of a modern state must be promoted in this new century by our specific methods. The challenges of our participation in the European Union should also be taken into consideration, as well as the question of our consideration of the constitutional functioning of those institutions of the Hungarian Republic which beside disposing of a great traditional past are also essential for the working of a modern state.[1]

The struggle against crime is doing its best to examine and reveal the causes in their complexity in order to eliminate them. From this point of view increasing attention is directed to the role of the sanction enforcement in the process of punitive challenge. Thus the effectiveness of every penalty or penal provision depends highly on the standards of the activities that law enforcement organizations provide. The law enforcement can follow no other route than the one followed by the development of our social life. The processes can be measured in historical eras so that the differences and the common progress be demonstrated and the following timely questions of this legal domain be formulated: what is Hungarian law enforcement going to be like, how much of it and what exactly needs to be reorganized, to what extent do our national interests and values count in this process, and what are the new challenges of the European Union?[2]

Further very important questions are: what kind of provisions are needed for crime-prevention, what theoretical bases we should build on, which provisions are the most effective

1 István LAJTÁR: Recenzió Vókó György „Büntetés-végrehajtási jog" című tankönyvéhez (Recension to György Vókó's coursebook entitled "Code of Law Enforcement"), Collega professional weekly, 1st Volume, No. 3

2 György VÓKÓ: A büntetés-végrehajtás időszerű kérdései (Current Issues of Law Enforcement), Jura – scientific paper of the University in Pécs, 7th Volume, No.1, p.94

and how can we provide the appropriate conditions for these. Among the numerous social and economic conditions should be included the organization of the punitive challenge in a way that is in agreement with scientific results, with the state of awareness of the population, with the possibilities and circumstances of an actual realization.

It is a well-known fact that the systems of the punitive administration of justice in the member-states of the European Union differ from each other to a great extent. The question of the role of law enforcement and its effectiveness should also be taken into consideration especially at times when the situation of crime is not reassuring at all. The content and the measure of realization of the legal harmonization is highly influenced by the situation of crime as well. As there is no punishment without penal-law and criminalization, there is no law enforcement without punitive challenge. For without law enforcement the whole process of punitive challenge would become something existing for its own sake. If the penal law can fulfill its role in society by punishing, then law enforcement can fulfill its role by actually asserting this penalty. This must be done in a way that is successful, effective and at the same time meets the requirements of constitutionality.[3]

The effectiveness of the punitive administration of justice is determined by interactions within the system. Thus the burden on all the organs interacting in the punitive administration of justice is determined on a wide scale by decisions taken by other organs in former stages of the proceedings. It is needed that new ways of approach are employed on the field of the organization. The law enforcement can be no other than human-centric. In the future greater attention must be paid to the relation and interaction between rights and obligations as well as to the clearing up of the contradictions existing in the question of the legal situation of the condemned.

The realization of the penal sanction depends on the right of Law Enforcement. So does the realization of the deprivation of civil rights which forms the content of forced provisions in the Code of Criminal Procedures, and the temporary, proportionate deprivation of other values and interests.[4]

Meeting the requirements resulting from constitutionalism in Hungary, along with the country's joining the international agreements had as a result the appearence in the domestic law of generally accepted international penal principles and orders, principles of legal procedures and of enforcement, as well as the reflection of these in the practice of law-adoption. Simultaneous tasks are the solution of harmonizational law-making problems arising from our international undertaking of obligations and the reform concerning the system of the punitive administration of justice. Legal harmonization is the result of careful consideration of national and historical features. Throughout this process, however, the inner requirements of the country should not be dispensed with either.

The demand of legality and humanity as well as the need for effectiveness highly improve the law enforcement worldwide. In the course of law enforcement activities constitutional principles and rules, international human rights expectations and demands must all be asserted. This can be served only by that law enforcement which is of high standards and which meets and helps practical demands.

Thus, it can be stated that law enforcement in Hungary has become more human, following current international conditions. The measure of deprivation and restriction of civil rights which constituted the basis of sanctions has gained composition in the law. Instead of

3 György VÓKÓ: A magyar büntetés-végrehajtási jog (The Hungarian Code of Law Enforcement), Ed. Dialóg-Campus, Budapest-Pécs, 2001

4 György VÓKÓ: A büntetés-végrehajtás időszerű kérdései (Current Issues of Law Enforcement), Jura – scientific paper of the University in Pécs, 7th Volume, No.1, p.95

obligations greater role has been awarded to motivation, the circle of expressing opinions, of making independent decisions and choices has increased and an extensive security-system is also working.[5]

In the first years of the new millenium, however, such a rule is needed which serves the punitive, educational and handling aims better than the often modified law-decree which is in force at the moment. This law should build upon the still usable traditions and values of the Hungarian law enforcement and at the same time approaches and assimilates with modern European solutions, thus becoming the result of the developmental tendencies of the Hungarian law enforcement.

2. The new codex of law enforcement

The new codex of law enforcement (Proposition, Bill) which is about the enforcement of penalties and provisions has become necessary due to the changing of the national organizations system and that of the legal environment. These were the reasons why the re-examination of the law-decree concerning the enforcement of penalties and provisions – 11th law-decree from 1979 – started. As a result of this re-examination – regarding the extent of the content of the law – the making of a new law is justified instead of the modification of the law-decree.

The above mentioned law-decree has gone through several modifications throughout the years, the most significant and innovative modification being the XXXII. law dating from 1993. This modification put forward the demands of constitutionality and made a further approach to the greatly improved European law-system as far as the detentions are concerned.

Along with these modifications this law-decree created appropriate legal bases for the enforcement of the law and that of the provisions throughout two decades. It ensured thus the continuous improvement of the right of law enforcement as well as the improvement of the system and practice of law enforcement. All this happened in agreement with the international principles as for example the minimum rules concerning the detention of the condemned, these rules being included by the Council of Europe in the 'European Penal Regulation'.

In the second half of the year 2003 the Government came out with the bill of its proposal for the regulation-principles of law enforcement and enforcement of provisions. This pointed out the most important guiding principles of the new regulations. In the second half of the year 2004 a departmental decision was taken that beside the creation of the new law enforcement code – which takes the place of the former law-decree – the re-creation of another law is needed, namely the CVII. law from 1995 concerning the law enforcement organization. Later, at the end of 2004 – considering the improvement of the inspectoral service – another departmental decision formed the conception that the new order of law enforcement must contain the regulations for the law enforcement service as well as the regulations for the supporter inspectoral service.

The guidelines for criminal politics were clearly outlined by the II. law from 2003 regarding the modifications of the penal rules and of some rules related to them, and also by the XIV. law from 2003 concerning the modifications of certain laws about supporters. The new law which is already being prepared, actually is about the Penal Code and it will be a determining change in the development of criminal politics in the following years.

The Bill comprises the tasks related to law enforcement into a complex system and contains the orders that need legal regulation, but are at the moment regulated on a lower level. At the

5 György VÓKÓ: A büntetés-végrehajtás időszerű kérdései (Current Issues of Law Enforcement), In: Jura – scientific paper of the University in Pécs, 7th Volume, No.1.

same time it enforces unambiguously the constitutional principle of the division of power-branches and defines the jurisdiction of the court and that of the prosecutor according to this principle. The basic rules of penalties and provisions, the form and order of the enforcement are raised to a legal level, and so are the rights and obligations of the person under punitive challenge as well as the rights and obligations of the organs that enforce law and provisions.

The reconsideration and modernization of a law decree which is close to its jubilee of a quarter of a century is basically justified taking into consideration the development of social relations. The re-examination is important also on behalf of the state organizational system and the forwarding of certain tasks and modified jurisdictions. The law that is being made has got the character of a codex. It emphasizes from numerous laws the predictions regarding enforcement, but at the same time while the former law focused mainly on imprisonment, this current one treats the enforcement of provisions and secondary punishments in detail as well.[6]

Nowadays, the legislation and the application of the law, the punitive administration of justice and the law enforcement are all pervaded by the spirit of our joining the European Union. According to our most important principle it is the duty of a constitutional state to ensure its citizens human rights, safe life, the success of laws and the possibility of assertion of the objective truth. In order to protect the basic values of the European Union, the Council of Europe would emphasize prevention rather than penalty in case of infringement of lawful rights. For the task of the committee in Brussels is to control the keeping of common values as well as to recognize the factors that might endanger them. Brussels has just now come to the end of the work during the course of which they worked out the methodics of practicing the laws that are transferred to them.

The new regulation of law enforcement will be made necessary not only by legality and practical demands, but also by the regulations in the Law of Criminal Procedures and in the Penal Law itself, in general. The simplification of the legal aid proceedings, the establishment of common investigation-groups and the recognition of absolute conclusions of criminal cases will result in important changes.[7]

Imprisonment remains further on in the centre of the sanction-system as the most important penalty. The specialized literature as well as public opinion are concerned about it, especially the questions regarding the legal position of the condemned are the matters on issue. That is why the European Union expects that every member state have the obligations put down in laws.

The maintenance that follows the penalty must strenghten the purpose of social integration and create the objective conditions for its realization (assuring accommodation, restoring family relations, promoting employment). It is a great leap forward for instance that the law of taxes made in 2004 has held out the prospect of advantages for the employers who employ people sentenced to communal labour and standing under supporter surveillance. Year by year an increase can be seen in the number of those spending their sentence to communal labour, and those standing under supporter surveillance, a fact that expresses the approach to the European practice.

While making the rules for law enforcement the factors that need to be considered are the following: according the general living-conditions (eg. rules regarding public health and

6 Ferenc TARI: Előkészületek a büntetés-végrehajtásról szóló törvény megalkotására (előadásanyag), (Preparations for the creation of the law concerning law enforcement (course material), 21st Jurist Regional Meeting, Hungarian Jurist Association, Szeged, 14-15 October, 2004.

7 György VÓKÓ: Előkészületek a büntetés-végrehajtásról szóló törvény megalkotására (előadásanyag), (Preparations for the creation of the law concerning law enforcement (course material), 21st Jurist Regional Meeting, Hungarian Jurist Association, Szeged, 14-15 October, 2004.

employment) which divergent regulations are required and made possible by the legal relations of law enforcement. Based on such considerations, the new law enforcement codex depends in the first place not on the rules of the Penal Code, but on regulations containing other legal relations, the agreement of which with the law decree – the cause being the obsolescence of the Law Enforcement law-decree – has raised serious constitutional anxiety.

The Proposition re-codifies the legal documents of law enforcement along several junctions. The power of the Law Enforcement law-decree spreads at the moment over the enforcement of pre-trial detention, supplementary maintenance and imprisonment imposed on account of contravention, these being penalties and provisions according to the Penal Code and forced provisions concerning imprisonment determined in the Law of Criminal Procedures.

Within the power of the Proposition it was to decide whether the new law enforcement proposition should spread only over the sanctions related to the Penal Code and the Law of Criminal Procedures, over forced provisions and over enforcement of supplementary maintenance, or it should further on contain the regulations regarding imprisonment because of contravention and foreign security detentions. In connection with the imprisonment because of contravention, the Proposition takes into consideration that – according to the conception of the new contravention-rule that is being made – the imprisonment for contravention will be dipensed with as independent sanction and will only appear as custody instead of a fine.[8]

When answering this question what needs to be kept in sight is that beside the current saturation quotient of the law enforcement organizations, these should not be loaded with the enforcement of tasks that do not require the closed nature and security system that is characteristic for the law enforcement institutes which execute the carrying out of imprisonment penalties. Law enforcement institutes work with a saturation of almost 150 percent which highly endangers the success of penalty purposes.

Thus, it is justified that the power of the Proposition should spread exclusively over the legal institutions of the Penal Code and of the Law of Criminal Procedures, and over the enforcement of forced provisions which should be employed during international co-operations, respectively over the most restricted possible circle of the custodies replacing fines. The power of the Proposition does not spread over regulations of foreign security detentions, since in the future it will not be the task of the law enforcement institutes to carry these out.

A considerable novelty of the Proposition is that it terminates the 'divided' regulations concerning the organization of the Supporter Inspectoral Service. It also terminates the 'divided' regulations regarding the Law Enforcement Organization, which carries out the majority of the law and provision enforcement tasks. Besides these the Proposition includes the basic organizational regulations as well.

In the age of the informational society such questions have arisen (protection of personal data, the right to informational self-determination), which could not be regulated at the time of the making of the Law Enforcement law-decree. By today, based mainly on the documents of the Council of Europe and on the practice of the European Court for Human Rights, the components of the relation between state and its citizens have been revalued on the domain of law enforcement. Thus the dimensions of the citizens' rights and the guaranteed protection of those have been revalued as well.

As a result of the principle of constitutional legal security, when thoroughly re-examining the law enforcement, the Proposition raises to a legal level the orders that require legal regulation but are at the moment regulated on a lower level. It also gives orders about other questions concerning regulations of the order of law enforcement.

8 MOTIVATION to the Bill about the enforcement of law and provisions

When regulating the enforcement of imprisonment, the starting point of the Proposal is the attitude of the Penal Codificational Committee which has been created for the preparation of the new Penal Code. According to this, the law enforcement organization is not allowed free hand to include the condemned into so called "régimes". Thus the order of imprisonment enforcement is to be carried out further on according to the stages defined in the Penal Code. At the same time it aims at the modernization of the imprisonment enforcement system that a new system has been introduced, which makes possible the promotion of progressive enforcement within the classing of the condemned and the individualization of the condemned. Compared to traditional classings this new system promotes more effectively the reintegration of the condemned.

The Proposition – in compliance with the suggestions of the Council of Europe – contains the orders regarding certain special groups of condemned people. By defining special rules, a further differentiation of the imprisonment enforcement is possible, the principle of individualization or personalized enforcement can be asserted to a greater extent. Regarding imprisonment, the Proposition contains a separate regulation in the regard of underaged and soldier convicts and, beside these, now also in the regards of convicts considered special from a sanitary point of view, convicts with no Hungarian citizenship and mothers.[9]

As far as supplementary punishments are concerned, the starting point of the Proposition is the fact, that the background of their enforcement and their becoming effective is not well-arranged. At the same time, the Proposition brings to agreement the regulations regarding enforcement of forced medical treatments – concerning especially the rights of the sick people – with the regulations of the CLIV. law from 1997 regarding public health. Furthermore, it terminates the existence of penal provisions as such regarding the forced treatment of alcoholics, but it still contains regulations about the treatment of the alcoholics being under the penalty of imprisonment.

The Proposition gives orders about the rules of confiscation as well and completes these with rules regarding the public use of the confiscated goods. For the time being the orders concerning the public use of confiscated goods are defined in the XIII. law from 2000.

A constitutional state cannot exist without an administration of justice which keeps in sight the human rights, and there is no administration of justice without humanely working police, Prosecution, Court and Law Enforcement. Our common aim is to meet the constitutional requirements of the European Union.[10]

Along the preparation of the draft of the new law which required enormous work, an extremely detailed, precise codex has been made which aims at completeness and which will help the activity of all employers and followers of the law to a great extent.

3. Conclusions

The new regulations of law enforcement are made necessary by legality and practical demands but also by the Law of Criminal Procedures and the Penal Law. The answer given to crime has to respect the social function of the Penal Law and of the Code of Law Enforcement; it has to adjust itself to the traditional values of these and to the conditions required by constitutionality.

9 MOTIVATION to the Bill about the enforcement of law and provisions

10 György VÓKÓ: Előkészületek a büntetés-végrehajtásról szóló törvény megalkotására (előadásanyag), (Preparations for the creation of the law concerning law enforcement (course material), 21st Jurist Regional Meeting, Hungarian Jurist Association, Szeged, 14-15 October, 2004.

Thus the points of view of a special prevention can be carried out through individualization exclusively among the borders that adjust themselves to the gravity of the crime committed.

As for the future, it has become clear that imprisonment and restriction of freedom are indispensable for the sake of the protection of the society, the individual and the state. Effective crime-chasing is at the same time the duty of the state. Thus it is the duty of the state to ensure the constitutional ie. legal working including the assuring of financial conditions.

From the point of view of the human-centric punitive administration of justice, besides the conditions and forms of sanctioning the procedures and law enforcement are important as well. It cannot be tolerated that contraventions should remain without any consequence, or that enforcement should not take place. The protective areas and limits of freedom stirred up by the criminal act need to be consolidated again quickly and publicly especially for the sake of effectiveness.

The innovation needs to cover all the systems of organizations and has to contain further modernization of the law enforcement organizations and the modernization of the Code of Law Enforcement. Getting to know the whole system might be that certain basis starting from which its working can be examined. Thus answers can be found to certain questions, namely, whether it is effective as a whole or rather in its details and where does the system need to be improved.[11]

The penalties based on the community should be enforced in such a way that they be comprehensible for the perpetrator and they promote his individual and social improvement from the point of view of his integration into society.

In our age, in contrast to the exclusivity of certain theories, it is needed to work out a uniting theory which mirrors the versatility of punitive purposes and becomes more differentiated in answering questions of our era.

In conclusion, it would be proper to quote the words of József Lőrincz according to whom "it would be reasonable regarding the future to encourage a more vigorous improvement of the science of law enforcement. Knowing the reality of the law enforcement, the most important characteristic of this science would be that it would allow thoughts sprouted in the hot-house of other sciences' writing-tables, and reform-institutions burst into leaf in foreign countries' hot-houses take root in the domestic soil after a careful selection and naturalization. The isolation that was characteristic of the last century, and that made prisons become mystical institutions for the public opinion, needs to be removed. Just like the cloisters of the Tibetan lamas that have by now – the period of the opening – become a favorite hunting-ground for the clever reporters and movie-makers. It would be nice to guide the ship of the Hungarian law enforcement to calm European waters, so that the words of Krohne, one of the great classics of the issues of imprisonment, become true, namely that the issue of imprisonment as a profession engaged in humans should be the art of both science and practice."

When analyzing the code of law enforcement, the picture we get is always about a given point of time and the following day may bring up new practical questions, a new scientific result or a new point of view in the law making and it is important that we take these into consideration at once just as we do the whole system of inherence. We are not talking about a closed question, but a continuous task.. We are working with the aim of improvement and with the aim of a more modern and effective legal organizational system having in view the Hungarian and European law enforcement and the Code of Law Enforcement that promotes the above mentioned.

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11 György VÓKÓ: A büntetés-végrehajtás időszerű kérdései (Current Issues of Law Enforcement), Jura – scientific paper of the University in Pécs, 7th Volume, No.1, p.101, 2001

Zusammenfassung

Es wird zur Zeit in Ungarn ein neues Gesetz über die Strafvollziehung und die Vollstreckung von Maßnahmen erstellt. Diese Studie präsentiert diesen Gesetzentwurf.

Die Erschaffung des neuen Gesetzes war wegen der Entwicklung der Gesellschaftsverhältnisse, der Veränderung des staatlichen Institutionssystems und der Umgebung der Rechtsnorm notwendig.

Der Gesetzentwurf fasst die Aufgaben der Strafvollziehung in ein komplexes System, enthält Bestimmungen die zur Zeit auf niedrigerer Ebene geregelt sind, die aber eine Regelung auf Gesetzesebene benötigen.

Der Entwurf beinhaltet die grundlegenden Regelungen der Sanktionen, die Ordnung und die Art der Vollstreckung, die Rechte und die Pflichte jener Personen, die unter der Geltung der strafrechtlichen Verantwortlichmachung stehen, sowie jene Organe, die Strafen erteilen und Maßnahmen treffen können.

In den ersten Jahren des neuen Jahrtausends ist in Ungarn ein Gesetz nötig, welches den Straf-, Erziehungs- und Verwaltungszielen besser entspricht, als die zur Zeit geltenden, mehrmals veränderten Gesetzesverordnungen, und welches sich auf die heutzutage anwendbaren Traditionen und Werte der ungarischen Strafvollstreckung aufbaut, aber sich ebenso den modernen europäischen Lösungen nähert. Dieses Gesetz wird tatsächlich die Frucht der Entwicklungstendenz der ungarischen Strafvollziehung bedeuten

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"The Case of the Half Empty Glass" – How Many Illusions Are Left for Us About the UN Reform?

"We the Peoples of the United Nations…"
Governments, greed and wars, cold and hot,
trampled over those words
in the UN's first fifty years.
Now, at this transformation moment,
people everywhere are challenged
to give life to those words.
If they do, the United Nations of the future will create,
rather than respond to, history."[1]

1.1. 60 years after San Francisco... – "The UN as an alibi"?[2]

From the very beginning of the United Nation's existence reforms of the organization were necessary. This need was already present at the birth of the United Nations when the charter was signed. Now, in the 21st century, 60 years after this moment we are in the same situation. Everybody agrees and agreed on that. The organization which was used for justifying actions as a "fig-leaf", serving as a global forum for negotiations, having just something to blame for the failures, turning to something when there was nowhere to turn… Often used and used out…

1 Douglas ROCHE: The United Nations of the Future, In: UN Reform – Looking ahead after fifty years, ed.: Eric Fawcett and Hanna Newcombe, Science for Peace, University College, University of Toronto, Dundurn Press Limited, 1995, p. 321

2 Boutros-Boutros Ghali, former Secretary General of the United Nations

We are already after the negotiations of the 60th Assembly about the comprehensive UN reform. Unfortunately, this common conclusion mentioned before does not appear in the accepted lines.

The most acute problems remained – unsolved. Like the doubts about the future fate of the world organization. Before deciding about the reform there was still a hope that NOW… A lot of things can be changed. At least the chance could be given for change: the chance for taking the political reality closer to the principles of the Charter. What is the disappointing reality now? Instead of sovereign equality of all member states – marked power differences. Instead of fulfillment of state obligations – refusal or failure of this task based on greedy national interests. Instead of peaceful dispute settlement – wars, unlawful use of power. Instead of collective security, relative equality – neglecting the unimaginable poorness of the third world…[3]

It is true that waiting for the reform to heal all illnesses of our planet is a Utopian expectation and belongs to the world of bed-time stories. But it must also be admitted that it is inevitable in the interest of all members of the international community, because the UN till now is the only alternative to face the old and new threats of our globalized world.

1.2. The new challenges of a new century

It is a cliché already, that during the stormy history of the UN, the international community went through fundamental changes. The 60 years having passed since then were the witnesses of the cold war, its end, several wars, economic crisis, the process of globalization. These problems have to be answered by the world organization – which was set up as a noble experiment of human cooperation. In a world which is divided to extremes, in which the multitude of interests race for priority.

The primary objection of the UN's birth was keeping the peace, so the problem of international peace and security appears in the ordinary military sense, but the 21th century widens its frames. A thorough summary of these changes is collected and dealt with in the Report of the High Level Panel.[4] It names more, interrelated[5] phenomena that threaten international peace and security.[6]

– economic and social threats (e.g. infectious disease, AIDS, poverty, environmental degradation),
– inter-state conflict,
– internal conflict (e.g. civil war, genocide),
– nuclear, radiological, chemical and biological weapons,
– terrorism and
– transnational organized crime.[7]

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3 Sven Bernhard GAREIS – Johannes VARWICK: The United Nations: an introduction, Basingstoke, Palgrave Macmillan, 2005, p. 250

4 The Secretary-General of the United Nations established a High Level Panel in 2003 with the task to "map" the phenomena, threats, changes which threaten international peace and security, and find ways to challenge them. (SG/A/857, 04 11 2003) The Panel released its report in 2004, with the title:" A More Secure World: Our Shared Responsibility" (A/59/565).

5 The interrelated nature of the threats, the correlation among them is demonstrated by more examples: e.g. with the analysis of interconnection between the poverty and the civil war, and the infectious diseases – with special regard to AIDS and the economical problems.

6 These phenomena lead to the death of masses or decreases their life chances, or undermines state – as the essential fundamental part of international community.

7 A more secure world: Our shared responsibility, (A/59/565) Synopsis, p. 2.

Besides the phenomena which threaten international peace and security there are other circumstances, elements that demand the reforms.[8] The least developed countries lay more and more claims, expect external help, and parallel with this they want to have more say in the matters of the world.

Most policies, problems waiting for solutions have become intersectoral, touching more fields. The most obvious example to demonstrate this change is the matter of development. It is in connection with the economical, political, social and cultural sphere, with the problem of sustainable development. For this reason, the UN is demanded to realize a more effective cooperation among its organs, programmes and financial funds. The above mentioned phenomena urges the specialized agencies to establish more harmonized communication and relations as well.)

The changes have accelerated. The effect of the explosive development in the world of sciences spreads over to all fields, so all international organizations – so the UN as well – have to keep up with this, fast answers have to be given to the emerging global problems.

The present international community is much more populous, than at the establishment of the UN. Thousands of NGO-s, regional organizations appeared on the palette of international life. (Of course, their interests have to be taken into account as well…)

1.3. Which Way to Choose: "Marginalization, World Government or the Golden Mean"?

There are three possible ways for the future UN evolution: marginalization, to become a world government, or "somewhere between", reforming the existing system.[9]

The first possibility has only a slim chance. It presumes that the UN weakens and in the long-run it loses its significance. More important states ignore the organization and solve their problems by their own means, by their own ways, with the help of their own systems.[10] The UN would no longer play any role in international politics, there would not be a global forum of human rights for monitoring, norm development, discussion. In peace-maintenance the UN would be ignored, the prohibition of using force would erode and the frequency of wars would increase.

The second way for the UN is to become a world government. At first sight this vision takes us to a Hollywoodian film-dream where it is always the good that wins, where the happy-end is guaranteed. As a main character it would have the monopoly of use of force, effective implementation mechanisms in connection with human rights and a kind of global citizenship could be developed with applicable rights. However, this possibility would carry the danger of power concentration. This scenario seems to be even less imaginable than the first one.

If the UN takes the third direction mainly it remains the same as it is now: an organization which is in the need of reform. An organization which plays essential role in certain aspects, areas, an organization which cannot be substituted today. An organization

8 Renewing the United Nations: A Programme for Reform" A/51/950 (Part One – Overview), http://www.un.org/reform/track2/intro.htm

9 Sven Bernhard GAREIS – Johannes VARWICK: The United Nations: an introduction, Basingstoke, Palgrave Macmillan, 2005, p. 249-252.

10 Unfortunately the behavior of the only superpower of today's world, the United States echoes this possibility. There were certain voices to establish a quite of "UN-rival" organ with the "fraternity of the willing". This attitude is foreshadowed by an opinion which is quoted from John Bolton who is an ambassador at the UN: "Not too many things would change if ten floors disappeared from the UN building in New York."

whose success and future depends on its ability to prove its competence. It must be accepted that it is only one actor in the economical, social field, and the gap between the human rights in papers, conventions and their realization will not disappear. The monopoly of use of force is not exclusively in the hands of the UN, but it is its legitimation which must be strengthened. Of course, this is the most realistic picture that can be foreshadowed.

The success of the UN depends on several factors which should be taken into consideration-as Gareis and Varwick indicate.[11] First of all: it can only become what the member states allow it to be. It is the member states itself that show the "roadsigns" and "make the system work". The organization can create a kind of framework for tremendous amount of different interests floating in the international politics – which can be governed then into the same direction.

Second the enormous gap should be ceased between the well-sounding rhetorical word flowers and political reality. Talking about serious topics – which need urgent action – in the General Assembly, promise all kinds of cooperation on the level of principles – and then, of course, to calm our conscientiousness to feel that we have reached something does not solve anything. To lay guidelines what we would like, should do is not enough – without effective implementation mechanisms they are just "words shouted into the steppe" – as a Hungarian proverb says…

Third the fact cannot be forgotten that – in opposition with the before mentioned tendency – the legitimation given by the UN becomes more and more essential. Even great powers are under the pressure to justify their unilateral actions with the help of international law and the provisions of the Charter.[12] Hopefully this trend will continue and the states which violate the rules get to be isolated.

Fourth, the too ambitious expectations cannot be established about the UN. It cannot be expected to be the healing balm for all global concerns.

Finally, the UN first must set its priorities and then convince the member states to contribute the needed financial and other means to be able to carry out its tasks.

2. Tendencies in the history of UN reforms – in a nutshell…

Already at the beginning the UN realized that issues in connection with international peace and security cannot be subjects to reform because of the Cold-War situation. So the attention turned to the economical, social field and it exhausted in some fast "hole-fixing" activity: staffing, planning, examinations at the administrative level.[13] Then it was followed by the topics of accountability, cost-efficiency and coordination.

In the middle of the 1980s "the crisis of multilateralism"[14] induced only managerial approach simply ignoring the real political roots of the problem. As a response the General

11 Sven Bernhard GAREIS – Johannes VARWICK: The United Nations: an introduction, Basingstoke, Palgrave Macmillan, 2005, p. 252-253.

12 Remember the efforts made by the US and UK to get the approval of the Security Council before starting their war actions in Iraq in 2003.

13 Victor-Yves GHEBALI: United Nations Reform Proposals Since the End of the Cold War: An Overview In: A New Charter for a Worldwide Organization? Ed.: Maurice BERTRAND and Daniel WARNER, Nijhoff Law Specials, 1997, Vol 27 p. 79-80.

14 The "crisis of multilateralism" was in the deep in fact about getting the control in the UN. On the surface the debate was about the crisis of confidence in the UN. It was the consequence of the fact that the "third world", developing countries attempted to push their interests with the support of the Soviet block countries. Each party accused the other of acting against the spirit of the Charter. Besides it associated with the belligerent behavior of the US against the organization which took the UN into the side of bankruptcy.

Assembly established "a Group of High-level Intergovernmental Experts"[15] with the task to make a comprehensive review about the financial and administrative matters of the UN. The "Group of 18" submitted its critical report[16] one year later in which it only offered routine solutions – carefully avoiding the sensitive issues. It created several recommendations relating to the activation and working process of the General Assembly and ECOSOC, coordination and the usual staff-reduction.

Similar solutions were offered by the non-governmental organizations in the next two years' reports.[17] The first one was written by the Heritage Foundation[18] – which labeled itself as anti-UN. It criticized the "Group of 18" report very sharply and ironically. The "Plaza Hotel Report"[19] initiated first-aid help: programme cuts, staff reduction, elimination of certain entities. The suggestions of PACE-UK International Affairs were released with the title: "Making the United Nations a Winner".[20] It urges the building of a communication strategy to make a better image for the organization – especially in countries which contribute the most to its functioning. UN Information Centres and public opinion monitors should be set up by the Department of Public Information.[21] Besides the proposals of NGOs two reform recommendations of private individuals must also be mentioned: Harold Stassen's and Maurice Bertrand's.[22]

The so called "third world organization paradigm"[23] was only capable of living in the circumstances of the Cold War. After collapse of communism the conception had to be thought over.

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15 See RES 40/237, 18 December 1985

16 See A/41/49, 18 August 1986

17 Victor-Yves GHEBALI: United Nations Reform Proposals Since the End of the Cold War: An Overview In: A New Charter for a Worldwide Organization? Ed.: Maurice BERTRAND and Daniel WARNER, Nijhoff Law Specials, 1997, Vol 27 p. 81-82.

18 See C. LICHTENSTEIN, J. G. PILON, T. E. L. DEWEY, M. L. MERKLE: The United Nations: Its Problems and What to Do about Them. 59 Recommendations Proposed in Response to General Assembly Resolution 40/237, Washington, The Heritage Foundation, 1986

19 See United Nations Financial Emergency. Crisis and Opportunity. New York, Plaza Hotel, August 1986

20 See Making the United Nations a Winner. How to communicate the United Nations to People, London, PACE UK International Affairs, 1986

21 In the third millennium – when the media is nearly a master with full powers it is important to use its opportunities. It is an essential interest that the message of the UN should get to the citizens of the world and be absolutely aware of its activity, understand and support that. It is the primary instrument of building a favorable image. However it must be handled carefully – it should be avoided that it "gobbles the organization up" and becomes the UN the victim of its tyranny. So its communicational policy should be created with special care – exclusively about its activity and aims should be given information and it should not be the crucial point what can be "sold better". It must be decided cautiously as well, if the information sent to different geographical regions, countries should be divergent or not. (If yes, in what extent?)
Today all UN institutions and missions have Internet connection already, and all UN documents can be found on it. The wider use of new communication devices could rationalize and speed up the work.
There is also a new field: the "digital divide" – informational and communicational technology – which can even give assistance in diminishing the gap between the developed and developing countries.

22 Maurice Bertrand served in the Joint Inspection Unit for 17 years. In his paper with the title "Some Reflections on Reform of the United Nations" he emphasized that till now the UN lived in three illusions. First: that the collective security system can be constructed under the provisions of the Charter, second: that the problems of developing countries can be healed in a non-integrated developmental approach and last: that the UN can serve as a global forum for getting the needed political consensus while the organization was not even accepted by all countries as a podium for discussing the vital concerns.

23 Victor-Yves GHEBALI: United Nations Reform Proposals Since the End of the Cold War: An Overview In: A New Charter for a Worldwide Organization? Ed.: Maurice BERTRAND and Daniel WARNER, Nijhoff Law Specials, 1997, Vol 27 p. 85.

In the time of post Cold War, till then, by necessity forgotten and hidden topics, problems emerged: the concern of international peace and security. The urging of changes originate from outside the UN and overall reforms are pressed arms in arms with the pushing of broad, long-term "reparations". A sparkling life started in the UN with significant reform proposals. The equitable representation and increase of the membership of the Security Council became an important issue in the General Assembly.[24] Peacemaking, peacekeeping, preventive diplomacy,[25] arms regulation – disarmament and development[26] appeared in the new agendas of the Secretary General Boutros-Ghali.[27] International conferences dealt with the burning topics of environment,[28] population,[29] social development[30] and human rights[31] – just to mention some issues.

Revitalization of the economic and social field[32] and the working methods of the General Assembly has also been undertaken.

The before mentioned reform proposals however – in contrast to the fact that nearly all areas of the UN's activity are touched by them – do not recommend the revision, the "re-writing" of the charter. After the millennium this urging need was given a voice.

First, the United Nations Millennium Declaration[33] (2000) set up crystallized global goals[34] for the international community – determining their timetables[35] as well.

Three years after "launching" the Millennium Declaration the Secretary-General of the United Nations established a high panel in 2003 with the task to "map" the phenomena, threats, changes which threaten international peace and security, and find ways to challenge them.[36] The Panel was assigned four main tasks:

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26 See the following Agendas:
– A/47/277 – S/24111 (17 June 1994) – An "Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping", A/50/60, (January 1995) – "Supplement to An Agenda for Peace",
– A/C.1/47/7 (27 October 1992) – "New Dimensions of Arms Regulation and Disarmament in the Post-Cold War Era
– A/48/935, (6 May 1994) – "An Agenda for Development" and A/49/665, (11 November 1994) – "An Agenda for Development: Recommendations".
However in these agendas Boutros -Ghali recommends the revitalization, the "shaking-up" of the UN, and not the revision of the charter – in contrast to the present reform proposals. (Wendell GORDON: The UN at the Crossroads of Reform, M. E. Sharpe, New-York-London, 1994., p. 212-213.)

27 Secretary General Boutros-Ghali makes several remarkable notices in his agendas. As an example a light must be laid on the Agenda for Development in which five interrelated factors are described forming the basis for development and durable peace. These factors are: peace (absence of war), economic growth, preservation of the environment, justice and social progress and democracy. (In: Richard H. STANLEY: Comments on Maurice Bertrand's Working Papers, In: A New Charter for a Worldwide Organization? ed. Maurice BERTRAND, Daniel WARNER, Nijhoff Law Specials, 1997, Vol 27 p. 181-182.)

28 See 1992. Rio de Janeiro Conference about the sustainable development

29 See 1994 Cairo Conference

30 See 1995 Copenhagen Conference

31 e.g. The High Commissioner for Human Rights was set up. (See the Resolution of the General Assembly: 48/141, (20 December 1993)

32 See the Resolutions of the General Assembly 45/264, (13 May 1991), 48/162, (20 December 1993 and A/49/558, (20 October 1994)

33 See RES 55/2 of the General Assembly

34 These goals are the following: to eradicate extreme poverty and hunger, achieve universal primary education, promote gender equality and empower women, reduce child mortality, improve maternal health, combat HIV/AIDS, malaria and other diseases, ensure environmental sustainability, develop a global partnership for development.

35 These goals should be achieved at last till 2015.

36 See footnote 4

– to find and examine the main challenges to international peace and security,
– to consider which collective action is to be used in challenging them,
– to review the work and functioning of the UN's main organs and finally
– to recommend changes to strengthen the UN, through reforms in its institutions and processes.

The report of the Panel was released 2nd December 2004. It introduced 101 reform proposals on how to modernize the UN to be able to meet the requirements of 21st century.

Based on the comprehensive work of the Panel and the Millennium Declaration Secretary-General Kofi Annan composed his report about the thorough reform of the UN with the title: "In larger freedom: towards development, security and human rights for all".[37]

2.1. "We do not think the UN is a failure. We think it has never been tried."[38] – And now? The starting-points of the documents…

After describing the main ideas set in the report of the High Level Panel and of the Secretary General's – the result of the September Summit will be examined: were the hopes recorded in these programmes given the chance for realization or not.

The report of the High Level Panel (see further as MSW) collects first several phenomena that threaten international peace and security.[39] From this starting point it tries to find ways for the international community to challenge them. The report of the Secretary General (see further as RSG) has a similar basis: it also takes into account the "challenges of a changing world" but on the grounds of the Millennium Development Goals: it scrutinizes the results achieved till the birth of the report. It states that the progress in not uniform across the world.[40] The greatest improvements took place in East and South Asia, where more than 200 million people were lifted from poverty. Sub-Saharan Africa is the centre of the crisis falling far from the set goals in all aspects with extremely high child and mother mortality, poverty and illnesses. Gender equality remained just a hope like environmental protection. Then attention is directed to the declaration[41] that "each developing country has primary responsibility for its own development… While developing countries, on their side, undertake that developing countries which adopt transparent, credible …. development strategies will receive the full support they need, in the form of increased development assistance, ….trade system and wider and deeper debt relief." The declaration remained only a pure, simple declaration without any effects.[42]

However, the targets are still there and a new framework should be built for action. In this progress a special emphasis should be laid on creating a healthy economic environment with accountable systems of governance, efficient public administration, capacity-building investments in human "resources" and development-oriented infrastructure. Civil society has a critical role in these changes and there is a lot on its shoulders.[43]

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37 See A/59/2005

38 William FULBRIGHT In: Wendell GORDON: The UN at the Crossroads of Reform, Reform of the United Nations, M. E. Sharpe, New York, London, 1994. p. 228.

39 See point 1.2.

40 See A/59/2005 II. Freedom from Want Box 2

41 See International Conference on Financing for Development (Monterrey, Mexico) and World Summit on Sustainable Development (Johannesburg, South Africa)

42 See A/59/2005 II. A/32.

43 ibid. II. B/36-38.

2.2. *"Freedom from fear"? – The heroic (and hopeless) fight against terrorism, transnational organized crime, weapons of mass destruction and the possible means*

Then the report goes on according to the logic of the triangle of "development, security and human rights" issues[44] which can only be put forward "hand in hand". In the section "Freedom from fear" the issues of collective security, terrorism, weapons of mass destruction, use of force and reducing the risk and prevalence of war are discussed.

In the report of the High-level Panel it is emphasized – supported by the Secretary General as well[45] – that the building up of collective security is the task of international community through the treatment of threats which already exist or in connection with taking the appropriate preventive actions – since "a threat to one is a threat to all."[46]

It is laid down in MSW that leading the preparation of a comprehensive strategy against terrorism is the duty of the Secretary-General – its most important elements are outlined.[47] Member states should join the 12, existing agreements against terrorism.[48] The Security Council should determine its sanctions for the countries which do not fulfill their obligations under its resolutions against terrorism in advance.[49] "The construction" of the definition of terrorism belongs to one of the most urgent tasks of the General Assembly – its most significant elements are fixed.[50] In RSG the same elements can be found supplemented with the new notion of the creation of a special rapporteur "who would report to the Commission on Human Rights on the compatibility of counter-terrorism measures with international human rights law".[51]

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44 "to perfect the triangle of development, freedom and peace" ibid. I. B/12.

45 "On this interconnectedness of threats we must found a new security consensus, the first article of which must be that all are entitled to freedom from fear, and that whatever threatens one threatens all." A/59/2005 III. A/81.

46 "A more secure world: our shared responsibility" (A/59/565), December 2004, II. 17. p. 14.

47 ibid. Art 38. a)

48

1. Convention on Offences and Certain Other Acts Committed On Board Aircraft („Tokyo Convention", 1963)
2. Convention for the Suppression of Unlawful Seizure of Aircraft („Hague Convention", 1970)
3. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation („Montreal Convention", 1971)
4. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (1973)
5. International Convention Against the Taking of Hostages („Hostages Convention", 1979)
6. Convention on the Physical Protection of Nuclear Material („Nuclear Materials Convention", 1980l)
7. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Extends and supplements the Montreal Convention on Air Safety), (1988)
8. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, (1988)
9. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988)
10. Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991)
11. International Convention for the Suppression of Terrorist Bombing (1997), (UN General Assembly Resolution)
12. International Convention for the Suppression of the Financing of Terrorism (1999), In: http://www.unodc.org/unodc/en/terrorism_conventions.html

49 ibid. Art. 156.

50 ibid Articles 163-164.

51 RSG III. B/94

Concerning transnational organized crime in MSW it is stressed that member states – who have not done so yet – should join and execute the agreements against and support the United Nations Office on Drugs and Crimes.[52] A central authority should be established which would give assistance for national judicial bodies to get the necessary evidence. Negotiations are initiated about the working out of an international agreement in connection with money-laundering and the agreement includes the problems of bank secrecy and the development of financial havens.

In connection with weapons of mass destruction nuclear-weapon states are requested to restart disarmament and to take all necessary measures to diminish the chance of nuclear war.[53] Negotiations to solve regional conflicts should be connected with taking steps for disarmament.[54]

Chemical-weapon states should destruct all their existing stockpiles by the agreed time, 2012.[55] Parties to the Biological and Toxin Weapon Convention should start negotiations to work out a new biosafety protocol about the classification, export of dangerous biologic agents.[56] In RSG states are only called upon to further measures to strengthen the convention itself and "increase the transparency of bio-defense programmes".[57] The Security Council should draw up the framework of the cooperation with the president of WHO in case an infectious disease broke out or its danger arose.[58] In his report the Secretary General asks for further, strengthened rights to investigate the suspected use of biological materials incorporating the latest technology as well.[59]

In RSG among the tools to reduce the risk of war mediation is mentioned first in which task the Secretary General plays a crucial role. Member states are urged to give additional resources for his good offices function.

The control of the effective application of sanctions belongs to the authority of the Security Council. The members of the High Level Panel advise that parallel with imposing of sanctions, a monitoring system should be established – with the needed authority and capacity – and an adequate budget. The sanction committees of the Security Council should outline guidelines for the process of reporting to help countries to fulfill their obligations in the effective execution of sanctions. Donor countries are expected to contribute more resources and support for the strengthening of the legal-, administrative- and boarder control mechanisms of certain states. The Secretary General is suggested to appoint a senior officer who should give him assistance in collecting information in this field, determining the necessary technical need and providing coordination in this field.

The imposing of secondary sanction arises in cases of countries violating sanctions. Furthermore, the Security Council is under the obligation to analyze the humanitarian consequences of sanctions. It is the task of the above mentioned committees to examine the cases of those who protest against getting on the list of countries (against which (a) sanction(s) is/are imposed).[60] The Secretary General is much more cautious in his report and without any

52 MSW Art. 172. See: United Nations Convention against Transnational Organized Crime and its Protocols, 2003. United Nations Convention against Corruption and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

53 ibid. Articles 120-121.

54 ibid. Art 123.

55 ibid. Art 125.

56 ibid. Articles 126 and 137.

57 RSG III. C/103.

58 MSW Art 144.

59 RSG III. C/104.

60 MSW Art 180. a)–e) and Articles 51. and 52.

details only the significance of strengthening of state capacities to implement sanctions, the monitoring mechanisms and the mitigation of humanitarian resources are mentioned.[61]

Regarding peacekeeping[62] cooperation should be established with regional organizations.[63] In the analyzed documents the clear link between peacekeeping and peacebuilding is not stressed enough – e.g. in the Brahimi Report their interrelated nature is definitely stated.[64]

In both documents a special emphasis is laid on peacebuilding after war. In the proposals of the High Level Panel it is recommended that the special representatives of the Secretary-General should coordinate donor countries and the resources given by them with special regard to the harmonization of the UN assistance with the affected country's priorities and needs.

Peacebuilding and disarmament are connected through the suggestion according to which – on the suggestion of the Security Council – the General Assembly may may have the authority to finance peacebuilding from the budget of disarmament. A special fund should be founded for peacebuilding – it would serve the financial needs of countries right after a conflict to support the government in birth or programmes for rehabilitation and reintegration.[65]

The setting up of the Peacebuilding Commission[66] is suggested as well. The new body should identify states which stand before a conflict or collapse. It organizes preventive actions in cooperation with national governments to prevent escalation and after conflict appropriate peacebuilding actions are arranged. Principles are fixed which have to be taken into account in creation of procedural and other detailed rules.[67] It should be suitable for construction of general strategies and action plans for a certain country.

The Secretary General takes over the same suggestions adding that a Peacebuilding Support Office should be built in the frameworks of the Secretariat with the obligation of reporting to the Security Council or the Economic and Social Council – depending on the phase in which the conflict is.[68]

Regulations relating to weapons are discussed in two levels in MSW: negotiations are initiated to create an agreement about the trade and marking of light weapons. Member states are called upon to report all data and elements precisely to the United Nations Register of Conventional Arms and the Secretary-General should report the grievances to the General Assembly and the Security Council.[69] A special training should be organized for UN mediators

61 RSG III/D 109–110.

62 A policy of "zero tolerance" should be enacted in connection with sexual exploitation and other offenses committed by peacekeepers on vulnerable people.

63 The trends in international law and politics show in the direction of creating regional security communities in Europe, America and to a less extent in Asia. However, there are problems with legitimacy and capacity in some regions: e.g. in African territories they are unable to sustain regional organizations, while in other parts of the world there is not willingness to support their work. See: Brian L. JOB: The UN, Regional Organizations and Regional Conflict: Is There A Viable Role for the UN? In: The UN and Global Security ed. R. M. PRINCE and Mark W. ZACHER, 2004 p. 239.

64 In the Brahimi Report besides this other significant elements are mentioned for the success of these operations: the cooperation, help of the local police and the humanitarian activities. See: Hisashi OWADA: Introductory Remarks and Keynote Addresses, in: The Reform Process of UN Peace Operations, ed. Rham-Azimi, Nassrine – Debriefing and Lessons – Report of the 2001 Singapore Conference, Kluwer Law International, the Hague, 2001 p. 6.

65 See MSW Articles 226-28. The minimum amount of the fund is 250 million USD.

66 ibid Art 263. Commission is established by the Security Council after consultation with ECOSOC.

67 ibid Art. 265. a)–h) A relative small body should be set up, among its members there are the representatives of the Security Council, ECOSOC and the affected country .

68 RSG III/D 114-119.

69 MSW Articles 96-97.

and the representatives of the Secretary-General – its most important elements are listed.[70] The proposals of the Secretary General[71] are more moderate: only two actions are urged: making an agreement on an instrument to regulate marking and tracing of small arms and light weapons and implementing their obligations in removing all landmines and in connection with the "Conventional Weapons Convention".[72]

Regarding the use of force the High Level Panel draws the attention to the fact that the fundamental principles are fixed: Article 51 of the UN Charter must not be changed. Alternatives should not be made for the Security Council, but its operation must be made more effective. One of the key ideas of the report can be found here: the idea of "the collective international responsibility to protect". This obligation is fulfilled by the Security Council through authorization of the use of force – as a last resort – in case of genocide, ethnical cleansing or the mass violation of human rights.[73]

Five essential criteria are named as the indispensable conditions of the use of force:[74]
– seriousness of threat,
– proper purpose,
– last resort,
– proportional means and
– balance of consequences.
These criteria must be embodied in resolutions of the General Assembly and the Security Council.[75]

The Secretary General takes over the same suggestions emphasizing that the proposed way of making decisions will definitely contribute to the greater respect of the Council by the governments and the public opinion as well.[76]

2.3. "Freedom to live in dignity": the Triple of Magic Words are rule of law, human rights and democracy

This issue only emerges in the report of the Secretary General. The triple of rule of law, human rights and democracy are stressed. A Rule of Law Assistance Unit is to be created and member states are encouraged to accept the compulsory jurisdiction of the International Criminal Court and to strengthen its functioning.

The UN High Commissioner for Human Rights should play a more active play and country teams should be trained in his office. The significant notion of "responsibility to protect idea" appears here: it gives the basis and the ground for collective action in case of ethnic cleansing, genocide and crimes against humanity – first of all it is the individual state itself that is in charge of protecting its civilians, but if it is unable or unwilling to do so, this obligation goes to the international community.

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70 ibid Articles 101-103.
71 RSG III/D 120-121.
72 The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, supplemented by Amended Protocol II to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.
73 MSW Articles 192., 198. and 203.
74 ibid Art. 207. a)–e)
75 ibid Art. 208.
76 RSG III/E 122-126.

In the interest of states which want to strengthen their democracy a Democracy Fund should be established to give financial and technical assistance.[77]

2.4. The Gordian knots of reshaping the UN bodies

Besides the growing encumbrance, more complex tasks, the General Assembly has lost its priority, authenticity, it is distressed by financial problems. Dominant states work on the erosion of its role. Therefore, it should get back its vitality[78] with the help of shortening its agenda, making it much more conceptional – the Secretary General marks the most significant topics as well which it should deal with: international migration and a comprehensive convention on terrorism. Besides this, it should rationalize and speed up its process. Smaller, more concentrated preparatory commissions are more suitable assisting the Assembly. The role of the president must be strengthened. As a repeating requirement a tighter relationship should be built with civil society.[79]

The reform of the Security Council is the most problematic. The topic has been on the agenda for many years, but no improvements have been made because of its extremely sensitive and complicated nature with a whole net of interests.[80] From the 1990s it became obvious for all states that the increased membership, the end of Cold-War and the already mentioned new challenges make the reform inevitable.

Both reports propose the same changes. In MSW first the principles[81] were collected which have to be followed in the reform process. For those countries which contribute most to the functioning of the UN[82] more competence should be assured in the decision making. The body should be reorganized to be more representative – with special regard to the needs of developing countries. It should be transformed to be more democratic and transparent with the help of procedural rules.[83]

Two models were worked out for enlargement of the organ: both models take into account the division of new seats on the grounds of regionalism.[84] The election of nine new members is proposed.

According to model A the body should be enlarged with 6 new permanent and 3 new members elected for two years. Model B suggests the election of 1 new member for two years – which is not renewable – and 8 new members for four years – this membership can be

77 ibid IV. 127-152.

78 One of the different ideas to revitalize the General Assembly was to settle two assemblies: the present General Assembly and a Parliamentary Assembly – the latter one with an advisory function. See: Recommendations to the Commission on Global Governance – Science for Peace Workshop on United Nations Reform, In: The UN Reform – Looking Ahead After fifty years, ed. Eric FAWCETT and Hanna NEWCOMBE, Dundurn Press Limited, 1995 p. 302.

79 MSW Articles 240., 242. and 243. and RSG V/A 158-164.

80 There are a lot of "banana peels" in this: states are racing for new membership, the current P-5 members do not want the curtailing of their rights and the future relationship of the US with the UN is uncertain. See in: Barbo FASSBENDER: Pressure for Security Council Reform, in: The UN Security Council: from the Cold War to the 21st century, ed.: David M. MALONE, 2004, p. 341-342.

81 MSW Art. 249. a)–d)

82 It reflects to countries which give the most support for the UN militarily, financially or diplomatically, take an active part in peacekeeping operations or make voluntary activities on the field of development and security. Art. 249. a) e.g. Germany, Japan, India, Brazil, Nigeria, South Africa were mentioned among the"probable winners".

83 ibid Art. 258.

84 Art. 252. The determined regional groups: Africa, Asia and the Pacific, Europe and America.

renewed. (This latter proposal is a new category.)[85] Veto should not be extended in any way and indicative voting should be introduced.

In his report the Secretary General urges states to reach consensus in this issue even before the September 2005 Summit[86] and calls the attention that its lack should not be a gate for action.

The expectations on the shoulders of the Economic and Social Council deriving from the Charter were "either unrealistic from the outset, or naive".[87] The Council which was hoped to "become an active and important organ as the Security Council and will become the Council of the twenty-first century"[88] was marginalized. Its developmental function should come to the front, so the agenda should be built on the issues determined by Millennium Declaration and Monterrey Consensus. The direction of its work should be lead by a smaller executive committee which is in charge of organizing the cooperation with other organizations and programmes.[89] A Committee on the Social and Economic Aspects of Security Threats has to be established in the framework of ECOSOC – which examines the interconnection, interrelation between threats to international community– suggests the report of the High Level Panel. This latter proposal is missing from the report of the Secretary General.

What is new proposed by the Secretary General is that it should regularize its work in post-conflict management with the Peacebuilding Commission.

It would be useful to refer to the principle of subsidiarity: economic and social issues concerning regional and local levels should be left at local and regional organizations and on Central UN level only global issues should be dealt with, so a "mini UN" is needed for each region.[90]

The first proposal for the reform of Secretariat suggested by the High Level Panel is the establishment of the post of a new Deputy Secretary-General who is in charge of international peace and security. Instead of this the Secretary General decided to create a cabinet-style decision making mechanism. The other propositions have rather general nature: member states are called upon to supervise the connectionship between the General Assembly and Secretary to keep the flexibility of Secretary-General relating to the management of the staff – besides the accountability[91] to the General Assembly. A package of management reforms[92] are offered in the interest of accountability, transparency and efficiency.[93]

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85 MSW Articles 250-253. and RSG 170 (Box 5)

86 Of course they have not succeeded…

87 Jan WORONIECKI: A New Worldwide Organization? In: A New Charter for a Worldwide Organization? Ed.: Maurice BERTRAND and Daniel WARNER, Nijhoff Law Specials, Vol 27 p. 213.

88 Boutros-Boutros Ghali in: Dr. Shyam Kyshore KAPOOR: International Law, Allahabad, U.P.: Central Law Agency, 1996, p. 500.

89 Art. 278. All regional groups should have a representative among the members of the executive committee. e.g. the annual meetings with Bretton Woods Institutions should inspire for the reaching of goals listed in the above mentioned documents

90 Benjamin BASSIN: Reform of the Economic and Social Aspects of the UN System, The Finnish Yearbook of International Law, 1998. p. 59.

91 "Other than the membership, whom is the UN accountable to? Its membership of state parties, many of which are authoritarian governments, who couldn't give a damn what their people think of it. There are not checks and balances by public constituencies over what the member states do at the UN, so it is undemocratic in that sense." (Shepard Forman) In: Linda FASULO: An Insider's Guide to the UN, Yale University Press, New Haven and London, 2004, p. 105.

92 The establishment of 60 new posts are proposed in the Secretary to be able to fulfill the obligations which derive from the reform proposals. Reforms concerning the UN personnel have to be executed and the members of UN staff have to be inspected as well-suggested in MSW.

93 "The question was how to make the United Nations managers manage and not simply administer their programmes" – it was stated very telling in the Administrative and Budgetary Committee Summary Records. In: UN 21 – Accelerating Managerial Reform for Results, UN, 1997 April, p. 41.

The Commission on Human Rights should be replaced by the Human Rights Council. The High Commissioner of Human Rights should make an annual report about the situation of human rights and the Security Council resolutions relating to human rights.[94] (In contrast to this in RSG the latter ones are not put forward.)

3.1. The "success" of the reform

Most countries were disappointed with the results of the 60th Assembly. (The Venezuelan delegation called the negotiations grotesque.) Most proposals fell through. The Secretary General in his speech compared the situation to a half empty glass. With his compulsory, forced optimism he referred to the fact that his reform proposals were introduced in a package – because of the hope that states can reach a compromise on this way easier in less important issues if they feel that in serious, more touching fields they get more concessions. Now the most significant suggestions will be introduced.

The goals of the Millennium Declaration were strengthened with the obligation for the states that the degree of ODA should be increased to 0,7% of the GDP.

The Human Rights Council will be established, but there was no decision about the composition and the tasks of the new organization – it was postponed. The Peacebuilding Commission also got green light – the detailed rules were not worked out either. There was no decision about which organization it will be subordinated.

According to Kofi Annan the greatest achievement is the establishment of "collective responsibility to protect civilian population" in case of ethnic cleansing, in connection with war crimes. It is agreed that if local authorities fail in this the Security Council should get the role.

The Assembly failed again to create the definition of terrorism – which would have been a vital interest. At least it was declared that all member states condemn all kind of terrorism independent from its aim. The Secretary General's rights were not exceeded either.

The reform of the Security Council still keeps us waiting – negotiations should be made about the issue. The General Assembly only has the obligation to examine the results of discussions till the end of the year.

The results were only small steps towards a better organized world organization. The solution to the whole issue would be very simple – in theory. All states should understand that forcing their own greedy interests does not lead to the desired peaceful world of the future. If states can not make any compromise – all future reform proposals will get to the fate of all the previous ones…

ZUSAMMENFASSUNG

Eine der wichtigsten Organisationsreforme der letzten Jahrzehnte steht auf der Tagesordnung der Vereinten Nationen. In 2004 hat dieser Prozess einen neuen Anstoß bekommen, als ein umfassender Reformplan auf Vorschlag des Generalsekretärs Kofi Annan über einen speziellen Korps vorgelegt wurde. Dieser Plan war der Grund des Reformprojekts des Generalsekretärs. Die meisten Reformvorschläge wurden auf der Konferenz im September abgewiesen (Reform des Sicherheitsrates, Definition des Terrorismus, Vorschläge über Massenvernichtungswaffen), nur in wenigen Fragen hatte die Versammlung Erfolg (Friedensbauende Komission, neue Komission für Menschenrechte usw.). Es ist selbstverständlich, dass keine Vorschritte zu erwarten sind, solange die Staaten sich nicht über ihre egoistischen Interessen erheben können.

94 MSW Articles 285-289.

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Constitutional Foundations of Economy

I. Unfolding Art. 9. of Constitution

Constitutional judicature has two basic and close-knit function: interpreting the Constitution and declaring validity (precisely: invalidity) of particular norms in the legal system.[1] The constitution's interpretation must proceed from the definition of the interpreted rights, as it is neutral category. However, the purport of these rights may vary with more different value-based concept. In border-line cases it is the Constitutional Court's responsibility to choose. Constitutional Court will obligate the interpretation, that is concordant to the whole Constitution – according to His opinion.[2]

When legal rules of the economy, "legal regulation of the economy" (if it is possible) is subject of the Constitutional adjudication, one has to interpret those Articles of the Constitution, that relate to the economy: particularly phrases of Art. 9. (naturally interpretation will remain within the boundaries of the particular constitutional issue considered by the Constitutional Court).

From the point of constitutional protection's view, Art. 9. comprises state purposes, constitutional rule and fundamental right as well. Market-economy principle and freedom of economical competition shall be considered as state purpose – according to the Constitutional Court's interpretation –, when the Court will restrain state interference only in extreme cases. From the market-economy principle the freedom of contracting has been deduced by the Constitutional Court, which is constitutional rule but not fundamental right. Its violation means unconstitutionality but state has more possibilities to restrain it, as if it were fundamental right and it would have the fundamental right's protection, namely it would be

1 See András BRAGYOVA: Az alkotmánybíráskodás elmélete (Theory of constitutional judication), KJK-MTA ÁJI 1994, p. 23.

2 23/1990. (X. 30.) AB decision, ABH (Official collection of Constitutional court's decisions) 1990. 89, 98. HOLOUBEK, M.: Funktion und Interpretation der Grundrechte. Zeitschrift für Öffentliches Recht und Völkerrecht, 1999, 54. 97. and following

interpreted as fundamental right. It is the right to enterprise where the constitutional protection reaches its highest intensity. This fundamental right is positively named in Art. 9., so there is no need of indirect deduction.[2/a]

"Disassembly" of these rights, rules and purposes in Art. 9. does not mean rigid separation, for these items of economical constitutionalism assume each other and often appear together by considering the constitutional issues. Among the constitutional dispositions referring to the market economy the acknowledgement of the right to enterprise, considering its nature of primary rights, means at the same time the essential assurance of other dispositions of the Art. 9. of the Constitution.[3]

1. Market economy

The Constitution is – beyond proclaming the market economy – economically neutral.[4] The fundamental question proposed by the theory of the economical constitutionality from the Constitution, from which namely the size of the state intervention, its power, still less its prohibition, and respectively the limitation of the national wealth and the size of the national wealth can not be directly deduced.

The direct constitutional disposition concerning the market economy of the state is the Art. 10. of the Constitution, according to its section (2), statute is specifying the range of the exclusive state property and the state's exclusive economical activities. According to this by defining the state's economic policy – between the restrictions of the Art. 9. – the freedom of the legislator is huge but the ability of the Constitutional Court is limited.[5]

Therefore the Constitutional Court can determine the critical size of the state's intervention only in an abstract sense and with a general criterion, the exceeding of which is already unconstitutional, because of the injury of the market economy. The intervention, which would exclude the existence of the market economy conceptually and obviously – for example the general nationalization and the introduction of the planned economy –, can be rated this way.

But beyond these inordinate cases the market economy is irrelevant at all constitutional inquests. No one has a right to the market economy, so it can not be rated as a fundamental right and referring to the injury of the market economy, the unconstitutionality of an injury of any fundamental right can not be decided. The constitutionality of an intervention can not depend on whether the restriction serves the development of the market economy.[6]

Maintaining and protecting the market economy is the State's constitutional duty as well, which can be fulfilled by promoting the economic competition as of written in the Constitution, but above all, with the enforcement and protection of fundamental rights. However, protection of fundemental rights has its methodology and its criterions.[7]

The Constitutional Court did not particularize the thesis of the market economy on theoretical level like it did the rule of law. After the essential decisions the later resolutions

2/a See analysis from Zsolt BALOGH in: BALOGH – HOLLÓ – KUKORELLI – SÁRI: Az Alkotmány magyarázata (The Explanation of the Constitution). KJK – Kerszöv, 2003. p. 238.

3 See BALOGH – HOLLÓ – KUKORELLI – SÁRI: Az Alkotmány magyarázata (The Explanation of the Constitution). KJK – Kerszöv, 2003. Chapter I, Part II.

4 This was pronounced after long theoretical debates by the German Constitutional Court, see BVerfGE 4, 7. (Investitionshilfe), BVerfGE 50, 290. (Mitbestimmung)

5 33/1993. (V. 28.) AB decision, ABH 1993, 247., 249.

6 668/B/1996. AB decision, ABH 1996, 636., 637.

7 21/1994. (IV. 16.) AB decision, ABH 1994, 117., 119-120.

rather contain argumentations of preventive nature, the market economy is a constitutional duty, which is besides its relation with the primary institutions of the constitutionality, irrelevant at all constitutional inquests. No one has a right to the market economy, upon that injuries of primary rights can not be based on, so that can not be rated as a fundamental right. It follows from all of this, that the constitutionality of any intervention or legal restriction can not depend on whether the restriction serves or does it serve at all the development of the market economy.[8]

The basic reason for the constitutional thesis of the market economy relatively falling in the background in the practice of the Constitutional Court, is that the estimation of the state's economic policy in a settled market economy is not essentially a constitutional question. The critetions providing the predominance of the market economy prevail typically through questions within the domain of the protection of fundamental rights, but these fundamental rights also have independent contents which go further than the market economy and which connect only partly to the constitutional thesis of market economy.[9]

2. Freedom of contract

The practice of the Constitutional Court, followed from the beginnings, realizes the protection of freedom of contract attached to the market economy, included in the Art. 9. of the Constitution. Nevertheless this relation was not inevitable but still remained determinant. The Constitutional Court declared briefly in its first decision related to the freedom of contract, that the essential element of the market economy determined in the Art. 9. of the Constitution is the freedom of contract, which is considered as an independent constitutional right (but not as a fundamental right).[10] The dogmatic issue in this context was and is caused by the following: no other fundamental rights may be deducted from the cathegory of market economy – which is enforced through fundamental rights like other aims of state.[11]

Nevertheless the freedom of contract could have been connected not to the institution of the market economy absolutely, but to the authonomy of action on the sphere of economy and in the private authonomy-based civil law. Instead of using the freedom of contract deduced from the general personal rights, the Constitutional Court decided the dogmatic obscurity coming from the terminology in such manner that the Court considers the freedom of contract deduced from the market economy as a constitutional right but not as a fundamental right. The Constitutional Court regards the right to human dignity as another phrase for a "general right of personality".[12]

So the fact is the following dogmatically: the freedom of contract is not a primary right, it is not affected by the restriction in the Art. 8. of the Constitution, that is why also its essential contents could be restricted, if the constitutional reasons of these restrictions exist. The

8 1524/B/1992. AB decision, ABH 1995, 651., 655.; 668/B/1996, AB decision, ABH 1996, 636., 637.

9 See BALOGH – HOLLÓ – KUKORELLI – SÁRI: Az Alkotmány magyarázata. (The Explanation of the Constitution) KJK-Kerszöv, 2003. Page 245.

10 13/1990. (VI.18.) AB decision, ABH 1990, 54., 55.

11 See 21/1994. (II. 16.) AB decision, ABH 1994, 117., 120.

12 Sólyom mentions that the Constitutional Court's decision concerning the freedom of contract was passed on 12 April 1990, but it was published only on 18 June. The decision about the general personal right nevertheless was passed on 17 April. According to the president of the Constitutional Court of that time if the decisions had been passed in an other order, the freedom of contract would have been put in its right place. László SÓLYOM: Az alkotmánybíráskodás kezdetei Magyarországon. (Beginnigs of the Constitutional Jurisdiction in Hungary) Osiris, 2001. 657–658. p.

freedom of contract considered as a constitutional right receives a stronger constitutional protection than the state's aim (market economy), but it still remains as a question what this protection consists of and which are the methods of the restriction's assessment.

The injury of a non-constitutional right can be judged before the Constitutional Court if it is connected with any disposition of the Constitution. Many types of law can be iniciated into the defensive zone of fundamental rights, the Constitutional Court decides when might be referred to a primary right and when is the lack of connection verified. If the injury of a right raised in the motion can not be regarded as an injury of a primary right named before, it can still collide with one of the following: with an aim of the state, with the basic principle of rule of law, the equality of the law interpreted the expanded way by the Constitutional Court, and failing all else, with the general personal right deduced from the human dignity or with the general freedom of act deduced therefrom.

The arbitrariness produces the injury of the human dignity in every case, because in cases of this kind the persons affected were not treated with the same respect and also thier aspects were not treated with the same attention and fairness.[13] This criterion of the verified injury of the human dignity – namely the arbitrariness – can be used in every case as the measure of the non-fundamental rights' unconstitutionality if the Constitutional Court takes these injuries under constitutional examination, whether by virtue of the injury of the fair treatment or the consitutionality; or directly because of the restriction of the general personal right (freedom of act). The legislative or the law applier's arbitrariness is contrary to the constitutionality, to the equality before the law and to the human dignity, even if it does not affect any fundamental right.

The Constitutional Court has to decide separately when the injury of the right to the human dignity has to be examined by the criterions of the fundamental rights, and when does it apply to the protection of the Constitution for initiating not fundamental rights originally. In the latter case the Court has to measure lightly. The boundaries can not be drawn generally, there might be a need for a special protection of certain living conditions or the injury of a legal institution can also justify a stricter measure. The Constitutional Court, by applying the stricter measure, can raise certain rights to the fundamental rights' quality, that is to say the Court can segregate fundamental rights from the mother-law of human dignity. The initiation of the fundamental right of human dignity could be motivated by an expanded restriction of the freedom of contract, which threatens the effectiveness of the institution and could justify a direct fundamental rights' protection.[14]

Nevertheless the freedom of contract was connected to the market economy as the state's aim in the practice of the Constitutional Court. Because a fundamental right can not be deduced from an aim of the state, the freedom of contract gets protection as a "constitutional right". The freedom of contract could obviously enjoy a stronger protection of the Court as a form of the authonomy of act's manifestation, which is part of the human dignity, and the freedom of contract could even a protection of the fundamental rights if a stricter measure is used. This possibility is there naturally at the Constitutional Court's balancing decision in every case. The Court establishes for itself a similiar balancing possibility among the legal regulation of contracts concerning the relation of public and civil law's elements; the constitutional balance of these public and civil law's elements can be suitably formed and maintainable; and this balance is the one which has relevancy of constitutional point if view and the judgement of which the Court has authority.[15]

13 857/B/1994. AB decision, ABH 1995, 717.
14 35/1994. (VI.24.) AB decision, ABH 1994, 197. László Sólyom's parallel justification on page 214-216.
15 32/1991. (VI. 6.) AB decision, ABH 1991, 146., 152.

Later this contingent dogmatical possibility of ranging fell into the background in the practice of the Constitutional Court. Several decisions even require a real restriction of an other right or a constitutional principle in order to establish the fact of a violation of Constitution, and stipulates conditions such as the following: the restricted right or the restricted constitutional principle has to have a connection with the freedom of contract. In this case the point is that obviously it is neither about the protection of the freedom of contract, nor about the human dignity (general personal right), but about the protection of a given fundamental right or a constitutional principle.[16]

Even a "softer" restriction is determined by that chain of ideas concerning the restriction of the freedom of contract, which mentions the categories of "reasonableness" and "founded reason" about the restraint. The freedom of contract was not considered as a fundamental right by the decisions of the Constitutional Court, so the Art. 8 (2) of the Constitution is not competent to the restriction of the freedom of contract. That is to say the freedom of contract can not be restrainted in unavoidable cases only, that means when the restriction has a coercive reason, but it can be subjected to reasonable limits also if the restriction has a founded reason.[17]

Concerning the constitutional estimation of the freedom of contract, some sort of uncertainty can be verified. The point of origin of the uncertainty could have been on the one hand the fact that the first decisions on this kind of subject connected the freedom of conrtract to the constitutional institution of market economy. In the first two years of the operation of the Constitutional Court the question of the freedom of contract came up merely in cases in which legal interventions were needed exactly in the contracts, in order to call the market economy to existence. Maybe this also have interferred with the fact, that the Constitutional Court formally did not strengthen the status of the freedom of contract. However after 1994 the consequent performance of its own system – the application of the test of arbitrariness and reasonableness to rights not considered as constitutional rights – would have reduced seriously the treshold of the defense of private authonomy theoretically, and furthermore even when the Constitutional Court revaluated it in the area of protection of property.[18] The use of conditional – as we saw – became needless indeed and the treshold became lower undoubtedly.

It can be verified nevertheless that the consideration of the freedom of contract as a constitutional right and its constitutional proctection hereby secures a possibility for the Constitutional Court to ward off the state interventions, which violate the functional regularities of market economy, and a possibility to give an abstract protection for the market economy. The criterions of constitutional estimation of the restriction are relatively mild, but the exceptionalism of the Constitutional Court's intervention does not change the fact that the freedom of contract is the essential and fundamental element of the market economy. The different constitutional defensive directions of the two different relations of the freedom of contract is still open in front of the Constitutional Court' practice. From the point of view of the individual legal defense the values protected by the freedom of contract can be found also in the Art. 54. (1) of the Constitution, in the circle of the right to self-determination rising from the human dignity and the freedom of act. This relation, the protection deduced from the Art. 54. (1) guards the freedom of the individual and in relation to this, the state's scope of action is fairly limited. But at the same time the protection rising from the Art. 9. (1) of

16 327/B/1992, AB decision, ABH 1995, 604., 607; just like 897/B/1994. AB decision, ABH 1995, 726; BALOGH – HOLLÓ – KUKORELLI – SÁRI: Az Alkotmány magyarázata (The Explanation of Constitution) KJK-Kerszöv 2003. page 256.

17 1414/D/1995. AB decision, ABH 1999, 539., 541.

18 László SÓLYOM: Az alkotmánybíráskodás kezdetei Magyarországon (The beginnings of Constitutional Jurisdiction in Hungary) Osiris, 2001. page 658.

Constitution and connected with the market economy has a "social effect", and within these limits the state's freedom is quite big, a lot more wider than the previous relation.[19]

3. The right to enterprise

The right to enterprise was acknowledged by the Constitutional Court – as a result of factual constitutional expression – as a constitutional fundamental right from the beginning of the first proposals. In the system of the protection of Constitution this has a dogmatic importance, because rising from the nature of fundamental rights, concerning the right to enterprise a prohibition of the Art. 8. (2) of Constitution is effective; so this means that the test of necessity/proportionality has to be applied in the course of the estimation of restriction or rather with respect to its essential contents – constitutionally – even statutes can not limit it. The ackonwledgement of the right to enterprise as a fundamental right means a strong protection, which protection does not indicate though the unlimitability but requires the stricter examination and enforcement of constitutional criterions of the protection.

The practice of the Constitutional Court connects consistently the right to enterprise as a real fundamental right with another fundamental right, namely with the right to labour. The right to enterprise is an aspect of the constitutional fundamental right to free choice of employment, one of the phrasings on a special level. The right to enterprise means that the right to enterprise, namely the right to conduct business activity is anybody's right guaranteed by the Constitution. The right to enterprise by virtue of mentioned above is a certain insurance for the ventures to have the possibility to enter into an economical system of conditions produced by the state, it means with other words the insurance of the possibility to become an entrepreneur, which insurance is restricted and in some cases is subject to conditions motivated by professional aspects. So the right to enterprise can not be absolutized and is not unrestrictable: no one has the right to practise either an enterprise connected to a certain employment, or to practise this in a given legal form of enterprises. The right to enterprise means as much as to say – but as a constitutional requirement at least – that the state should not prevent and should not make the becoming an entrepreneur impossible.

The right to enterprise, like all fundamental rights, has a subjective and an objective, institutional side; which means an essential obligation of the state to provide the conditions enforcing a subjective constitutional right. The aspects of the Constitution's protection of the right to enterprise is subjective side are identical to the right to free choice of work and employment. There is no hierarchical relationship between the subjective right to work, the right to choose freely one's job and profession (Art. 70/B of the Constitution), on the one hand, and the right to enterprise on the other hand. The right to work must be interpreted as containing the freedom to choose and practise every time of occupation, profession and „work". In this context, the specific mention of the freedom of choice in Art. 70/B of the Constitution and the right to enterprise in Art. 9. of the Constitution are mere repetitions or more detailed specifications. Work, occupation or enterprise as fundamental subjective rights do not differ from one another.[20]

It follows that when the protection of the right to enterprise's institution is under discussion – and not the subjective right –, basically the market economy and the freedom of competition appear, and the constitutional estimation slides through to these categories several times. The objective side of institutional protection of the right to enterprise is in the

19 See BALOGH – HOLLÓ – KUKORELLI – SÁRI: Az Alkotmány magyarázata (The Explanation of Constitution) KJK-Kerszöv 2003. page 257.

20 21/1994. (II.16.) AB decision, ABH 1994, 117., 121.

service of realizing the state's aims connected to the economical constitutionality. That's the reason why the specific interpretations competent to the right to enterprise – in the circle of the institutional protection – do not exceed the limits of the Art. 9. of Constitution and determine the prohibitation of discrimination as the final limit.[21]

The fundamental right to labour (right to employment, right to enterprise) receives a protection similar to freedom rights against the interventions and restrictions of the state. But the constitutionality of these restrictions should be rated with different measures depending on whether the state restricts the practice or the free choice of the employment, and within the latter, the estimation of getting into employment is different concerning the subjective and objective restrictions.

The right to labour (right to employment, right to enterprise) is seriously endangered in case the individual is interdicted from an activity and must not choose it. If this right would not have been named, the right could be asserted through the injury of the general personal right. The state cannot make the becoming an entrepreneur impossible.[22] But the initiated restriction of the participation rate in the individual employments based on objectional criterions does exactly this: if the participation rate is full, apart from all personal conditions, it makes impossible to choose the given trade. The constitutionality of an objective restriction of this kind, and first of all its necessity and its unavoidableness, and the fact that the restriction is really the mildest tool in order to reach the given purpose; needs to be examined the strictest way. The stipulation of subjective conditions is also the restriction of the freedom of choice. The execution of these conditions is open to everybody (if not, the restriction is objective). That's why the legislator's scope of action is bigger in a way than at the objective restriction. Finally, the limits of an employment's practice are mostly justified by professional and practical purposes, and rarely cause problems with fundamental rights.

By summarizing, it can be established that in the conception of the Constitutional Court the right to free choice of labour and empolyment, and the right to enterprise are connected to eachother, and the earlier right means one of the latter's aspect. The subjective protectional side and the social service side of the right to labour have to be distinguished, and namely so that on the social side are labour, employment and enterprise as similar fundamental rights, which enjoy similar protection against the interventions of the state, just like the classic freedom rights do.[23]

4. Freedom of competition

The freedom of the economic competition – just like the market economy – is not interpreted in itself by the Constitutional Court, but through the aims and rights phrased in the Art. 9. of Constitution and through the whole Constitution, the real guarantee of the freedom of competition's effectiveness is the prevailance of the other dispositions of the Constitution. Both the market economy and the freedom of the economical competition are state aims, which presume eachother, just like the collective effectiveness of other dispositions bound in the circle of the economical constitutionality (and the insurance of its realization).[24]

21 See See BALOGH – HOLLÓ – KUKORELLI – SÁRI: Az Alkotmány magyarázata (The Explanation of Constitution) KJK-Kerszöv 2003. page 259.

22 54/1993. (X. 13.) AB decision, ABH 1993, 342.

23 See László SÓLYOM: Az alkotmánybíráskodás kezdetei Magyarországon (The beginnings of Constitutional Jurisdiction in Hungary) Osiris, 2001. page 678.

24 See See BALOGH – HOLLÓ – KUKORELLI – SÁRI: Az Alkotmány magyarázata (The Explanation of Constitution) KJK-Kerszöv 2003. page 246.

Freedom of economic competition is likewise not a fundamental right but such a condition of the market economy whose existence and operation must be ensured by the State pursuant to Art. 9. (2) of the Constitution. The State's „recognition and support" of the freedom of competition requires the establishment of an objective, institutionalized protection for free enterprise and the fundamental rights, necessary for the market economy. It is primarly the realization and protection of these fundamental rights that gives rise to free competition, which – similar to the market economy – has no separate constitutional assessment.[25]

So the freedom of the economical competition is not a fundamental right, therefore the examinational criterions of necessity/proportionality competent to a restriction of a fundamental right cannot be applied here. The freedom of economical competition has not got a special constitutional measure, that's why the Constitutional Court can determine the size of the state's intervention only in the abstract and with a general criterion for inordinate cases, the transgress of which is – because of the violation of the market economy – unconstitutional.[26]

A sharp restriction of the freedom of competition had been deduced from the Constitution itself by the Constitutional Court. According to the Art. 10. (2) of Constitution, statute is determining the circle of the state's exclusive property and its exclusive economical activities. The Constitutional Court in the course of the interpretation of this constitutional disposition, that this rule means beyond any shadow of doubt the following: the Constitution itself restricts it in the Art. 9. (1) of Constitution and restricts the circle of effectiveness of the dispositions in Art. 9 (2) – so the equal rights of proprietary rights's actors and the freedom of economical competition-, when it produces constitutional possibilities in a certain circle as regards that the state could get into a more favourable position as a proprietor and as authorized to certain economical activities than other proprietors or other participants of the economical life. It is not about a contradiction within the Constitution, but no more than the fact that one of the dispositions of the Constitution – the Art. 10. (2) – gives possibilities for exceptions of two other dispositions of the Constitution – namely the Art. 9.(1) and 9.(2)-. According to the Constitutional Court's point of view, the activity in the circle of the state's monopoly is not part of the sphere of the market. The main point of founding a monopoly is even that a circle of activities is maintained exclusively for the state itself, which excludes the economical competition from the beginning. It is actually a question of detail how the state exercises its right to monopoly: whether through organizations, which are in exclusive state property or through giving it into concession to other organizations at its own discretion, when the state defines the conditions of concession to its preference.[27]

On the basis of these it can be verified that the restriction of the freedom of competition on constitutional purpose has only relevancy where any of those fundamental rights suffer injury or get under restriction, which contribute and serve the realization of the freedom of competition. The constitutional questions get into another dimension with this, they are transferred from the constitutional thesis of the freedom of competition into the dogmatics of the fundamental rights' protection. In case of a restriction of a fundamental right, the constitutional test of necessity/proportionality is the main point, so is the existence of the rational reason at the questions of discrimination, the basis of which the constitutionality of a restriction can be estimated. That's why it could not be considered unconstitutional for example the right to a healthy environment (Art. 18. and 70/D. of Constitution), the right to

25 21/1994. (II. 16.) AB decision, ABH 1994, 117., 120.
26 21/1994. (II. 16.) AB decision, ABH 1994, 119.
27 1814/B/1991. AB decision, ABH 1994, 513., 514-515.

health (Art. 70/D.), the national defense (70/H.) or any restriction of the freedom of competition even on the purpose of consumer protection.

The Constitutional Court's treatment concerning the questions of the freedom of competition means in essence that through the judgement the problem is transferred from the purposes of the Art. 9. (2) of Constitution into a sphere, which can be exactly decided on constitutional purpose (relation to fundamental rights, prohibition of discrimination). But this produces that the questions "below" this sphere are indifferent on constitutional purpose; and the restriction of the competition or just the accomplishment of the competition has a fairly large volume based on the Constitution.

From the interpretations of the Constitution concerning the freedom of economical competition – and also concerning the market economy – a dogmatic kind of conclusion can be drawn referring to the protection of the state's aims implied in the Constitution. On the purpose of constitutionality a protection based on merely state's aims makes the unconstitutionality verified only in immoderate cases, this means such a case of an act of the state when the state's intervention is "obviously and conceptually contrary to the state's aim". The state has a large freedom in realization of the state's duties implied in the Constitution and the only limit of the freedom is that the state must not violate any fundamental right or other constitutional disposition during the realization of the state's aim. Obligations may be atteched at the same time to the state's aim implied in the Constitution. But these obligations do not derive just from the declaration of the state's aim but from the constitutional duty of developing the institutional side of fundamental rights, which also serve the realization of the given aim of the state.[28]

II. The right to property

In the first decision of the Constitutional Court concerning the right of property the Court clearly stated that the State's guarantee of the right to property [Art. 13 (1) of the Constitution] also embraces the right to acquire property.[29] But later this opinion changed basicly, and even turned into its opposite.

This changed opinion declares that the right to acquire property is not a fundamental right, it does not even concern the fundamental right of capacity ensured in the Constitution (Art. 56). The ability to acquire property and the freedom of contract are not fundamental rights. The abridgement of these rights, which are not fundamental rights, would be unconstitutional, if the abridgement had not a racional reason.[30]

To protection of property, with regard to the issue of „aquiring of estate", the basic category will be the evident due, which is statable if the content of the claim is certain. All of these were declared with general force by the Court of Constitutional connected to the issue of aquiring estate of municipalities. The authorities opposite of the State have estate demand only in case of, established constitutional defence of the authorities's property – in point of limited part of the estate – if the authorities have arosen evident due of limited part of the estate by right of the rules of acts. The due is evident, if that is unequivocal, namely by right of the acting statement of facts getting property of the local government – and its extension too – unequivocally guaranteed. As

28 See See BALOGH – HOLLÓ – KUKORELLI – SÁRI: Az Alkotmány magyarázata (The Explanation of Constitution) KJK-Kerszöv 2003. page 250.

29 Dec. 21/1990. (X. 4.) AB, ABH 1990, 73., 77.

30 Dec. 35/1994. (VI. 24.) AB, ABH 1994, 197., 201.

long as the authority (court) states not legally binding getting property, so that getting property's due was arguable, local governments by right of Art. 12 (2) and 13 (1) of the Constitution can not relish in point of in question assets constitutional defence of property.[31]

Art 13 the Constitution, which states the right to property, declares defending rules only in the matter of appropriation. It doesn't mention the social obligations and the other possibilities of abridgements of the property unlike the German Grundgesetz.[32] This would have resulted in a practice which interpret the idea of property closely and gives protection only from the property draining. This might be the reason why at the beginning of the practise of the Constitutional Court, the Court identified the object of the right property with the idea of property in the Civil law, and in this case it guaranteed strict defence. But these decisions were also based on the fact, that the Constitution not only limits the appropiation, but also protects from other interventions.[33] However dogmatically this defence happend considerably in different ways, both using the requirements of necessity and proportionality, and arbitrarity or racionalism.[34]

From the beginnings of the Constitutional Court the right to property was considered as a fundamental right. As the right to property is fundamental right, its limitation will only cause restriction of a fundamental (constitutional) right, in other words it is unconstitutional only if the abridgement is avoidable, that is the limitation has no compulsive cause, and fiurthermore if the „weigh" of the abridgement is disproprotionate to the aim of the limitation.[35]

Beside the constitutional measurements: necessity and proportionality, the idea of public interest already appeared in 1992. The community rule, the using in the civil service and the public utility can be the basis and the constitutionally supportable reason of the more strict criminal defence.[36] The 1312/B/1991. reasons for the Constitutional Court runs similarly: „The Constitutional Court expressed its attitude in more decisions about the Constitution Act 13 – that dispose of property – which according to the property is defended by the Constitution, but that is not limitless right. According to the Constitution Act 13, the property can limited by the act with suitable guarantee and by public interest."[37] In the 66/1992. (XII. 17.) decision of the Constitutional Court appears the idea of public interest more stronger : "The Constitutional Court explained in more decisions its standpoint about the property, as constitutional fundamental right. It formulated from the Constitutional Act 13 deductionable

31 Dec. 893/B/1994. AB, ABH 1996, 496., 500.

32 Art 14 of the German Grundgesetz – beyond ensuring the right to property and the right to inherit – declairs that its contents and limitation can only be regulated by statutes. Whereas paragraph (2) in the same article declairs, that the right to property obliges, and discribing the contents of this obligation, it adds, that practicing the rights connected to property must serve the interest of the common good. Without going into the details of the German definition and interpretation of constitutional property, we just refer to a point of view existing in the German legal literature, which says that concerning the restriction of property, the first two points of this Article of the Constitution must be separated from eachother; the restrictions of property determined by the laws given in Point 1 have to be distinguished from the restrictions coming directly from Point 2. These latter limitations – coming from constitutional basis – don't even need specification in statutes. See: T. MAUNZ – G. DÜRIG: Grundgesetz Kommentar. München, Band II. (Art. 14) 298.

33 Ld. Pál SONNEVEND: A tulajdonhoz való jog. In: Emberi jogok. Szerk.: Gábor HALMAI – Gábor Attila TÓTH. Osiris, 2003. 664. p.

34 7/1991. (II. 28.) AB decision, ABH 1991, 22.; 13/1992. (III. 25.) AB decision, ABH 1992, 95.; 24/1992. (IV. 21.) AB decision, ABH 1992, 126. etc.

35 7/1991. (II. 28.) AB decision, ABH 1991, 25.

36 6/1992. (I. 30.) AB decision, ABH 1992, 40., 43.; and this is confirmed by 29/1993. (V. 6.) AB decision, ABH 1993, 227., 231.

37 ABH 1992, 677., 678.

important principle, that the state intervention, namely the limit of the property is possible, if it is necessary from public interest, and the guarantees are proportional with the deprivation, and they are insured by act. It declared too, that the state can not come by property by means of its power position so, that it does not give reward therefore".[38]

The constitutional defense of property was cleared up palatial, dogmatical by the constitutional inspection of the flatact at the end of 1993. This decision formulated craggy the difference between the property of civil law and the property of constitutional law (property idea), and it determined the measure of the constitutional defense, and with this it determined the proposition of the social restriction of property, that we know since Rerum Novarum,[39] and it was fixed normative in the German Grundgesetz.

Right to the property – according to the Constitution Art. 13. (1) – is a fundamental right. The scope of the constitutional protection of property and its method does not necessarily follow the civil right's ideas. The necessary and proportional limitation and the main content of ownership don't have any suitable idea in the civil law. The different legal establishment of the ownership – which even in the civil law does not always belong to to the owner, moreover in each case as by law enacted these belong not to the owner – can't identify as the right for the property's main content, which enjoys constitutional protection.

Thus the scope of the constitutional protection of proterty may not be identified with the protection of the abstract civil law property, that is, neither with the bundle of rights of possession, use and the disposal, nor with its determination as a negative and absolute right. The content of property as a fundamental right must always be understood within the framework of (constitutional) public and private law restricition. Wieved from the other side, the constitutional permissibility of the intervention of the public authorities into the property right varies according to these considerations.

Property afforded constitutional protection in its capacity as the traditional means of securing an economic basis for the authonomy of individual action. The constitutional protection must track the chanigning social role of property so as to fuilfill the same task. Thus, when the protection of individual authonomy is at stake, the constitutional protection of proparty extends to rights with an economic value which today perform this former role of ownership, including public law entitlements (for instance, to entitlements for the social insurance). On the other hand, however, the social burdens of property make constitutionally permissible the far-reaching restrivtion on the autonomy of the property owner. The means of constitutional protection is determined by the particularity of property – which does not arise with other fundamental rights – that as regards its constitutionally protected role it may be substituted. The object of the consitutitonal protection is primarily the physical object of property. But it is the constitution itself, which permits expropriation in the public interest, indicating that the limit of consitituiotnal guarantee of property is the guaranteeing of the compensation of its value for the owner.

Because of the particularities of the nature of the prpoerty protection the central point of the enquiry into the constitutionality of state intervention, the field of the constitutional review, has become the adjudication of proportionality beetween the ends and the means, viz., the public interest and the restriction on property. At the outset of an enquiry into the necessity and unavoidability of restricting a fundamental right, it must be borne in mind that Art. 13 (2) of the Constitution merely requires the 'public interest' to justify expropriation; that is, if monetary compensation is provided, a more compelling and justified 'necessity' need not be established for constitutional purposes. In a democratic society it is natural that the 'public

38 ABH 1992, 293., 300.

39 The encyclica Rerum Novarum of XIII. Leo Pope (1891) in: The social teaching of the Church. Edited by Milkós TOMKA and János GOJÁK. Szent István Társulat, 27.

interest' uis evaluated in significantly divergent ways. Accordingly, the constitutional review of the 'public interest' determined by the democratically elected legislature does not focus upon the question of whether such legislation was unavoidably necessary; rather – tough formally it is not directed at ascertaining the existence of the 'public interest' but applies the criterion of 'necessity – proportionality' – it confines its enquiry to the question of whether the invocation of the 'public interest' is justified and whether the solution adopted for the 'public interest' violates some other constitutional right (such as the prohibition of negative discrimination).[40]

Dogmatically basis of the right to property's delimitation consequently could be the abstraction of public interest. The right to property could be limited for public interest, supposing that in this way realized delimitation's importance is commensurate with the enforce required publis interest. The legislator decides it, what can be on view of public interest, and his decision could be reconsidered only in case of the evident lack of public interest; so the constitutional inspection limits the proportion of intervention. At proportion of public interest and property limitation's review the Constitutional Court is who defines those criterions, which decide the commensurating of intervention

It is worthy to turn eye, the decision relies the adjudication of the intervention's proportion on the Constitutional Court's discretion in the concret situation, nontheless it is a basic right. We have already seen discretional possibility like this, an ad hoc consideration in case of contractual liberty, which is not a basis right (balance of public law's – civil law's elements), or in case of limitation of free competition.

Whatever reasonable and strong to seem the doctrine, its further validation and completion is not unequivocal. Subsequent decisions generally refer to just as pensum the findings of decision connected to the property and its limitation. Category of public interest, and inspecting proportion's residence of reference, or it shows the suspense in this view, that subsequent decisions also reference of (disposition) right's main contents, or its limitationality[41] in Art. 8 (2) of Constitution, like – common – the necessarity and proportionality basis right (limitationality) requirement and from public interest – according to proportion of Constitutional court's criterions – principle of limitation.[42]

Zusammenfassung

Die Verfassungsgrundlagen der Wirtschaft

Die Studie analysiert die im § 9. und § 13. der Verfassung regegelten Verfassungsgrundlagen der der wirtschaftsrechtlichen Regelung, wobei sie sich grundlegend auf die Praxis des ungarischen Verfassungsgerichtes stützt. So erörtert die Studie die vom Verfassungsgericht als Staatsziel interpretierte Forderung der Marktwirtschaft und die Freiheit des Wirtschafts-wettbewerbs, sowie die aus letzterem als Grundrecht abgeleitete Freiheit auf Abschliessen von Verträgen. Die Studie untersucht das indirekte Ableitung nicht erfordernde und sich einen grundrechtlichen Schutz eingeräumte Recht auf Unternehmung bzw. Eigentum, hinsichtlich deren die Intensität des Verfassungsschutzes bedeutend größer ist.

40 64/1993. (XII. 28.) AB decision, ABH 1993, 373., and next page.
41 3/1997. (I. 22.) AB decision, ABH 1997, 35.; 67/1997. (XII. 29.) AB decision, ABH 1997, 418.
42 23/2000. (VI. 28.) AB decision, ABH 2000, 134.; 27/2000. (VII. 6.) AB decision, ABH 2000, 449.

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Legal basis of the Hungarian family support scheme[1]

Introduction

This article intends to introduce a comprehensive overview of the legal provisions of the Hungarian family support scheme (in cash benefits). In a wider sense the direct or indirect financial subsidy for families is based on a multi-pillar system in Hungary. The elements of which are legal regulations prepared in the spirit of the Hungarian Constitution. The main branches of the family protection are as follows: 1) universal type benefits (legal base: family support act); 2) insurance type benefits (legal base: health insurance act), 3) assistance type benefits (legal basis: social assistance act and child protection act) and 4) tax allowance (legal base: income tax act). The first three benefits are direct in cash provisions and the fourth one is indirect financial provision. According to the new reform ideas the position of the fourth element (tax allowance) is seems to be shrinking.

Benefits available on universal basis. The recent services supporting families were re-regulated in 1998, when a new act was passed which declared that families are the basic units in society, and one of the most important tasks of the state is to provide diversified help for families, and improve the safety of family life and conditions of raising children. The effective act contains the following main solutions for improving the conditions of raising children.

One of the most important element of the act is that the benefits pursuant to the Family Support Act are offered as of universal right, which means that neither prior insurance period or needy situation is required to be proved. The amount of the benefits is defined by law, and they do not depend on considerations by the authorities (local government) or the income of the eligible individual; if the criteria specified by law exist, the amount defined in the regulations has to be paid out.

With regard to benefits the act differentiates in the amount of support according to the number of children, including consideration of twins; it also differentiates according to the health status of care recipients, in so far as it tries to offset the more difficult situation of children or persons of age with long-term illness and severe disability; according to the

1 This paper is a modified version of the Hungarian National Report on Family Allowances presented in the VIII[th] European Congress of Labour and Social Security Law, Bologna, September 2005

completeness of the families, in an effort to compensate the more disadvantageous conditions of single parents raising children.

Benefits available on insurance basis. According to the effective legislation benefits available on insurance basis include pregnancy-confinement benefit (TGYS) and childcare benefit (GYED). On the basis of the insurance principle these services are only available for insured people, which means that at the time of eligibility the individual concerned must have been insured for at least 180 days, and for purposes of calculating the benefit, the amount based on which the individual paid the health insurance contribution needs to be taken into account as income.

Benefits available on assistance basis are a) Family support available as of right and not on an insurance basis include aid types, regulated in the Child Protection Act (regular and one-time child protection benefit). b) Different social assistance benefits.

Tax allowances for children were re-introduced in the tax system in the year 2000. On the basis of their volume, the tax allowance is the second most important family support tool after family allowance.

In this paper I will deal with and analise the above mentioned family protection benefits from different legal point of view. At the end I will briefly introduce the amendment proposal of the recent government to change the Hungarian family support system in force.

1. Historical overview

1.1. The first legislations

Hungary was the first country in Europe to introduce a family allowance system. Act XXXV of 1912 benefited civil servants, and within this, those working in the state administration received a higher amount (200 Koronas per child per month), other public employees, like teachers and nurses, received half of it. It provided 20-50% of the monthly income of a public employee with three children, depending on their ranking and income. The act aimed at strengthening the traditional family-structure: it was men who received it. Women could only get family allowance in case the father died or was unable to work, or if the mother reared the child without any financial help from the father.

The main reason for such an early introduction can be grasped in the Bismarckian pattern of social security. By this time, Hungary had a 20 years tradition of Bismarckian social insurance for public employees and industrial workers. It is typical for Bismarckian countries that the state first introduced social policy measures first for its own employees. By differentiating even within this group the state expressed its priorities: the major share of family allowance went to those directly involved with the state-affairs, those working in the Ministries and state administration. They received the allowance up until their child was 24 in case the child was studying. Public employees with a lower status were expected to make their children study less: they received the allowance until their children reached 16 years of age. This is a clear example of preserving the position of social classes and groups, a characteristic of conservative welfare regimes.

The exception was the Hungarian Republic of Soviets of 1919, which aimed at a child-protection system and family policy based on social equality and institutional care. One of the main goals was to end the system of foster-parents as children were extensively abused in these situations. Because of the very short period of the Republic the original ideas could not become reality, apart from some major holiday-programs for children.

After the First World War, there was a general boom of social insurance measures throughout Europe: Central and Eastern Europe was no exeption. Before the major 1928 Pension Act, pregnancy, child-bed and breast-feeding allowance were introduced in 1927 (Act XXI. 1927.). The duration of pregnancy and child-bed allowance was six weeks before and after the birth of the child and amounted to 100% of the previous income of the mother. As this was an insurance-based benefit, only those women could get it who had worked at least 10 months in the previous two years. Breastfeeding benefit was provided for mothers after the child-bed allowance was over and it lasted for another 12 weeks.[2]

The extension of family allowance to the lower classes was one of the most important family policy measures. The first widely accepted legislation on family allowance was Act XXXVI of 1938 on the Child Raising Allowance. The Act XXXVI of 1938 was introduced following the French example of family allowance, and was seen as a kind of „family wage" for industrial workers. As it was mentioned there had been some earlier legislations relating to family allowance in some sectors and companies, for example, Act XXXV of 1912 on the Family Allowance for state and regional railway workers or at the Komló Mine set up a family allowance scheme. These were isolated and small systems.

According to Act XXXVI of 1938, the personal scope of the legislation covered workers who worked in one of the following sectors: 1) industry; 2) commerce; 3) mining; 4) metallurgy and who takes care of a minor child (under 14 years old). The financial burden involved in introducing it for every entitled worker would be too high, therefore the Family Allowance Act entered into force gradually. First it covered the workplaces where the number of workers exceeded 20 persons. This restriction resulted in the fact that in 1941 only 12 per cent of potentially entitled children received family allowance benefit. The contribution for family allowance was paid by the employers in every quarter of the year.

If the parents (mainly the father) were impeded, the grandparents were entitled to receive the benefit. This was the only piece of the family allowance legislation before the Second World War.

According to my knowledge and available information the first Family Allowance Act (1936) was initiated by social motivation. The original family allowance was paid to every insured parent and grandparent who was in charge of taking care of a child. To be insured at that time meant to work in the designated sector, such as industry, commerce, mining, metallurgy. The family allowance was a lump sum payment for every child. The allowance was equal to every child. It was not paid only for low-income and/or big family.

When the first family allowance act was enacted it was not a case in Hungary. Before the first family allowance act in some very isolated sector certain employers started to set up the family allowance system on voluntary basis. However, the principle of the Act XXXVIII of 1936 (first family allowance act) was the obligatory participation of employers in the family allowance scheme.

1.2. Family policies under state socialism

State socialist family and maternity policies were designed to accommodate the state's labour requirements and were important parts of the state's overall social engineering project. While the shape and conditions of these provisions varied significantly, there were a number of similarities in the ways in which family and maternity policies were formulated in the three countries. Here we want to briefly review three especially important similarities: their pro-natalist bend, the replacement of social citizenship rights with claims made on the basis of need in the context of state paternalism, and the family and gender ideology embedded in policy making.

2 http://www.unifr.ch/travsoc/espanet05/papers/pap01A-03.pdf

First, maternity and family provisions in Hungary had pro-natalist goals: they strove to encourage births and increase the size of the population. It was done by introducing generous maternity leave benefits and state contributions to child rearing.

Yet the explicit goal of all these policies was to encourage women to have more children and therefore to reproduce the socialist labour force. It should be noted, however, that Hungary was not able to achieve this goal on a permanent basis: the birth rates show a gradual decline in Hungary after the 1960s, following a similar tendency in much of Western Europe.

Second, communist party ideology abolished the idea of citizenship, and thus the well-known Western European concept of social citizenship rights and claims made on this basis cannot be employed to describe state socialist societies. Instead, state socialist states vowed to guarantee welfare on the basis of need defined from above to accommodate politically advantageous social and labour goals at any given time. State subjects the population had little if any influence on policymaking[3] and had no rights to any specific social provisions on the basis of citizenship. Instead, when policy makers deemed it fit, the state allocated benefits in a manner considered expedient and while retaining full control over these resources for themselves. This paternalist practice, noted by a number of observers, resulted in people's lingering expectations that the state take care of them even after 1989 without their input or contribution.[4]

Finally, mothers' (and parents') needs were defined within the general gender and family ideology of the communist parties. These emphasized the importance of women's participation in the paid labour force, although this participation did not have to be of the same value or intensity as that of men. In addition, the political ideology considered the nuclear family as the building block of society. Although both husband and wife were expected to work outside the home- a radical break with women's role in pre-war Eastern Europe- policy makers did not intend to transform men's role within the domestic division of labour. As a consequence, the general thrust of social policies was to encourage women to balance family and paid work in a specific manner: After the birth of children, women were expected to withdraw from the labour force for a few years but return to full time work thereafter. Maternity leave benefits and other smaller provisions (such as leave for parents if the children were sick) as well as a characteristically large number of in-kind provisions supported this goal. Child care for children under 3 years of age was largely unavailable in much of the region, thus women with small children were not supposed to be in the labour force, unless other female members of their family (grandmothers usually) took over their responsibility. In addition, leave was guaranteed for mothers only – fathers could only take "maternity leave" in Hungary, and only after 1985. State policies thus enforced a very clear pattern of the gendered division of labour within the family as well as a simple pattern of child rearing practices, which both enabled women's participation in paid work, but simultaneously also limited the quality of their participation.

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3 This is not quite precise. State policy makers did indirectly respond to pressures they perceived within the population and occasionally asked for the opinion of experts and political advisors. Yet, overall, lacking democratic elections and suppressing social organization outside the party of almost every kind – needs and demands could not be formulated in a way that would have achieved serious influence on policy outcomes.

4 While in some of the countries, maternity leave and pay could be claimed on the basis of employment (such as in Romania), in others as a universal right (as in Hungary after 1985), since over 90% of women of working age were actually engaged in paid work, this was not a meaningful distinction. Not even in principles, since employment itself was not seen as participation in the labour market (thus benefits were not ties to social insurance) rather as an obligation of all able bodies subjects of the state.

1.3. The development of the Hungarian family support legislation/scheme after 1945

In the period following World War II, the number of children and the issues of population growth in general started to receive more attention only at the beginning of the 1950s. In 1953 the Council of Ministers passed a decree about improving mother and infant protection. This is the often-mentioned "ill-famed provision" linked with the name of Minister Anna Ratkó. The resolution consisted of 7 titles, and only the last of them was related to the tightening up of abortion. Through the so-called demographic resolutions and then through the legal regulation arising in association with the changes in the priorities of social policy it is easy to follow the state efforts which aimed at influencing people's willingness to have children by awarding family supports.

1.3.1. Family allowance

In 1945 the entitlement to child raising allowance (gyermeknevelési pótlék) was extended[5] to the employees of factories employing a minimum number of 10 persons and to all the workers covered by the scope of compulsory social insurance. The age of entitlement was increased until the child reached 16 years of age.

The norm itself prescribed allowances for persons in employment, breast-feeding allowances for mothers, sickness benefit if the child was ill and free layette for infants. From the third child family allowance was increased approximately 1.2 times proportionately, but the "tax on childless people" was introduced.[6]

In 1948 family allowance was also due to a child over 16 years until 24 years of age if the child was a student. If the child was ill, family allowance was payable to the parents without restrictions, even until the child's death.

Agricultural workers, who were excluded for a long time, became entitled to family allowance after 1953, but only those ones who were bringing up 3 or more children or performed at least 120 work units in the previous year. The sum due to them was half of the sum due to other insured workers, and their entitlement was until the child reached 16 years of age, or until 18 years of age if the child was a student.

By Act II of 1975 on Social Insurance coming into force, the separate system of family allowance was incorporated into the uniform system of social insurance and the principle of equal treatment with respect to entitled persons was realized.

As of July 1, 1979 income supplement was introduced for families providing only for one child in the case of non-single parents, for children receiving orphan's allowance, for third-year students in industrial schools and for children taken care of in a children's home.

Hungary after 1985, when everyone became eligible for maternity benefits regardless of employment status. (Since this distinction remains between the countries in the post state socialist era, one might argue that they had longer-term consequences.) Importantly, the term "entitlement" is ill fitted to describe the paternalist welfare provisions of the state socialist states: People were not entitled to benefits, rather they were grateful for the benevolent handouts, wisdom, and generosity of the communist party-state. For this reason, the technical differences in the eligibility criteria were even less significant.

The concept of entitlement started to make sense in the post state socialist region as the communist regimes were replaced, at least formally, by democratically oriented polities and

5 Council of Ministers Decree 6 1004/1953. (II. 8.) on the Improvement of Mother and Infant Protection
6 Government Decree 11780 of 1946

people came to understand by the mid 1990s their rights (and especially lack thereof) as citizens of an increasingly tightfisted state. Important differences in the basis of parental and family entitlements ensued in the three countries.

Hungary, after a period of means-testing programs between 1996 and 1998, reverted back to universal entitlements both in the case of family benefits (although after age 6, the benefits are tied to school attendance) and parental benefits (at least for its most general and popular kind). Universal benefits are often the most advantageous for women, because they do not restrict the circle of eligibility and allow women to claim benefits independent of family relations, employment, or life history. Interestingly, the universal eligibility of benefits had a (brief, since 1985) history in Hungary, but unlike in earlier times, the state socialist legacy is now expected to create advantages for women in terms of escaping poverty and being able to establish independent households, compared to the other countries.

A new regulation came into force as of April 1, 1996, when family allowance was changed into a benefit depending on income for families with one or two children and for single-parent families with one or two children. In this way family allowance became a selective, assistance type benefit.

The act on the support for families (Act LXXXIV of 1998 on Family Support) came into effect on January 1, 1999, today this regulates (with several other forms of support) the basic rules of family allowance, which became a universal type benefit again.

Upon its introduction, a special benefit was schooling support, which was a special form of family allowance in the case of children of school age. Schooling support was terminated in 2002.

1.3.2. Birth allowance

The single benefit paid upon giving birth – aimed at contributing to the extra expenses arising when a child is born – was connected to insurance legal relationship at the time of introduction, and its name has changed several times.

The sum of the birth allowance was increased several times since 1953 depending on for which children it was payable and how long the service time was.

Pregnancy allowance was due from January 1, 1993 until April 15, 1996,[7] it was meant to facilitate healthy intrauterine development and possibly to prevent abortions by promoting pregnant women's better nutrition. It was a monthly allowance paid from the 4th month of pregnancy, its sum was adjusted to that of family allowance. This form of support became universal then.

Since 1996 it has been regulated as a universal, single support connected to birth under the name of birth grant. The condition of its payment is participation in prenatal care. Its sum is 150% of the prevailing minimum amount of old-age pension.

1.3.3. Child home care allowance

Child home care allowance was introduced in 1967, at that time it was payable until the child reached 2.5 years of age. Insured persons were entitled to child home care allowance. After 1969 it was paid until the child was 3 years of age.

In 1982 the rules of child home care allowance were modified again. The important regulation came into effect, according to which after the child became one year old the father was also entitled to receive child home care allowance instead of the mother. After the child reached 1.5 years, the parent was allowed to work while receiving child home care allowance, but working time could not exceed four hours a day. The period of payment was longer and the amount was higher in the case of the permanent illness or serious disability of the child.

7 Act LXXIX of 1992 on the Protection of Embryonic Life.

After 1985 students studying in institutions of higher education became entitled to child home care allowance, too, if the child was born during the existence of the student's legal relationship or within 180 of its termination. Child home care allowance could be paid by equity.

After September, 1994 income supplement was also due to the applicant in addition to child home care allowance.

1.3.4. Child raising support

It was introduced in 1993 as a normative cash benefit to increase support for families raising at least 3 children. It can be considered as the initial step in making motherhood, bringing up and caring for children an activity which is socially useful and is financed by the state. Child raising support was paid to those who had at least three children, the youngest of whom was between 3 and 8 years of age. It is a universal type benefit.

1.3.5. Income tax allowance

Rules of law providing tax allowances for families raising many children have existed since the beginning of the 20th century.

Certain groups of families with children could benefit from the tax allowance from the introduction of income tax in 1988 until 1994 – although under different conditions – which allowance became generally known as „child allowance".

The scope of beneficiaries was extended continuously until 1994 – with the exception of one year, the year of 1999 – and the rate of the tax allowances also changed several times. In the beginning only persons bringing up at least three children were entitled until the child reached 14 years of age, from 1989 the scope of beneficiaries was extended to parents bringing up a seriously disabled child and to single parents bringing up two children.

From 1991 the allowance was due for every child under 6 years – the age limit of 14 years remained in the case of the previous scope of beneficiaries – and after 1992 every child giving entitlement to family allowance became a „tax relief factor".

From 1993 the allowance could be deducted not from the tax base but from the tax itself, and its rate depended on the size of the family.

After a lapse of four years, the income tax allowance for families was included again in the act on personal income tax by Act 1999. The allowance was due to persons who received family allowance (schooling support). This tax allowance for families still exists, only its rates have changed.

2. The legal background of family protection

2.1. The Hungarian Constitution

The Hungarian Constitution among its General Provisions, in Articles 15 and 16 requires the protection of the institutions of marriage and family, as well as the protection of the interests of the juvenile. Further, in its Article 67 the Constitution declares that „in the Republic of Hungary all children have the right to receive the protection and care of their family, and of the State and society, which is necessary for their satisfactory physical, mental and moral development".

In addition, the Constitution declares the universal and fundamental right to human dignity [Article 54 (1)], the right to private secrecy and to private data protection [Article 59 (1)], the freedom of thought, conscious and religion [Article 60 (1)], the right to file a complain (Article 64), the right to education (Article 70/F), and the right to the highest possible level of physical and mental health [Article 70/D (1)]. All the above listed rights are laid down in the Act on the Protection of Children and on the Guardian Administration as well, in accordance with the principles of the Convention on the Rights of the Child, New York, 1989. As a result of the Parliamentary Commissioners' investigations, the children have not only often suffered injuries in connection with the children's rights, but also in connection with the above enumerated rights.

The protection of children's rights has a special importance because due to their age children are not able to take steps in their own interests; they are more defenceless and vulnerable than adults. Nevertheless, being defenceless cannot mean being subordinated.

Furthermore, Article 70/E of the Hungarian Constitution states that the citizens of the Republic of Hungary have the right to social security; they are entitled to the support required to live in old age, and in the case of sickness, disability, being widowed or orphaned and in the case of unemployment through no fault of their own. The Republic of Hungary shall implement the right to social support through the social security system and the system of social institutions.

2.2. The labour law background of maternity benefits

As for preliminary remark it must be stated that many of the insurance type family benefits are rooted back into the labour law legislation. According to the Hungarian Labour Code, the women who is pregnant or has given birth shall be entitled to 24 weeks of maternity leave. (Labour Code, Article 138). This shall be allocated in such a way that four weeks should preferably be taken out prior to the expected time of the birth.

Upon the employee's request, the employer shall permit unpaid leave

a) for the purpose of looking after a child after the expiry of maternity leave up to the time at which the child reaches the age of three, or the age of ten in case of a chronically ill or seriously disabled child as well as
b) in the case of the child's illness for the purpose of nursing the child at home for the duration of illness up to the time at which children reaches the age of ten.

During the first six months of nursing, the woman is entitled to two hour off work each day, and after this one-hour daily up to the end of ninth month. Child care fee is paid until the 2nd birthday of the child.

2.3. The Hungarian social security system in brief

Key patterns of the Hungarian social security system. There are five main branches of social security in Hungary. Pensions and health services (including statutory work accident system) are classified as social insurance. The other three main branches are unemployment insurance, universal family support system and social assistance system.

The following risks are covered by the Hungarian social security schemes: sickness, maternity, old age, invalidity, occupational diseases (accident-related disability), employment injuries, survivorship, child-raising (family support) and unemployment.

The Hungarian social security system mainly corresponds to the Bismarckian type system. There are few exceptions, for example the family allowance system, which is based on the Beveridge logic.

2.4. The structure of the Hungarian family protection schemes

As it was mentioned, in Hungary there are several benefit schemes dealing with family protection issues. However, the most significant branches that we usually call family support scheme are the universal type family support scheme, the insurance type maternity benefit scheme and social assistance type benefits. These provide cash benefits for parent(s) or child. Over and above the benefits in cash there used to be a wide network of crèches for children under three, and of kindergartens for preschool children. The capacity of the day-care institutions for the under-three has shrunk significantly, the coverage for the preschool cohort has been by and large maintained.

The structure of cash benefits:

1. Universal type benefits – Family support benefits (Act LXXXIV of 1998 on Family Support)
   Benefits:
   - 1.1. Family Allowance (családi pótlék)
   - 1.2. Child Home Care Allowance (Gyermekgondozási segély – GYES)
   - 1.3. Child Raising Support (gyermeknevelési támogatás – GYET)
   - 1.4. Birth Grant (Anyasági támogatás)
2. Insurance type benefits (Act LXXXIII of 1997 on the Benefits of Compulsory Health Insurance)
   - A) Maternity benefits under the Health Insurance System
     1. Maternity Allowance (Terhességi-gyermekágyi segély – TGYS)
     2. Child Care Fee (Gyermekgondozási díj – GYED)
     3. Sickness benefit for pregnant and child-giving women, and for persons who take care of a sick child (gyermekápolási táppénz)
   - B) Pension Insurance System (peripheral benefit)
     1. Orphan's allowance (árvaellátás)
3. Social assistance type benefits
   - A) Child protection benefits (Act XXXI of 1997 on the Protection of Children and on the Administration of Guardianship)
     1. Regular Child Protection Support (rendszeres gyermekvédelmi támogatás)
     2. Irregular Child Protection Support (rendkívüli gyermekvédelmi támogatás)
     3. Advanced Guarantee of Child Alimony (Gyermektartásdíj megelőlegezése)
     4. Home Settlement Support (Otthonteremtési támogatás)
     5. Benefits in naturam
   - B) Social assistance benefits (Act III of 1993 on the Social Assistance) These benefits are peripheral benefits within the family protection schemes.

Social assistance provisions offered by self-governments. The Social Assistance Act and the Child Protection Act regulate the statutory welfare obligations of the local self-governments. Community local self-governments use the standard central budgetary funds defined in the State Budget Act in order to fulfil their statutory obligations in social care and child protection, the normative standard funds are used, however, at the discretion of the local self-governments. In addition local self-governments are entitled to provide additional services out of their own budgets. Pursuant to the Social Assistance Act, coverage for financing public administration tasks are required to be ensured by the state budget. The state contributes to local governmental tasks, which can be regarded as local public affairs through social normative, institutional normative, and earmarked subsidies. (The social normative is

differentiated in accordance with the social and demographic situation of the individual settlements, thus it functions as an equalizing mechanism.) Normative support to non-governmental organizations and to churches organizing social service institutions must be applied for at the licensing body at the time of issuance of the license. Normative subsidies are disbursed by the Public Administration Office.

According to the effective Social Assistance Act, cash benefits include elderly annuity, regular social assistance, housing support, nursing fee, temporary social assistance and funeral aid. There are two relevant social assistance type benefits, which has strong family connection: a) nursing fee (ápolási díj) and b) temporary social assistance.

2.5. The administration of family support schemes

In Hungary the family support scheme is integrated into the social security system. It is organised and financed partly by the state central budget organisation (universal family support benefits: Family Allowance (családi pótlék); Child Home Care Allowance (Gyermekgondozási segély – GYES); Child Raising Support (gyermeknevelési támogatás – GYET) and partly by the health insurance fund (maternity allowance: tgys and child care fee: GYED). However, there are supplementary social assistance type benefits.

1. The universal type family support benefits scheme is administered by separate institutions. See them below:
   a) At central level the Ministry of Youth, Family Affairs, Social and Equal Treatment is responsible for family support benefits.
   b) Family support benefits are operated by the Regional Directorates of the Hungarian State Treasury (in Budapest: Budapest and Pest County Regional Directorate), competent in the county according to the home or place of residence of the applicant and their sub-regional representation offices (hereinafter together Hungarian abbreviation MÁK).
   c) The family support paying agency at the applicant's workplace (hereinafter: MÁK and family support paying agencies together: application assessing agency).
2. The insurance type benefits are organised by the following insurance administration bodies:
   2.1. Maternity benefits by the National Health Insurance Fund Administration (Országos Egészségbiztosítási Pénztár – OEP) and its subordinate county (capital) and local branch offices and at the workplace benefit paying agency (kifizetőhely).
   2.2. Orphan's Allowance by the National Pension Directorate and its subordinate county (capital) and local branch offices.
3. Social assistance type benefits
   A) Child protection benefits (Act XXXI of 1997 on the Protection of Children and on the Administration of Guardianship) – local governments are responsible for administration.
   B) Social assistance benefits (Act III of 1993 on the Social Assistance)

Local governments are responsible for administration.

2.6. Personal scope of family protection schemes

1. Universal type benefits. The family support scheme is a universal system. Every citizen who has a child up to a certain age may be entitled to various family support benefits.

More precisely: Unless an international treaty provides otherwise, the scope of the Family Support Act extends to:

a) Hungarian citizens

b) foreigners recognised as refugees by the Hungarian Refugee Agency, or possessing an immigration permit or settlement permit, living in the territory of the Republic of Hungary.
c) persons falling under the personal scope of the 1612/68/EEC regulation and 1408/71/EEC regulation and possessing a valid right of abode (tartózkodási engedély).

2. Insurance type benefits. Every insured person – according to Article 5 of Act LXXX on Personal Scope and Financial Issues of the Social Insurance Scheme – is covered. The insured persons are mostly wage earners.

According to the above mentioned Act the following persons shall be considered as insured and paying contribution in Hungary:

a) Persons in full- or part-time employment relation;
b) Persons working for a fee provided that the income serves as contribution base;
c) Members of co-operatives;
d) The self-employed, private entrepreneurs, clergymen, family members in helping status in private companies with or without legal entity are obliged to pay health insurance contribution and are entitled to health services and sick pay too.

3. Social assistance type benefits. Basically every Hungarian citizen is covered who is in a needy situation (It means those persons whose income is falling below a certain level.)

Within the general personal scope, the following table shows the family benefits and the entitled persons in detail.

Table 1: The entitled persons according to the type of benefits within the Hungarian family protection scheme

Type and groups of benefits	*Entitled persons*
Family support type scheme (universal)	
1. Family Allowance (családi pótlék)	– parent, foster parent, official foster-parent;
	– guardian, temporary guardian;
	– leader of the social institution;
	– person in his or her own right, who is over 18 and is severely disabled or permanently ill
2. Child Home Care Allowance	– parent;
(Gyermekgondozási segély – GYES)	– foster-parent;
	– guardian;
	– grandparent, at the parent's right (special rules apply)
3. Child Raising Support	– parent;
(Gyermeknevelési támogatás – GYET)	– foster-parent;
	– guardian
4. Birth Grant (Anyasági támogatás)	– woman who attended pre-natal care;
	– adopting parent;
	– guardian
Social insurance type benefits	
1. Sickness benefit for pregnant and child-giving women, and for persons who take care of a sick child (gyermekápolási táppénz)	– insured person incapable of earning;
	– woman who cannot work due to pregnancy or delivery and is not entitled to maternity allowance;
	– mother breast-feeding her child younger than 1 year under hospital care;
	– parent, foster-parent, substitute parent taking care of a sick child under 12 years

2. Maternity Allowance (Terhességi-gyermekágyi segély – TGYS)	– insured woman giving birth; – person bringing up a child with the intention of adoption
3. Child Care Fee (Gyermekgondozási díj – GYED)	– insured parent; – mother who received maternity allowance
4. Orphan's Allowance (árvaellátás)	– the child (orphan of insured deceased person; – after the adopted child's blood-parent only if the child has been adopted by the spouse of the blood-parent; – brother/sister, grandchild,
Social assistance type benefits	
1. Regular Child Protection Support (rendszeres gyermekvédelmi támogatás)	– the child
2. Irregular Child Protection Support (rendkívüli gyermekvédelmi támogatás)	– the child
3. Advanced Guarantee of Child Alimony (Gyermektartásdíj megelőlegezése)	– the child
4. Home Settlement Support (Otthonteremtési támogatás)	– young adult leaving temporary or permanent care
5. Benefits in naturam	– especially children under protection
1. Nursing fee (Ápolási díj)	– relative
2. Temporary social assistance (átmeneti segély)	– persons with cost-of-living problems

Source: The author's source.

3. The main provisions in cash the Hungarian family benefits

The parental benefits in cash is paid to the mother or the father who interrups a paid working activity to upbring his/her child. In Hungary there are three types of parental benefits: 1) maternity allowance, 2) child care fee and 3) child home care allowance.

1. Social insurance type benefit (Act LXXXIII of 1997 on the Benefits of Compulsory Health Insurance). There are two social insurance type benefits: a) maternity allowance (terhességi-gyermekágyi segély) and b) child care fee (GYED)

a) Maternity allowance (Terhességi-gyermekágyi segély): Insurance type benefit. Entitled persons include the employee, self-employed person and assimilated groups. For eligibility at least 180 days of insurance during the last two years before delivery; and she will give birth during the insurance period or within 42 calendar days of its expiry (or 28 days in case of receiving sick pay.) The maternity allowance is paid for 24 weeks (4 weeks before and 20 weeks after the planned date of birth, or 24 weeks after the date of birth, depending on the mother's choice). The amount of the maternity allowance is 70 per cent of the daily average gross earnings of the previous year. If the insured person is not entitled to maternity allowance, she can apply for special sickness insurance (táppénz). There is a contribution which is paid by both parties (employer and employee as well.) The benefits are subject to taxation. General taxation rule is applied.

b) Child care fee (gyermekgondozási díj – GYED) (employment-and wage related benefit introduced in 1982): 70% of daily average gross earnings of the previous calendar year. In the absence of earnings, the current minimum wage is used. There is a maximum limit of child care fee: HUF 83,000 (EUR 330) per month.

Child care fee (GYED) is provided from the birth or from the expired date of maternity allowance to the age of 2 years of the child.

However, maternity allowance and child care fee are terminated when the beneficiary takes up work.

2. Universal type benefit (Act LXXXIV of 1998 on Family Support)

a) Child Home Care Allowance (Gyermekgondozási segély): Universal entitlement, financed by the state budget that provides a flat-rate benefit for all residents. As a general rule, the benefit is provided until the age of 3 years of the child. In case of twins, the benefit is provided until the twins enter into primary education. In case of a child being severely ill or disabled, the benefit is provided until the age of 10 years of the child.

b) Child Raising Support (gyermeknevelési támogatás) is a supplementary benefit for numerous family. It has universal entitlement, financed by the state budget that provides a flat-rate benefit for all residents. It is regulated in Act LXXXIV of 1998 on Family Support. The child raising support is provided if there are three or more minor children (being under the age of 14) raised in the family. The benefit shall be provided from the age of 3 years of the youngest child until she/he reaches the age of 8 years.

c) Birth Grant (Anyasági támogatás): paid to all mothers if they attended at least four prenatal medical examinations (one in case of premature birth). Universal type benefit. It is lump-sum payment, 225% of the minimum amount of old-age pension (öregségi nyugdíj) HUF 55,575 or 300% HUF 74,100 per child in case of twins. No contributions, it is covered by taxes.

d) Family allowances (családi pótlék)

It is indispensable to establish the filiation of a child for a family benefit. According to the Article 12 of Family Support Act, for the purpose of establishing the amount of family allowance, the children by birth, adopted or foster children need to be taken into account who:

a) share the same household with the applicant, and
   - aa) with regard to whom the parent, foster parent, official foster parent or guardian is eligible to family allowance,
   - ab) who study in a public education institution or a higher education institution in the first accredited higher education system, first university or high school type basic training without a regular income.
   - ac) who are eligible for the benefit on their own rights. (It is described in the provisions of Article 8 Section (3) of Family Support Act.),

b) who are disabled and receive social institutional care, providing that the guardianship agency did not take them for temporary or durable care, and they maintain contact with the individual applying for the allowance.

Family allowance is payable for children conducting their studies in a public primary and secondary education institution until they reach twenty three years of age. However, if a child or individual who has reached 18 years has a regular income, the disbursement of the family allowance established for the individual must be stopped from the fourth month while the individual has a regular income.

3. Social assistance type benefits (Act III of 1993 on Social Assistance)

a) Nursing fee (Ápolási díj)

The Nursing Fee (Ápolási díj) is a cash benefit provided by local municipalities for family members, taking care of persons who are under the age of 18 years and, in the opinion of their general practitioner, are permanently ill. Also provided for family members, taking care of severely disabled persons who are unable to care for themselves without age restrictions. It is based on the philosophy of social assistance.

b) Temporary social assistance (átmeneti segély)

Benefits in cash and in kind, as well as social services are available on a means-tested basis, with the establishment of social need being defined by the per capita income of the household. Benefits in cash and in kind may be provided in a regular or ad hoc form (certain types of aids

can be provided in both ways). In the aid system, prevention of the total financial failure of the elderly (elderly annuity), alleviation of high housing expenses (for example, housing support), and prevention of total deterioration of health status (for example, medical indigence card), as well as reduction of the crises caused by unexpected fatal events (for example, funeral aid) are the most important factors.

c) Regular Child Protection Support (Rendszeres gyermekvédelmi támogatás)

The purpose of regular child protection support (hereinafter: regular support) is to provide financial support for socially disadvantaged families in order to promote the care of the child in the family and to prevent the child's removal from the family. Regular support is payable for the child if the monthly per capita income in the family taking care of the child is less than the prevailing minimum amount of the old-age pension (hereinafter: minimum amount of the old-age pension) and if the care provided in the family is not in conflict with the child's interests. (social assistance based)

The sum of the support is calculated – at the time of submitting the application – according to the number of close relatives sharing the same household.

The monthly amount of the regular support – per child – equals 22 per cent of the minimum amount of the old-age pension (HUF 24,700 in 2005).

If the conditions are fulfilled, the regular support is also payable after the child comes of age until the completion of his or her studies but not later than 23 years of age, or until 25 years of age in case of students in an institution of higher education. If the entitled person comes of age, the regular support is payable in his or her own right.

Increased amount of regular support: If the conditions applying to regular child protection support are fulfilled, an increased amount of regular support is payable to the relative who has no taxable income, is obliged to provide care and receives old-age pension, accident-related pension, pension-like regular social assistance or old people's benefit and is assigned by the court of guardians as the child's guardian. The Parliament decides about increasing the sum of the increased amount of regular support at the time of passing the budgetary act.

d) Irregular Child Protection Support (Rendkívüli gyermekvédelmi támogatás)

Irregular child protection support (hereinafter: irregular support) is payable to the child if the family taking care of the child has temporary cost-of-living problems or is in an extraordinary situation endangering subsistence.

e) Advanced Guarantee of Child Alimony (Gyermektartásdíj megelőlegezése)

Advanced Guarantee of Child Alimony is due if

a) the court has already settled the child alimony in its final decision and
b) the sum of the child alimony cannot be collected temporarily, and
c) the parent or other legal guardian taking care of the child is unable to provide the necessary care for the child on condition that the monthly per capita income in the family taking care of the child is less than two times the minimum amount of the old-age pension.

If the conditions are fulfilled, the payment or the continued payment of the advanced guarantee of child alimony is also due after the child comes of age while he or she studies in an institution of secondary education, but not later than 20 years of age.

The amount of the advanced guarantee of child alimony shall be paid back to the state with interest by the obliged person.

4. Rates of the family benefits and its influencing factors

1. Universal type benefits.

1.1. Birth Grant (Anyasági támogatás): It is lump-sum payment, 225% of the minimum amount of old-age pension (öregségi nyugdíjminimum) HUF 55,575 or of 300% HUF 74,100 per child in case of twins. The amount of the benefits varies according to the number of children (more specifically in case of twins).
1.2. Family allowance (Családi pótlék): As regards the amount of family allowance, it depends on the 1) number of children, 2) the permanent illness or disability of the child, 3) whether the child concerned is raised by both or by a single parent and whether the child is in social institution or at home (family environment).

Table 2.: The amount of the family allowance

No. of children in family	*1*	*2*	*3+*	*Disabled/ill child*	*Foster child*
Benefit per child (HUF)	5,100	6,200	7,800	13,900	7,200
Benefit per child for single-parent family (HUF)	6,000	7,200	8,400	15,700	–

Source: The author's own source.

In July the amount of family allowance provided for families is doubled.

The benefit is paid by the family benefit pay-office of the employer or by the regional directorate of the Hungarian State Treasury.

1.3. The amount of the child-care support (GYES) and child-raising support (GYET) is as follows: Irrespective of the number of children, the monthly amount of child-care and child-raising support is identical with the lowest amount of old-age pension (HUF 24,700 in 2005), while in the case of incomplete months, one thirtieth of the monthly amount is payable for one calendar day.

In the case of twin children, the monthly amount of childcare support is identical with 200% of the lowest amount of old-age pension, irrespective of the number of children.

2. Insurance type benefits.

2.1. Maternity allowance (Terhességi-gyermekágyi segély): The amount of the maternity allowance is 70 per cent of the daily average gross earnings of the previous year.
2.2. Child care fee (GYED): the amount of the benefit is defined as 70% of the previous average daily income, with a ceiling of maximum HUF 83,000 (EUR 330) in 2003. From that year the state budget act will decide the ceiling of the monthly child care fee.

3. Social assistance type benefits.

The monthly amount of the social assistance is equal to a certain per cent (80-90%) of the minimum old-age pension.

5. Comparison to minimum wage

In Hungary there is minimum wage regulation. The legal sources of Hungarian minimum wage: 1) Labour Code Act No. XXII of 1992 Magyar Közlöny, 4 May 1992, pp. 1613–1614 and the Government Decree No. No. 327/2004 (XII. 11.) concerning the minimum wage.

Minimum wage fixing procedure

A mandatory minimum wage rate is determined by the government. The National Interest Reconciliation Council is consulted during the wage setting process, and minimum wage rates set by the government are subject to the agreement of the Council.

Minimum 57,000 Forints per month in 2005. Minimum wage rates must be reviewed regularly. The legislation does not set forth exactly how frequently rates should be adjusted.

An employee, trade union or works council may initiate proceeding as a result of an act or omission that contravenes the Labour Code, such as failure to pay relevant minimum wage rates.

Additionally, the Labour Inspection Act LXXV of 1996 provides that the scope of labour inspection extends to compliance with the legal provisions on wage, including minimum wage.

The Labour Code does not set forth the penalties to be applied if minimum wage rates are not paid. However, there is fine in national currency for nonrespect of minimum wage legislation.

Minimum wages may be set in collective agreements on the condition that minimum wages set in collective agreements are higher than the statutory minimum wage rate. Collective agreements may be extended to a whole sector, provided that the organizations entering into such a contract are considered to be representative in the sector.

Table 3: Changes of minimum wage in Hungary (1990–2005)

Period	The amount of the minimum wage (HUF/month)
23 December 1990 – 31 March 1991	HUF 5,800/month
01 April 1991 – 31 December 1991	HUF 7,000/month
01 January 1992 – 31 January 1993	HUF 8,000/month
01 February 1993 – 31 January 1994	HUF 9,000/month
01 February 1994 – 31 January 1995	HUF 10,500/month
01 February 1995 – 31 January 1996	HUF 12,200/month
01 February 1996 – 31 December 1996	HUF 14,500/month
01 January 1997 – 31 December 1997	HUF 17,000/month
01 January 1998 – 31 December 1998	HUF 19,500/month
01 January 1999 – 31 December 1999	HUF 22,500/month
01 January 2000 – 31 December 2000	HUF 25,500/month
01 January 2001 – 31 December 2001	HUF 40,000/month
01 January 2002 – 31 December 2003	HUF 50,000/month
In 2004	HUF 53,000/month
In 2005	HUF 57,000/month

Source: The author's own source.

Table 4: The rate of minimum wage and family allowance in Hungary 2005

Family allowance (types)	Amount of family allowance	Rate of minimum wage and family allowance (%)
a) for families with one child	HUF 5,100	08,9
b) for a single parent raising one child	HUF 6,000	10,5
c) for families with two children, for each child	HUF 6,200	10,8
d) for a single parent raising two children, for each child	HUF 7,200	12,6
e) for families with three or more children, for each child	HUF 7,800	13,7
f) for a single parent raising three or more children, for each child	HUF 8,400	14,74
g) for a durably ill or severely disabled child (individual)	HUF 13,900	24,38
h) for a child living in an institution, a child placed with foster parents or official foster parents, and a child not falling under the scope of subsection g.) [durably ill or severely disabled child]	HUF 15,700	27,54
The base of the minimum wage is HUF 57,000 (2005)		

Source: National Health Insurance Fund Administration.

Basically the Hungarian family protection systems don't behave as a guaranteed minimum living income source. However, the universal type benefits in certain sense, unintentionally behave in that way.

6. Deductions from family benefits

6.1. Family allowance and the taxable household income

1. Universal type benefits – Family support benefits (Act LXXXIV of 1998 on Family Support)

According to Section 40 of Act CXVII of 1995 on Personal Income Tax, the family tax-deduction (családi kedvezmény) is applicable under the following circumstances.

In respect of severely handicapped private individuals, on the basis of a statement verifying such condition, an amount equal to 5 per cent of the prevailing monthly minimum wage in effect on the first day of the tax year (personal allowance) may be deducted each month from the tax on the consolidated tax base, as of the first day of and for the duration of the disability.

The family allowance that can be claimed by the right-holder in connection with the beneficiary dependent shall not be paid from the tax on the consolidated tax base.

Depending on the number of dependents, the family allowance for each beneficiary dependent per month of eligibility shall be

a) HUF 3,000 in the case of one dependent,
b) HUF 4,000 in the case of two dependents,
c) HUF 10,000 in the case of three or more dependents.

The "month of eligibility" means the month for which child benefits or disability benefits are provided. In respect of a fetus, it means the month of pregnancy during which eligibility prevails for at least one day according to the medical diagnosis of pregnancy, except the month when eligibility for child benefits commences due to birth. The tax authority may request a review of the medical certificate diagnosing pregnancy.

The family allowance shall be granted to private individuals who are eligible for child benefits according to the Family Support Act as well as to pregnant women and their spouses living in the same household. The family allowance, however, shall not be granted to private individuals who receive child benefits as the guardian and authorized custodian or ad hoc conservator for children (persons) cared for in a children's home or juvenile facility or placed in a correctional institution. Nor shall the family allowance be given to the head of a social institution if he/she receives the child benefits for children (persons) placed in that institution.

If the beneficiary dependent would him/herself be eligible for the family allowance or if the beneficiary dependent is a private individual who receives disability benefits, one of the private individuals living in the same household shall, in accordance with their decision, be considered eligible.

As a prerequisite for receiving the family allowance, the natural identification data or the tax identification code of the dependents shall be indicated in the tax return (employer's account statement); in respect of fetuses (twin fetuses), a certificate of pregnancy shall be accepted instead.

The family allowance can only be claimed once for any given beneficiary dependent, but the recipient shall share it at the end of the tax year with his/her spouse or common-law spouse living in the same household (including also if the beneficiary is unable to claim any part of the family allowance), if neither of the spouses have claimed any family allowance as a single parent and if sharing the allowance is duly indicated in their tax returns (employer's account statement) along with the other party's tax identification code.

If pregnancy (whether single or twin) is diagnosed after the tax return is filed, the family allowance granted on the basis of pregnancy may be claimed for the months of eligibility remaining in the tax year by self-revision - in due observation of the provisions of this Section.

The family allowance granted in connection with the dependents referred to in Subsection (7) may be claimed in accordance with this Section regardless of the recipient for whom it was claimed when determining the tax advance.

According to Section 40 of Act CXVII of 1995 on Personal Income Tax the following family and child care related social benefits are tax-exempt:

1) Birth grant (anyasági támogatás), income supplements (except the auxiliary income supplement connected with scholarship), social assistance, widow's pension received on account of a child's eligibility for orphans' allowance;
2) Child support benefits received according to the Family Support Act;
3) Social welfare provided by the state social welfare system, local governments, the church or religious charitable organizations; cash benefits, child-raising benefits and special provisions paid to foster parents in addition to child-raising benefits and post-care assistance provided on the basis of the Act on the Protection and Guardianship of Children; temporary aid,
4) Fees or reimbursements received for fostering and raising a minor – under institutional or state care – in a family, or fees or reimbursements received from a therapeutic institute for providing outside nursing care for a patient.

2. Insurance type benefits (Act LXXXIII of 1997 on the Benefits of Compulsory Health Insurance)

Maternity allowance (terhességi-gyermekágyi segély) and child care fee (gyermekgondozási díj) are subject to taxation. General taxation rules are applied. No special relief for benefits.

3. Social assistance type benefits (Act III of 1993)

1. Irregular child protection support (Rendkívüli gyermekvédelmi támogatás): The amount of irregular child protection support, belonging to the scope of social assistance and provided in kind, is exempt from taxation.
2. Family protection benefits and social security contributions

Any person receiving child care fee (gyermekgondozási díj) child home care allowance (gyermekgondozási segély) or child raising support (gyermeknevelési támogatás) is obliged to pay pension contribution (to pension insurance fund) and/or fee (to compulsory private pension insurance). An old age pensioner and widow's/widower's pensioner does not pay pension contribution and/or fee. In the case of persons on child care fee (gyermekgondozási díj) child home care allowance (gyermekgondozási segély) or child raising support (gyermeknevelési támogatás) the pension contribution and/or fee payable by the employer is paid by the central budget.

All cash benefits, including old age pensions, family benefits, invalidity pensions, unemployment benefits, sickness benefits, survivor benefits are exportable without any limitation.

7. Financement

7.1. The methods of financing social security system

Social insurance type benefits are financed through contributions paid by both employers and employees. Deficits of social insurance funds (both health and pension) are financed by the government budget out if its general revenues.

The universal type and social assistance type benefits are non-contributory benefits. They are financed from taxation. Family benefits are financed by the government budget. Social assistance is partly financed by the central budget (90%) and partly from the local governments' own budgets (10%).

Table 5: The nature of the financing family protection schemes

Name of the benefit	Financing source
1. Universal type benefits:	Taxation (local + central taxes) (non-contributory)
2. Insurance type benefits :	Contribution (paid by employer and employee)
3. Social assistance type benefits :	Taxation (local + central taxes) (non-contributory)

Source: The author's own source.

7.2. The contribution rate and ceiling

In 2005, for the first public pension pillar, the contribution paid by employees is 8.5% of gross earnings if they are only insured in the first pillar. Those employees who are insured in both the first and second pillars, have to pay 0.5% of their gross earnings to the first pillar and 8% of their gross earnings to the second pillar. Employers shall pay 18% of the gross earnings exclusively to the first public pension pillar. Self-employed persons pay the total contribution by themselves.

In 2005, the ceiling of pension contribution by insured persons is HUF 16,440 per calendar day, calculated on the basis of three times the gross average earnings per day. The floor of contribution is calculated on the basis of 1/30th of the minimum wage per calendar day. There is no ceiling for the employers' contribution.

For health insurance, insured persons have to pay 4% of gross earnings and employers pay 11% of payroll. Self-employed persons have to pay both parts of contributions. Self-employed pensioners have to pay 5% work accident contribution. No ceilings exist in health insurance. For self-employed persons the contribution rate is fixed according to the minimum wage.

As we could see above, both the insured persons and the employers are obliged to pay social insurance (health and pension insurance) contribution. In some exceptional cases (family benefits and allowance receivers) the employer's contribution is paid by the central budget. However, the family benefit receivers contribution is paid by themselves.

There is no separate social security contribution applicable to the family allowance scheme. The insurance type family benefits are financed from the health insurance contribution. The universal and social assistance type benefits are financed from general (central and local) taxes.

8. Ongoing debates and reforms in Hungary

According to the so called 100 steps program of the ruling Hungarian government in 2005 fairer family support means that the community's support is received really by those who are in the greatest need for it. In this last part of my paper I would like to pick up and highlight some reform conceptions and aims which may contribute to make better performance and higher satisfaction of the Hungarian family protection system.

1. Family allowance is almost doubled

Instead of today's supports distributed unevenly from three sources – as family allowance, tax allowance and regular child protection support paid is cash – all the families bringing up children will receive the same, essentially higher amount of family allowance. Family allowance disbursed as allowance for the 13th month will also be incorporated into the amount of the monthly support, thus it will give more uniform help for families bringing up children.

2. An increased amount of family allowance is paid to single parents bringing up children and to parents bringing up permanently ill or disabled children.

3. Family tax deduction will cease for families with one or two children.

The new, uniform family allowance will provide a higher amount of benefit for families bringing up one or two children than the previously combined amount of family allowance and

tax deduction. Today a family with two children is entitled to HUF 12,400 family allowance (HUF 6,200 per child) plus tax deduction of HUF 8,000 (HUF 4,000 per child) – provided that they have liability to pay as much tax – so the total amount of support is HUF 20,400 per month. The new family allowance will provide HUF 24,000 for them in total, that is HUF 3,600 more (HUF 1,800 more per child). Instead of the present, total amount of support (HUF 5,100 family allowance and HUF 3,000 tax deduction), HUF 2,900 more will be paid to families bringing up one child, even if they could use the tax deduction previously.

4. The tax deductions for families with three or more children will remain to a limited extent.

In the case of families bringing up three children, the increased amount of family allowance, HUF 14,000 per child, means a substantially increased support for those who previously were not or were only partially entitled to the tax deduction of HUF 10,000 per child. However, it is HUF 3,800 per child lower for those who could use the maximum amount of tax deduction. (They received HUF 10,000 tax deduction for every child in addition to the family allowance of HUF 7,800 per child.) In the case of families with the highest income it is reasonable to lessen their previous considerable support to some extent. However, it is not justified to bring about a decrease in income for families bringing up several children with average or just slightly more than average earnings. For this reason those whose income does not exceed HUF 6 million annually (HUF 500,000 per month) will continue to receive a tax allowance of HUF 4,000 per month, and over this income threshold it will gradually decrease, ceasing at HUF 550,000 per month. In accordance with the agreement made with the National Association of Big Families, the income threshold for persons bringing up more than three children will increase significantly.

5. The regular child protection support will be incorporated in the new, unified system of family supports.

For lower income families, the new family allowance will also cover the sum of the regular child protection support provided in cash so far, it is higher than the previous, combined amount of their family allowance and child protection support. However, while earlier families in need were entitled to this support only upon submitting an application and after a means test, in future they will receive it as subject right, as part of their family allowance, with due respect to their human dignity.

6. The transformation of the system of social assistance helps to improve the conditions of the most needy persons the best.

The new system of family assistance will provide support equally and uniformly for adult and child members of families struggling with severe financial problems and it will contribute to the expenses of housing. In the framework of this, families bringing up children will be entitled to a separate, targeted financial support for children they provide for. This sum will ensure that the neediest children can receive supports substantially greater than at present.

7. After the child has reached one year of age, the mother can work full time while receiving the total amount of child home care allowance.

In the future the mother will be entitled to child home care allowance even if she has a full-time job after the child has reached one year. The reason for this is that at present many mothers hold back from looking for a job as they will lose their child home care allowance if they start to work.

The continued payment of the same amount of support will help mothers with a possibility of employment to find proper care for their children while they are away working.

In the new system of child home care allowance it will be forbidden to perform any kind of work in the future, too, until the child becomes 1 year old. However, after the child reaches one year, the mother is allowed to work not only part time, but also full time while receiving child home care allowance.

8. Combine work and family obligations

State policies, particularly those that directly address child rearing, deeply influence women's ability to combine work and family obligations. While technically allowed to fathers to take parental leave, this is still the rare exception: it is women who drop out of the labour force in order to look after children. Parental leave policies, therefore, regulate women's relationship to the labour market: sometimes encouraging mothers to withdraw from the labour force, sometimes allowing a balance between work and family obligations.

Hungary is a country that allows women on maternity leave (those on "GYES" and "GYET"[8]) to work part time after the first birthday of their child. This allows women to retain some of their ties with the labour force and facilitate a potential return.

However, the structure of Hungarian family benefits is not fully in line with the Union's emphasis on the accommodation of family life with work, an element of the social inclusion strategy. The EU strongly encourages instruments that allow parents (particularly women) to return to the labour market after child birth. In the Hungarian family policy there is too much emphasis on offering parents the alternative of staying home for long periods of childcare, while the extended network of day care institutions has been neglected. The first sign of the rediscovery of the importance of child day care as a means to combine family and work appeared at the end of 2003 in the Population Program of the government. The EU certainly influenced this rediscovery.[9]

9. As concerns the taxation of the income from work received by mothers who work full time, child home care allowance shall be considered – in accordance with current regulations – as pay not liable to taxation.

This method of taxation, previously also applied for the employment of pensioners, means a considerably smaller taxation than in the case when child home care allowance is taxable income for mothers who work. For people receiving the minimum wage no liability to pay taxes arises for GYES, so they will receive the total amount. However, for persons receiving higher, average or more than average income, the support remaining after taxation will be HUF 4-5 thousand smaller than they would receive if this was their only income.

In sum, the Hungarian state provides an extensive support for women who want to (or have to) balance work and family through the provision of public day care, as well as maternity leave benefits and regulations. Women can claim family and maternity benefits as their universal rights, which decreases the stigma attached to housewife status and is a step towards appreciating child rearing as paid work.

The Hungarian maternity benefits seem to be exceptionally generous by European standards as far as their length is concerned. They support child care at home rather than to

8 As it will be explained later, Hungary has three types of maternity leave policies for three different types of women. "GYES" (loosely translated as "child care benefit") is by far the most popular of these institutions, and women receiving GYES are allowed to work for pay, 4 hours per day, after the first birthday of their child.

9 www.uni-konstanz.de/FuF/verwiss/Alber/Potucek/ferge_juhasz.pdf

encourage parental paid work. However, the lifestyle and personal desire of the modern (single) women and men doesn't match perfectly with this family policy.

Appendix 1

Family supports	Social insurance benefits	Social assistance
Act LXXXIV of 1998 on Family Support	Act LXXXIII of 1997 on the Benefits of Compulsory Health Insurance	Act XXXI of 1997 on the Protection of Children and on the Public Guardianship Administration
	Act LXXXI of 1997 on Social Insurance Pensions	Act III of 1993 on Social Administration and Social Assistance
Types of support:	Types of support:	Types of support:
family support	health insurance supports:	child protection act:
family allowance (upbringing allowance) (családi pótlék)	maternity allowance (tgys)	regular child protection support (until March 1, 2003: supplementary family allowance)
child home care allowance -gyes,	child care fee (GYED)	irregular child protection support
child raising support – gyet (child care support)	sickness benefit for persons taking care of a sick child	advanced guarantee of child alimony
birth grant (anyasági támogatás)	pension insurance supports:	home settlement support
	orphan's allowance (árvaellátás)	benefits in kind
		act on social assistance:
		nursing fee
		temporary social assistance
Typical features:	Typical features:	Typical features:
benefits provided as citizen's right: they provide basic support for certain groups of the population	insurance type benefits: they provide benefits for insured persons	assistance type benefits: they provide support for "socially needy" persons
no contribution to be paid	contributions to be paid, the extent of contribution depends on the income of the protected person	no contribution to be paid, the beneficiary of the support has no prior obligation to pay contributions
extent of support: it is not adjusted to the previous standard of living	extent of support: it is adjusted to the previous level of earnings	extent of support: it is not adjusted to previous earnings
benefits provided as subject right: legally enforceable after the fulfilment of statutory conditions, actual need is not examined	benefits provided as subject right: legally enforceable after the fulfilment of statutory conditions, actual need is not examined	benefits not provided as subject right: the judgement of claims is subject to a means test
financed by: the central budget	financed by: the Health Insurance and Pension Insurance Funds	financed by: means of taxation, local government budget, to a small extent by the central budget

Source: The author's own source.

Zusammenfassung

Rechtliche Grundlagen des Familienförderungssystems

Dieses Artikel befasst sich mit dem Gesetzeshintergrund und mit den finanziellen Gundlagen des ungarischen Familienförderungssystems.

Kurz werden die wichtigsten Stationen der Entstehung des ungarischen Familienförderungssystems vorgeführt. In Ungarn werden die direkten und die indirekten finanziellen Förderungen der Familien von mehreren Seiten unterstützt.

Die rechtlichen Grundfragen der Familienförderung werden durch nationale Normen und durch die Verfassung geregelt. Außer diesen erscheinen sie noch in verschiedenen Gesetzen von sozialem Gegenstand.

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Antike Rechtsgeschichte» und rechtsvergleichende Forschungen auf ethnischer Basis

l. Es ist bekannt, daß sich die grundsätzlich feindliche Einstellung der überwältigenden Mehrheit der Anhänger der Historischen Rechtsschule hinsichtlich der Rechtsvergleichung in der europäischen Rechtswissenschaft nicht zur herrschenden Meinung[1] entwickelt hat. Anselm Feuerbach, Anton Friedrich Justus Thibaut, Karl Theodor Pütter, Eduard Gans und Joseph Unger – um nur einige Namen zu nennen – waren bekanntermaßen engagierte Befürworter der rechtsvergleichenden Forschungen. Friedrich Carl von Savigny vermag in der Frage über den wissenschaftlichen Wert der Vergleichung der modernen Rechte bzw. Rechtssysteme seinen grundsätzlich negativen Standpunkt nicht zum Siege zu verhelfen. Verstärkt werden die rechtsvergleichenden Forschungen in Deutschland auch dadurch, daß i. J. 1829 die «*Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes*» (herausgegeben von Karl Joseph Anton Mittermaier und Carl Salomo Zachariä von Lingenthal (der bis zu seiner Nobilitierung 1842 den Familiennamen Zachariä trug) gegründet wird. Beide Autoren können mit Grund als Wegbereiter der Rechtsvergleichung betrachtet werden.[2]

Die Gründung dieser Zeitschrift kann auch als eine Art «Kriegserklärung» gegenüber der Historischen Schule betrachtet werden. Der folgende Satz von Zachariä von Lingenthal ist besonders beachtenswert: «Wenn nun aus dieser Übersicht des jetzt unter den europäischen Völkern bestehenden literarischen Verkehrs und des dermaligen Rechtszustandes der europäischen Staaten der Schluß gezogen werden darf, daß das, was in irgend einem europäischen Staate für die Gesetzgebung oder für die Rechtswissenschaft geschehe, auch die übrigen europäischen Staaten und Völker mehr oder weniger interessiere, so bedarf wohl der Plan der vorliegenden Zeitschrift, der Versuch, dem deutschen Publikum die Bekanntschaft mit den Rechten und den rechtswissenschaftlichen Schriften des Auslandes zu erleichtern, nicht erst einer Entschuldigung».[3]

1 Es ist natürlich eine andere Frage, daß die auf der historischen Rechtsschule basierende Pandektistik keineswegs eine an einem bestimmten nationalen Rechtssystem orientierte Wissenschaft war. Der Orientierungspunkt für die Pandektistik war das damals noch dem gemeinsamen europäischen ius commune gleichgesetzte Privatrecht schlechthin. S. Coing, Rechtsvergleichung und Rechtsanschauung, in Buts et méthodes du droit comparé, Rotondi, Inchieste di diritto comparato. 2 (Padova-New York 1973) 84.

2 Vgl. Wadle, Wegbereiter der Rechtsvergleichung: Die Internationale Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre, in Zeitschrift für Neuere Rechtsgeschichte 17/1995/ 50.

3 Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes 1/1829/ 25.

Diese Äußerung von Zachariä von Lingenthal kommt einer Rechtfertigung gleich, wobei auf die Unzulänglichkeiten der ausschließlich auf das römische Recht und das mittelalterliche deutsche Recht abgestellten Forschungen hingewiesen wird.[4]

Die gleiche Auffasung wird – im Bereich der antiken Rechte – schon bei Bunsen[5] vertreten. Er unterzieht die zwischen dem römischen Recht und dem Recht der anderen indoeuropäischen Völker bestehenden Beziehungen einer wissenschaftlichen Analyse. Bunsen stellt unter anderem fest, daß die Erbfolge bzw. das Erbsystem bei den Römern, Indern und Athenern im wesentlichen auf den gleichen Grundlagen beruht.

2. Gegen Mitte des 19. Jahrhunderts ist der Kreis derjenigen, die sich für die Beziehungen zwischen dem römischen Recht und dem Rechte der indoeuropäischen Völker interessieren, schon relativ bedeutend. Dieses wachsende Interesse ist vor allem auf die Errungenschaften der philologischen und historischen Forschungen der Orientalistik zurückzuführen. Zu erwähnen ist dabei das Preisausschreiben der Berliner Akademie i. J. 1824, das auf die systematische Erforschung des attischen Prozeßrechts abzielte.[6] Mit diesem Themenkreis beschäftigen sich die Werke *Der Attische Prozeß. Vier Bücher* von Meier und Schoemann[7] und die zweibändige Schrift unter dem Titel *Der Process und die Klagen bei den Attikern* von Platner.[8] Die Rechtsvergleichung auf ethnischer Basis beruht in diesem Zeitalter – was ihre ideologische Grundlage betrifft – auf den Ideen von Hegel und Fichte.

Die vergleichende Sprachwissenschaft erzielt in dieser Epoche spektakuläre Ergebnisse. Dabei sind vor allem – im Terrain der deutschen Philologie – die Namen von Franz Bopp und Jacob Grimm zu erwähnen. Die sog. arische oder indogermanische Richtung,[9] die eine der Tendenzen der rechtsvergleichenden Forschungen darstellt, steht vor allem mit der vergleichenden Sprachwissenschaft im Zusammenhang.

Zu betonen ist aber, daß die orientalischen Forschungen nicht notwendigerweise – jedenfalls nicht im Bereich der juristischen Forschungen – zur Entstehung der «arischen Theorie» führen. Beispielhaft ist in diesem Zusammenhang das Buch von Oppert,[10] in dem der Verfasser sehr vorsichtig verfährt. In seinem Werk sind keine Spuren von unwissenschaftlichen Hypothesen zu finden. Das Gleiche bezieht sich auf die Problematik der meistens künstlichen Analogiesuche zu den Konstruktionen des römischen Rechts. Man könnte diesbezüglich auch das Werk von Karl Theodor Pütter[11] erwähnen, in welchem zahlreiche Berufungen auf das indische Recht zu finden

4 In seiner Übersicht über die Befruchtung des deutschen Rechts durch die Rechtsvergleichung mißt auch Dölle der Kritischen Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes (1829–1855) große Bedeutung zu. Dölle, Der Beitrag der Rechtsvergleichung zum deutschen Recht, in Buts et méthodes 126 ff.

5 De iure hereditario Atheniensium, (Göttingen 1813).

6 Eine Übersicht über die juristische Gräzistik im frühen 19. Jahrhundert bietet Thür in seiner Abhandlung. Thür, Juristische Gräzistik im frühen 19. Jahrhundert, in Bedeutung der Wörter. Studien zur europäischen Rechtsgeschichte. Festschrift Gagnér (München 1991) 521 ff.

7 Halle 1824

8 Darmstadt 1824–1825

9 Der seit 1846 in England lebende deutsche Sprachforscher Friedrich Max Müller hat als erster gegen Mitte des 19. Jahrhunderts das Sanskritwort „Arier" zur Bezeichnung einer indo-germanischen Sprachgruppe verwendet. Er bezeichnete die Sprecher der dieser Sprachgruppe angehörigen Völker als „arische Rasse." Die Idee der Konstruktion einer „volklichen Urrasse" aus dem Begriff Arier, der ursprünglich als Bezeichnung einer Sprachgruppe gedacht war, stand ihm fern. Vgl. Bein, Der moderne Antisemitismus und seine Bedeutung für die Judenfrage, in Vierteljahresschrift für Zeitgeschichte 6 (1958) 542.

10 De iure Indorum criminali (Berlin 1847).

11 Der Inbegriff der Rechtswissenschaft oder Juristische Encyclopedie und Methodologie (Berlin 1846).

12 Untersuchungen über die römische Ehe (Stuttgart 1853).

sind. K. Th. Pütter verfährt aber gleichermaßen sehr vorsichtig, was sich vor allem darin zeigt, daß er sich im allgemeinen der hypothetischen Verallgemeinerungen enthält.

Hervorzuheben ist dabei, daß die sog. arische oder indogermanische Richtung in vielerlei Beziehungen an die allgemeine Rechtsgeschichte anknüpft und davon eigentlich nur durch die Betonung der Rolle der Zugehörigkeit zum gemeinsamen Ethnikum abweicht.

3. Die sog. arische oder indogermanische Richtung kommt auch im Terrain der Erforschung der Institute des römischen Rechts zur Geltung. Anschaulich wird diese Feststellung durch die Forschungen von Rossbach dokumentiert. Er analysiert in seinem Buch[12] auf detaillierte Weise die unterschiedlichen Entstehungsarten der Ehe. Dabei nimmt er – im «rechtsvergleichenden Teil» des Buches – Bezug auf das indische, auf das griechische und auf das germanische Recht. Er betont im ersten Teil seines Werkes, daß die Frau überall bei den indogermanischen Völkern unter der *manus* des Ehemannes steht.[13] Nach Ansicht Rossbachs beruht die Eheschließung bei den verschiedenen indogermanischen Völkern im wesentlichen auf denselben Grundlagen. Indes betont er den ziemlich hypothetischen Charakter dieser Feststellung. Rossbach führt die Möglichkeit bzw. die Berechtigung der Vergleichung auf das Bestehen der engen Beziehungen und auf die Verwandtschaft unter den indogermanischen Völkern zurück, die noch durch «denselben Entwicklungsgang» verstärkt wird.

Erst im Laufe der letzten zwei Jahrzehnte des 19. Jahrhunderts kommt das Bestreben nach der Konstruierung des indogermanischen «Urrechts» zum Vorschein. Der Verfasser der «Graeco-italische(n) Rechtsgeschichte»,[14] Leist, unternimmt die Rekonstruktion des arischen *ius gentium*[15] und des arischen *ius civile*.[16] Die Betonung der indogermanischen ethnischen Gemeinschaft ist die Ursache dafür, daß der Verfasser – der übrigens die Methode der vergleichenden Sprachwissenschaft ohne Kritik übernimmt – der Analyse der Rechte der semitischen, der hamitischen und der anderen Völker bzw. ethnischen Gruppen *keine Aufmerksamkeit* widmet. Nebenbei sei bemerkt, daß Leist bei der Rekonstruktion des arischen Urrechts vor allem die Terminologie des römischen Rechts verwendet.

4. Für die Verbreitung derjenigen Theorie, die die Wurzeln des römischen Rechts im Recht der arischen Völker zu entdecken meint ist bezeichnend, daß selbst Rudolf von Jhering, der sich in seinen letzten Lebensjahren ebenfalls mit rechtsvergleichenden Forschungen befaßt hat, in seinem posthumen Werk[17] im wesentlichen dieser Richtung folgte. An dieser Stelle kann man natürlich nicht alle Aspekte des Verhältnisses zwischen Jhering und der Rechtsvergleichung erörtern. Es sei hierbei nur erwähnt, daß Jhering praktisch Vorläufer der modernen, sog. funktionellen Rechtsvergleichung ist. Bei Jhering spielt der sog. Kausalitätsgedanke, der die Analyse sowohl der internen als auch der externen Impulse voraussetzt, eine bedeutende Rolle. Im Bereich der sog. externen Impulse ist es notwendig, die Rechte der anderen Völker zu berücksichtigen. Die Analyse der sog. externen Impulse veranlaßt Jhering dazu, sich auch mit dem Rechte des «arischen Muttervolkes» zu befassen.

Das Rückgrat der «Vorgeschichte der Indoeuropäer» bildet die Untersuchung der Rechte und der Gewohnheiten der sog. indoeuropäischen Gemeinschaft. Für das Maß der Betonung der arischen Traditionen bei Jhering ist es bezeichnend, daß er die rechtsbezogenen Traditionen der semitischen Völker (der Babylonier, der Phönizier und der Karthaginenser) nur insoweit

13 Rossbach setzt die Entstehungsperiode der manus mit der der indogermanischen Familie gleich. Er formuliert wie folgt: „Die hausherrliche Gewalt und mit ihr die manus ist so alt wie die erste indogermanische Familie." Rossbach: o. c. 4.

14 Jena 1884.

15 Alt-arisches Ius gentium (Jena 1889).

16 Alt-arisches Ius civile I–II (Jena 1892).

17 Aus dem Nachlaß hrsg. von V. Ehrenberg (Leipzig 1894).

berücksichtigt, inwieweit deren Träger bzw. Vermittler für die Römer die *arischen* Völker sind. Auf die Unzulänglichkeiten dieses Werkes, die sich vor allem aus seinem posthumen Charakter ergeben, verweist der Herausgeber Ehrenberg. Er stellt fest, daß die Erhellung der Charakteristika des Rechts des «arischen Muttervolkes» schon deswegen unmöglich ist, weil dieses Volk über keine Staatlicheit verfügt hat.

Zu betonen ist immerhin, daß für Jhering das römische Recht sogar im Terrain der auf ethnischen Grundlagen beruhenden Rechtsvergleichung die maßgebende Rolle gespielt hat. Mit Rücksicht darauf ist die sog. arische Theorie in Jherings[18] Oeuvre zweifelsohne bloß als Mittel – als Grundlage der Vergleichung – zu interpretieren, welches der Darlegung der Geschichte des römischen Rechts dient.

5. Die arische Theorie kommt nicht nur bei den Vertretern der deutschen Rechtswissenschaft bzw. Rechtsgeschichte zum Vorschein. Der Forscher des armenischen Rechts, Amaduni, betont in seiner i. J. 1935 veröffentlichten Abhandlung[19] ebenfalls die gemeinsamen indoeuropäischen Wurzeln. Er zieht von der gemeinsamen indoeuropäischen Vergangenheit ausgehend Parallelen zwischen dem archaischen armenischen Staat und dem römischen Staat der Königszeit. Die Grundlage einiger Parallelerscheinungen, Parallelinstitute des römischen und des armenischen Rechts bildet seiner Auffassung nach das gemeinsame indoeuropäische Ethnikum.[20] Der Hinweis auf das gemeinsame indoeuropäische Ethnikum hat aber bei ihm keinen politischen Inhalt.

6. Im Gegensatz zu dieser Stellungnahme erwirbt die Betonung der gemeinsamen ethnischen Wurzeln in Deutschland im Laufe der 30-er Jahre des 20. Jahrhunderts eindeutig einen politischen Einschlag. Schönbauer hebt – mit der Absicht, daß die Anklage des Individualismus, die seitens der Machthaber dieser Periode gegen das römische Recht erhoben wird, zurückgewiesen werde – die Gemeinschaftsbezogenheit des *ius Romanum* hervor. Die Betonung dieser Gemeinschaftsbezogenheit des römischen Rechts kommt bei ihm in mehreren Artikeln zum Ausdruck.[21] Er versucht außerdem die gemeinsamen Charakteristika zwischen dem römischen Recht und den germanischen Rechten zu analysieren. Dieses Verfahren dient bei ihm zweifelsohne zur Verteidigung des römischen Rechtes. Er verweist dabei auf die. „indogermanische Blutsverwandschaft". Diese Idee konzipiert er *expressis verbis* in seinem 1936 am Deutschen Rechtshistorikertag in Tübingen abgehaltenen Vortrag *Vom Gemeinschaftselement im Bau der römischen Rechtsordnung.*

Schönbauer versucht in diesem Vortrag zu beweisen,[22] daß das Gemeinschaftsinteresse bei den Römern – jedenfalls bis zum Zeitalter des Prinzipats – dem Privatinteresse gegenüber Vorrang genossen hat. Außerdem sind seiner Meinung nach die Gemeinschaften der Römer als sog. Führungsgemeinschaften zu betrachten, die schon deswegen mit einer Art Garantie für Rücksichtnahme auf das Gemeinschaftsinteresse gleichbedeutend sind. Erwähnung verdient der Umstand, daß die für das römische Recht von Schönbauer vorgebrachten Argumente seitens

18 Influsso del diritto romano giustiniano sul diritto armeno e quantità di tal influsso, in Acta Congressus Iuridici Internationalis II (Roma 1935).

19 Amaduni schreibt folgendermaßen: „Fra il diritto romano e quello armeno vi fu certo un fondo comune, di provenienza etnica comune indo-europea… Un fondo comune tra due diritti fu l'identità etnica…". Amaduni, o. c. 257.

20 Zur Erklärung der lex metalli Vipascensis, (ZSS. Rom. Abt. 46/1926/), Untersuchungen zum Römischen Staats-und Wirtschaftsrecht (ZSS. Rom. Abt. 47/1927/), Studien zum Personalitätsprinzip in antiken Rechten, (ZSS. Rom. Abt. 49/1929/) und Zur Frage des Liegenschaftserbrechts im Altertum, in Atti der IV Congresso Internazionale di Papirologia (Milano 1936).

21 Conrad–Dulckeit, Bericht über den 5. Deutschen Rechtshistorikertag in Tübingen vom 12.–15. Oktober 1936 (ZSS. Rom. Abt. 57 (1937) 539 f.)

22 Was vermag die vergleichende Rechtswissenschaft zur Indogermanenfrage beizusteuern?, in Festschrift Hirt (Germanen und Indogermanen), (Berlin 1939).

der Germanisten (wie z. B. von Claudius von Schwerin) auf herben Widerstand stoßen. Die Germanisten sind auch weiterhin der Meinung, daß zwischen dem römischen Recht und den germanischen Rechten relativ große Unterschiede bestehen.

7. Die sog. arische Theorie schließt folglich auf der Grundlage der ethnischen Basis die Rechte der verschiedenen Völker zusammen. Die auch politisch motivierte arische Theorie verneint – und insoweit ist sie als eine Art Rassenideologie zu betrachten – grundsätzlich die Möglichkeit der Vergleichung der Rechte derjenigen Völker oder ethnischen Gruppen, die in keiner ethnischen Beziehung miteinander sind. Schönbauer z. B. verwirft praktisch aus diesem Grunde die Notwendigkeit bzw. Möglichkeit der Vergleichung der germanischen Rechte mit dem ägyptischen Recht.

Koschaker kritisiert diese Stellungnahme heftig; er geht davon aus, daß der Rasse im Terrain der rechtsgeschichtlichen Forschungen keine besondere Rolle zuerkannt werden kann.[23] Beachtung verdient die folgende Behauptung Koschakers: «Werden wir aber auf diesem Wege [d.h. auf der Basis der Rassenbeziehungen G.H.] wirklich zu dem Rechte des indogermanischen Urvolkes vordringen? Die Sprachvergleichung hat es schon lange aufgegeben, eine indogermanische Ursprache zu rekonstruieren, die zu einer bestimmten Zeit wirklich gesprochen wurde, und ein wenig von dieser Resignation ist vielleicht auch bei der Vergleichung von Rechtsinstituten am Platze. Was sie ergibt, sind bestenfalls Wegweiser, die über die Zeit der Wanderung in die Urzeit zeigen».[24] Koschaker ist weiterhin der Meinung, daß im Bereich der Analyse der antiken Rechte die sog. Kulturkreis-Theorie von geringer Bedeutung ist. Die Kulturkreis-Theorie, die zweifelsohne eine ethnische Prägung hat, gibt nämlich keine genügende Erklärung bezüglich der Konstruktion der Bürgschaft im Terrain der germanischen, slawischen und griechischen Rechte. Dasselbe bezieht sich auch auf das babylonische Recht.

Im Bereich der Analyse der konkreten Rechtsinstitute ist selbsverständlich nicht auszuschließen, daß die Rücksichtnahme auf die ethnischen Beziehungen ohne jedwede Form der Rassenideologie zum Vorschein kommt. In dieser Hinsicht sei auf die wohlbekannte Abhandlung von Condanari-Michler verwiesen.[25]

In dieser Abhandlung äußert er sich folgendermaßen: «Die sogenannte Verschuldenshaftung stellt sich als das Endergebnis einer Jahrhunderte währender Entwicklung dar, an der die großen Denker Griechenlands keinen geringeren Anteil haben als das vollendete Recht der Römer. Demgegenüber erscheint dann tatsächlich jene reine Erfolgshaftung als der Ausdruck eines längst überwundenen, rohen Zustandes der Kulturen. Daraus ergäbe sich der Schluß, daß Völker, die jene Erfolgshaftung als Grundsatz der Zurechnung von Schäden angewandt haben, als primitiv zu gelten haben. Wir werden sehen, daß der semitische Rechtskreis jenen Grundsatz in weitem Maße verwendet hat, und so mag es begreiflich erscheinen, daß versucht wurde, gegenüber der semitischen Erfolgshaftung ein arisches Prinzip der Verschuldenshaftung herauszustellen».[26] Anschließend betont er die zwischen den Römern und den Griechen bestehenden engen Beziehungen: «Innerhalb der alten Welt waren Rom und Griechenland in so enger Gemeinschaft verbunden, daß man von der griechisch-römischen Kulturgemeinschaft reden darf».[27]

Hier soll darauf verwiesen werden, daß Bernhöft bereits in den 80-er Jahren des 19. Jahrhunderts den äußerst relativen Wert der auf der ethnischen Grundlage beruhenden Beziehungen

23 Koschaker, Was vermag die vergleichende Rechtswissenschaft cit. 152.

24 Über Schuld und Schaden in der Antike, in Scritti in onore Ferrini, III (Milano 1948).

25 Condanari-Michler, o.c. 29.

26 Condanari-Michler, o.c. 31.

27 Zur Geschichte des europäischen Familienrechts. I. Stand der Frage, in Zeitschrift für vergleichende Rechtswissenschaft (8/1889) 19.

erkennt. Charakteristisch ist in dieser Hinsicht seine Äußerung: «Basken und Magyaren stehen uns in ihren Sitten und ihrem Recht viel näher als die indogermanisch sprechenden Inder».[28]

8. Die Theorie der indoeuropäischen Gemeinschaft findet sogar in der zweiten Hälfte des 20. Jahrhunderts Anhänger. Sie spielt vor allem im Terrain der Forschungen des archaischen *ius Romanum* eine bedeutende Rolle. Aufgrund dieser Theorie wären einige nicht mehr rekonstruierbare Institute des römischen Rechts auf der Basis der Konstruktionen der Rechte der indogermanischen Völker wieder rekonstruierbar. Raymond Bloch vertrat die Ansicht, daß die vergleichende Analyse der Rechte der indogermanischen Völker im Bereich der Untersuchung der Institute des archaischen römischen Rechts gerade zu unvermeidbar ist. Er betrachtet die auf diese Weise konzipierte Vergleichung nicht nur für zweckmäßig, sondern für geradezu notwendig. Er schreibt folgendermaßen: «Les problèmes qui se posent, divers, dans le monde du plus ancien droit romain doivent ... être envisagés en comparaison avec ce qui se passe à haute époque, chez les peuples indo-européens».[29]

Ihrem Wesen nach kann man auch die sog. Theorie der «unité italo-celtique», die aufs engste mit dem Namen von Antoine Meillet verknüpft ist, als eine Art der indogermanischen Theorie auffassen. Zu betonen ist aber, daß nach der vorherrschenden Meinung diese Theorie heute schon als überwunden, als «hypothèse incertaine» zu betrachten ist.[30] Nach Devoto soll das römische Recht im Rahmen der indoeuropäischen Rechte Platz finden.[31]

Die Annahme eines gemeinsamen prähistorischen Rechts ist – abgesehen von ihrem retrograden politischen Charakter – schon deswegen verfehlt, weil diese einen homogenen, einheitlichen historischen Entwicklungsgang voraussetzt. Die zweifelhafte Hypothese eines uniformen historischen Entwicklungsganges kann kaum zu fruchtbringenden wissenschaftlichen Ergebnissen führen, wie darauf in der Sekundärliteratur Volterra hinweist.[32]

Dumezil versucht z. B. die *confarreatio,* die *coemptio* und den usus des römischen Rechts mit den in Indien bekannten bzw. gebräuchlichen Eheschließungsriten zu vergleichen. Dabei entdeckt er viele Parallelen.[33] Gleichermaßen verfährt Devoto, der aber nur zwischen der *confarreatio* und der *coemptio* und den entsprechenden Instituten des ansonsten kaum homogenen indischen Rechts Parallelen zu entdecken versucht.[34]

9. Ohne Anspruch auf eine eingehende Analyse soll hier noch ganz kurz auf die Bewertung der Richtung der *antiken Rechtsgeschichte,* die vor allem mit dem Namen von Leopold Wenger verknüpft ist, eingegangen werden. Diese Richtung bekam ihren Namen vom Titel des in Wien gehaltenen Antrittsvortrags Wengers „Römische und *antike Rechtsgeschichte".*[35] Die antike

28 Réflexions sur le plus ancien droit romain, in Studi in onore Grosso, I (Torino 1968) 233.

29 Nur andeutungsweise sei in diesem Zusammenhang auf die folgenden Werke – deren Verfasser mehr oder weniger dieser Theorie Rechnung tragen – verwiesen: Bosch-Gimpera, Les Indo-européens, problèmes archéologïques (Paris 1961); Devoto, Origini indoeuropee, (Firenze 1962) und Mansuelli, Les civilisations de l'Europe ancienne (Paris 1966).

30 Inchiesta, 1956 – Studio e insegnamento del diritto romano. Labeo 2 (1956) 63. Charakteristisch für die Denkweise von Devoto ist der folgende Satz: „La scoperta della parentela delle lingue indoeuropee, della loro discendenza da una lingua antica comune, è stata una scoperta non soltanto linguistica. Unità di lingua vuol dire o unità di sentimento nazionale o unità di cultura." Devoto Parole giuridiche. Annali della R. Scuola Normale Superiore di Pisa Serie II, II (1933) 225–240 col titolo: I problemi del più antico vocabolario giuridico romano. = Devoto, Scritti minori, I (Firenze 1958).

31 Istituzioni di diritto romano (Roma 1961) 330.

32 La religion romaine archaïque (Paris 1966) 585 ff.

33 Origini indoeuropee cit. 323. 34 Graz 1905.

34 Hinsichtlich der Herkunft des Punktes 19 des ersten Parteiprogramms der NSDAP S. Pieler, Das römische Recht im nationalsozialistischen Staat in Nationalsozialismus und Recht. Rechtssetzung und Rechtswissenschaft in Österreich unter der Herrschaft des Nationalsozialismus (Wien 1990) 427 ff.

Rechtsgeschichte erfüllt eine sehr wichtige kulturpolitische Mission nach der Machtergreifung der Nationalsozialisten in Deutschland dadurch, daß das römische Recht als Unterrichtsdisziplin an den juristischen Fakultäten in deren „Mantel" gerettet werden kann. Dabei soll der bekannte Punkt 19 des Parteiprogramms der NSDAP, welches am 24. Februar 1920 verabschiedet wurde, in Erinnerung gebracht werden: „Wir fordern Ersatz für das der materialistischen Weltordnung dienende römische Recht durch ein deutsches Gemeinrecht".[36] In bezug auf das römische Recht äußert sich Alfred Rosenberg folgendermaßen: „Dieses seelenlos und unvölkisch fortgebildete Erzeugnis des späten syrisch-römischen Zersetzungsprozesses [d.h. das römische Recht G.H.] hat den ungeheuerlichsten Volksausbeutungen noch den Titel des Rechts verliehen. Das Interesse des Einzelnen wurde zum Götzen erhoben und ihm alle Möglichkeiten der Verteidigung zur Sicherstellung seiner sogenannten „Rechte" gewährleistet. Ob die Rechte der Allgemeinheit dadurch gefährdet waren, war gleichgültig." Die Rezeption des römischen Rechts in Deutschland wird mancherorts in der Sekundärliteratur der 30-er Jahre des 20. Jahrhunderts als „Unglück" und „Tragik" betrachtet.[37]

Die Vertreter der *antiken Rechtsgeschichte* – vielleicht mit der einzigen Ausnahme von Schönbauer – setzen keine ethnischen Grenzen in der Vergleichung der Rechte antiker Völker bzw. Staaten. Die *antike Rechtsgeschichte* ist wohl mit Recht als eine Art „neuhumanistische" Richtung bzw. Theorie zu betrachten, die gleich der *Humanistischen Schule* alle rekonstruierbaren Rechte der antiken Welt in ihr Forschungsfeld einzubeziehen versucht. Andererseits nennt Koschaker die antike Rechtsgeschichte als „ein echter Sproß der geschichtlichen Orientierung der neuesten, namentlich der deutschen Romanistik", die das römische Recht unter den antiken Rechten praktisch in den Hintergrund drängt.[38]

Die Erforschung der Rechte der antiken Völker setzt keineswegs das Vorhandensein eines einheitlichen antiken Rechtes voraus. Darauf verweist *expressis verbis* Wenger: „Ein antikes Recht im Sinne eines international gültigen Rechts hat es ebensowenig gegeben, wie etwa eine antike Sprache. Gerade die antiken Rechte sind von Haus aus grundsätzlich national, geradeso wie die Religionen der heidnischen Staatenwelt. Wohl hat es internationale Vereinbarungen innerhalb der Mittelmeerstaaten gegeben; wohl hat es gemeinsame Rechtsbräuche gegeben, aber sie bedeuteten nur faktisch gemeinsames Recht."[39] Nicht einmal das bei den Römern bekannte *ius gentium* ist als Dokument des einheitlichen antiken Rechtes zu betrachten. Wohl mit Recht schreibt Wenger diesbezüglich: „Wohl kennen die Römer ein international gedachtes *ius gentium* und bilden es aus, aber wie sich die anderen Völker und Staaten zu diesem von römischem Standpunkt aus erprobten *ius gentium* verhielten, wissen wir kaum und werden es kaum je ergründen können."[40]

Die antike Rechtsgeschichte ist – im weitesten Sinne – derjenige Teil der *Kulturgeschichte des Altertums,* der sich mit dem Recht und dem Staat der Antike befaßt, wobei natürlich nicht außer Acht zu lassen ist, daß unter den Vertretern dieser Richtung nicht selten wesentliche Meinungsverschiedenheiten herrschten. Als dominierende Tendenz ist jedenfalls festzustellen, daß bei der überwiegenden Mehrheit der Vertreter dieser Richtung der auf der Rassenideologie beruhende ethnische Aspekt keine Rolle spielt. Nach Ansicht Wengers gibt es nicht nur eine, vor

35 Die Spuren der negativen Einschätzung der Rezeption des römischen Rechts in Deutschland lassen sich bereits auf das 19. Jahrhundert zurückführen. Vgl. Bender, Die Rezeption des römischen Rechts im Urteil der deutschen Rechtswissenschaft (Frankfurt am Main 1979). Vgl. noch Koschaker: Europa und das römische Recht (München-Berlin 19664) 300.

36 Koschaker, Die Krise des römischen Rechts und die romanistische Rechtswissenschaft (München-Berlin 1938) 45.

37 Der heutige Stand der römischen Rechtswissenschaft. Erreichtes und Erstrebtes (München 1927) 4.

38 Der heutige Stand cit. 4.

39 Wenger, Wesen und Ziele der antiken Rechtsgeschichte, in Studi Bonfante II (Milano 1930) 475.

40 Archi, Storia del diritto romano e storia dei diritti antichi da Wenger a noi in Studi Donatuti I (Milano 1973) 44 ff.

allem auf das Privatrecht bezogene *antike Rechtsgeschichte,* sondern es existiert auch eine *„antike Staatsrechtsgeschichte."*[41] Die *„antike Staatsrechtsgeschichte"* setzt ebenso die Gleichrangigkeit der antiken Rechte voraus. Das Interesse für die Struktur des Staates ist sowohl in Deutschland als auch in Österreich besonders nach dem ersten Weltkrieg enorm gewachsen. Dieses Interesse macht sich auch im Terrain der Staatsrechtsgeschichte bemerkbar, wie darauf Archi hinsichtlich der *antiken Rechtsgeschichte* verweist.[42] Dies hat vom Standpunkte unserer Untersuchung her insofern Bedeutung, daß wir von einer Gleichrangigkeit der antiken Rechte nicht nur im Bereich des Privatrechts – bei den Anhängern der *antiken Rechtsgeschichte* – sprechen können.[43]

Die *antike Rechtsgeschichte* ist eigentlich mit einer „territorialen Ausdehnung"[44] des römischen Rechts gleichbedeutend, wobei – allerdings auf den ersten Blick – die „zeitliche Ausdehnung" des römischen Rechts von geringerer Bedeutung zu sein scheint. Diese „territoriale Ausdehnung" als Voraussetzung objektiver Natur ist grundsätzlich im krassen Gegensatz zur Rücksichtnahme auf jedwede Form von ethnischen Kriterien. Auf diesen Umstand läßt sich letzten Endes zurückführen, daß die Anhänger, die angesehensten Vertreter der *antiken Rechtsgeschichte* oder der *antiken Staatsrechtsgeschichte* sich nicht an ethnischen Kriterien – die öfters die Keime der Rassenideologie in sich bergen – orientieren.

SUMMARY

The trend of the "antike Rechtsgeschichte" and the etnical based comparative-law research

Concerning the research of the comparative-law the periodical called the "Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes" – founded in 1829 and edited by Karl Joseph Anton Mittermaier and Carl Salomo Zachariae – played a significant role in Germany. The appearance of this periodical was like a "declaration of war" to the Historical Law School (Historische Rechtsschule), which rejected any kind of tendency concerning the comparative law. The comparative philology – where the so-called "aria" or "indogerman" trend gets an important role – has a major influence on the comparative research of antic law.

The representatives of the Comparative Law School tried to find the relative or discordant elements between those constructions. There has been – and are even today – attempts to outline the characteristics of the indogerman "ancestor-law". The representatives of this School believe that the similarities between these law-institutions are founded on ethnical base. This theory, the trend of "antike Rechtsgeschichte" founded by Leopold Wenger, still had its believers in the early years of the 20th century. Defining this "antike Rechtsgeschichte" we find a comparative-law school, concentrating on antic law, territorially increases the researches and acknowledges the equality between ethnics.

41 Erbe bietet einen guten Überblick über das Verhältnis der antiken Rechtsgeschichte zur Rechtsvergleichung. Erbe, Der Gegenstand der Rechtsvergleichung, in Rabels Zeitschrift für ausländisches und internationales Privatrecht 14 (1942) 217 ff.

42 De Zulueta verwendet den Ausdruck „extension de localité". Vgl. De Zulueta, L'Histoire du droit de l'antiquité, in Mélanges Fournier (Paris 1929) 804

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Befriedigungsrangfolge im Vollstreckungsverfahren

1. Einführung

Im Vollstreckungsverfahren, wenn es mehrere Forderungen eintreiben will, das Interesse derjenigen, die am Verfahren teilnehmen, sind natürlich entgegensetzt. Besonders wenn die Summe, die im Verfahren behauptet wurde, nicht alle Forderungen befriedigen kann. Aus diesem Grund muss die Situation gelöst werden, wenn mehr Gläubiger an einem Fall interessiert sind, ohne ihre Erwartungen erfüllt worden zu sein. In diesem Fall ist die wichtigste Frage, in welcher Reihenfolge die Gläubiger befriedigt werden.

2. Grundprinzipien der Befriedigung

Im Vollstreckungsverfahren, wenn es mehrere Beitreibungen[1] von Schulden eingetrieben werden sollten und die eingegangene Summe nicht alle Ansprüche befriedigen kann, muss eine Reihenfolge der Befriedigung festgestellt werden. In den Rechtssystemen werden grundsätzlich drei verschiedene Prinzipien unterscheidet: das Prioritätsprinzip, das Ausgleichsprinzip und das Prinzip der Befriedigung laut Rechtstiteln.

Das Prioritätsprinzip bedeutet, wer früher das Verfahren[2] gegen den Schuldner eingeleitet hatte, dessen Ansprüche werden früher aus der Summe beglichen. Das Ausgleichsprinzip (oder Prinzip der Verlustgemeinschaft) bedeutet, dass alle konkurrierenden Gläubiger anteilmäßig am Vollstreckungserlös partizipieren, entsprechend der Höhe des Anspruchs eines jeden. Das Prinzip der Befriedigung laut Rechtstiteln bestimmt aber die Reihenfolge der Befriedigung danach, wessen Forderung die Rechstvorschrift wichtiger feststellt.

1 Die Beitreibungen können dieselbe Person betreffen, aber in den meisten Fällen sind sie verschieden.
2 Im deutschen Rechtssystem ist von größter Bedeutung, wer zuerst die Abfassung hatte, in dem angelsächsischen Bereich zählt der Zeitpunkt, wo die entsprechende Schrift beim Scheriff eintrifft.

In Deutschland,[3] in den Vereinigten Staaten[4] oder in England[5] wird das Prioritätsprinzip berücksichtigt. Im italienischen,[6] französischen, spanischen, nederländischen, japanischen und griechischen[7] Recht gilt das Ausgleichsprinzip als primär. Meistens folgten die ehemaligen sozialistischen Länder[8] wie auch Ungarn dem Prinzip der Befriedigung laut Rechtstiteln. Die oben ganannten Befriedigungsprinzipien werden in keinem Rechtssystem vollkommen durchgesetzt, es kommen immer Abweichungen in Richtung anderer Prinzipien vor.

3. Internationaler Ausblick

Im Nachfolgenden stelle ich am Beispiel von Griechenland, Deutschland und Rumänien vor, wie die drei Prinzipien funktionieren, oft miteinander ergänzt.

Wie ich schon oben erwähnt habe, in Griechenland bestimmt das Ausgleichsprinzip die Reihenfolge der Befriedigung. Nach diesem System partizipieren bekanntlich alle konkurrierenden Gläubiger anteilmäßig am Vollstreckungserlös, d. h. entsprechen der Höhe des Anspruchs eines jeden. Weder der Entstehungszeitpunkt der kollerierenden Ansprüche noch die Art des Titels, auf dem sie beruhen, spielen eine Rolle. Es ist gleichgültig, ob der Anspruch auf einem rechtskräftigen Urteil, einer öffentlichen oder privaten Urkunde oder auf gar keiner Urkunde beruht. An das Vollstreckungsverfahren können sich diverse Gläubiger anschließen durch das Instrumentarium der Forderungsanmeldung (anagelia), zeitlich haben aber sich früher anmeldende Gläubiger gegenüber sich später anmeldenden ebenfalls kein Vorrecht.[9] Die Gläubiger sind gleichberechtigt, insofern ihre Ansprüche keine Vorrechte genießen. In dem griechischen Rechtsystem wirkt also das Ausgleichsprinzip als entscheidend. Dieser Gleichheitssatz wird jedoch durch viele Ausnahmen durchbrochen. Bei der Zwangsvollstreckung in sowohl das bewegliche als auch das unbewegliche Vermögen gibt es viele mit Vorrechten versehene Ansprüche, die vor den übrigen befriedigt werden. Es gibt Vorrechte zweier Arten: diejenigen, die ein Recht auf bevorzugte Befriedigung aus dem ganzen Vermögen des Schuldners erlauben, und diejenigen, die dieses Recht nur für die Befriedigung aus speziellen Vermögensgegenständen vorsehen, die in einem besonderem Zusammenhang mit dem Anspruch stehen. Die ersten nennt man allgemeine (genika pronomia), die letzteren spezielle Privilegien (edika pronomia).[10]

Zu den allgemeinen Vorrechten gehören die nächsten Ansprüche:

– Ansprüche aus der Beerdigung oder Krankenpflege des Schuldners, seines Ehepartners und seiner Kinder,
– Ansprüche aus der Lieferung der nötigen Lebensmittel für die Ernährung des Schuldners, seines Ehepartners und seiner Kinder,
– Ansprüche aus der Leistung unselbstständiger Arbeit sowie Ansprüche von Lehrgeldern,

3 S. Ilona BERTALANNÉ KOREK: Ingatlanvégrehajtás a német jogban. In: Magyar Jog 1997/8. S. 507.
4 S. Mátyás KAPA: Végrehajtási eljárás az Amerikai Egyesült Államokban. In: Magyar Jog 2002/12. S. 753.
5 S. Erzsébet KORMOS: Dióhéjban az angol bírósági végrehajtásról. In.: Publicationes Universitatis Miskolciensis, Sectio Juridica et Politica, Tomus XVI., Miskolc, 1999. S. 60.
6 Codice di Procedura Civile. Art. 510, 541, 596. (www.studiocelentano.it/codici)
7 S. Pelayia YESSIOU-FALTSI: Das Ausgleichsprinzip im griechisen Zwangsvollstreckungsrecht im Unterschied zum deutschen Prioritätsprinzip. In: Zeitschrift für Zivilprozess. 1993, Band 106/1993, No. 2., S. 217.
8 S. István VIDA: A bírósági végrehajtás. Budapest, 1978. S. 450.
9 S. Pelayia YESSIOU-FALTSI: a. a. O., S. 216-217., 219.
10 S. Pelayia YESSIOU-FALTSI: a. a. O., S. 219.

– Ansprüche der Anwälte aus Entgelten, Entschädigungen und Spesen,
– fällige Ansprüche des Staates mit allen Zulagen und Zinsen,
– Sozialversicherungsansprüche.
Spezielle Vorrechte sind die Nächsten:
– Ansprüche aus Ausgaben für die Erhaltung des Gegenstandes,
– Ansprüche, für welche ein Pfandrecht oder eine Hypothek besteht,
– Ansprüche, welche die Kosten für die Erzeugung und die Ernte der Früchte betreffen.[11]
Im Falle, wenn sich mehr als ein bevorzugter Gläubiger anmelden, um aus dem Versteigerungserlös derselben Mobilie oder Immobilie befriedigt werden, muss unerlässlich eine Reihenfolge festzulegen, es wird dem folgendem Prinzip gefolgt: allgemeine Vorrechte haben gegenüber speziellen den Vorrang. Aber dieses Prinzip kann auch nicht als allgemein gültig anerkannt werden. Wenn mehrere Gläubiger mit allgemeinen oder speziellen Vorrechten zusammentreffen, ist für ihre Befriedigung die Reihenfolge ihrer Aufzählung in Art. Falls mehrere gleichrangige privilegierte Ansprüche vorkommen, z. B. mehrere Ansprüche mit dem allgemeinen Vorrecht aus der Leistung unselbstständiger Arbeit oder mit speziellem Vorrecht der Ausgaben, dann werden diese anteilsmäßig befriedigt. Dieses Prinzip gilt aber nicht für die dingliche Sicherung: mehrerer Ansprüche mit Pfand- oder Hypothekenrecht werden nicht anteilsmäßig, sondern in prioritärer Reihenfolge befriedigt. Diese Ansprüche werden also nach dem Pfandentstehungszeitpunkt oder der Hypothekeneintragung befriedigt.

Unter den Glaubigern, die kein Vorrecht genießen (egheirographoi), kommt die Hauptregel – die anteilsmäßige Befriedigung nach dem Ausgleichsprinzip – zur Geltung. Anteilsmäßige Befriedigung bedeutet Befriedigung gemäß dem Anspruchsumfang jedes Gläubigers. Der Teil des Versteigerungserlöses, der jedem Gläubiger zusteht, wird durch den einfachen Dreisatz kalkuliert.[12]

Die Verteilung des Versteigerungserlöses an die konkurrierenden Gläubiger wird durch die Aufstellung des sogenannten Teilungsplans (pinakas katataxeos) verwirklicht, welcher die Reihenfolge und die Bedingungen für die Befriedigung der Gläubiger festlegt. Dieser Teilungsplan, der als Prozeßhandlung der Zwangsvollstreckung gilt, wird von einem Notar aufgestellt, der als Zwangsvollstreckungsorgan funktioniert. Gegen den Teilungsplan können die Gläubiger Einspruch erheben, darüber entscheidet das Gericht. Es gibt materiellrechtliche und prozessuale Widerspruchsgründe. Materiellrechtlich sind diejenigen Gründe, die den Anspruch des Widerspruchsklägers, des beklagten Gläubigers oder des Schuldners angehen. Prozessual sind Gründe, die die Klassifizierungsart der Gläubiger, bevorzugter oder nicht bevorrechtigter, angehen.

In Deutschland kommt auf dem Gebiet der Befriedigungsreihenfolge das Prioritätsprinzip zur Geltung, und zwar in solchem Ausmaß, dass in der Rechtsliteratur das deutsche Recht als Musterbeispiel dieses Prinzips erwähnt wird. Jedoch können wir bei der Prüfung der deutschen Regelung feststellen, dass bei der Verteilung des aus dem verkauften Gegenstand stammenden Versteigerungserlöses, bei der Aufstellung der Rangfolge neben dem Zeitpunkt der Pfändung auch der Rechtstitel der Forderungen von Bedeutung sein können.

In Deutschland durch die Pfändung erwirbt der Gläubiger ein Pfändungspfandrecht an dem gepfändeten Gegenstand. Falls nach dem Verkauf des gepfändeten Gegenstandes auch von Berechtigten anderer Pfand- oder Vorzugsrechte Anspruch erhoben wird, aus dem Versteigerungserlös eine vorteilhafte Befriedigung zu gewinnen, und der eingeflossene Betrag nicht ausreicht, alle Ansprüche zu befriedigen, so richtet sich die Verteilung des eingeflossenen Verkaufspreises nach der Rangfolge der Rechte. Der Rang des Pfändungspfandrechtes entwickelt sich im Vergleich zu anderen Rechten folgendermaßen:

11 S. Pelayia YESSIOU-FALTSI: a. a. O., S. 223-226.
12 S. Pelayia YESSIOU-FALTSI: a. a. O., S. 227.

a) Das Pfändungspfandrecht kommt immer jenen Pfand- und Vorzugsrechten zuvor, die im Laufe des Insolvenzverfahrens nicht unter die selbe Beurteilung wie das Faustpfandrecht fallen, auch in dem Fall, wenn das Pfändungspfandrecht erst später entstanden ist.

b) Gegenüber jenen Pfand- und Vorzugsrechten, die im Laufe des Insolvenzverfahrens unter die selbe Beurteilung wie das Faustpfandrecht fallen[13] (z.B. gesetzliches Pfandrecht des Vermieters), bewirbt sich das Pfändungspfandrecht um den Rang. Das früher gegründete Recht kommt in der Rangfolge dem später entstandenen Recht voraus.

c) Im Fall von mehreren Pfändungspfandrechten kommt das Prioritätsprinzip zur Geltung: das früher gegründete Pfandrecht kommt dem später zustande gekommenen Recht voraus. Dies gilt auch im Fall, wenn der Gläubiger, zugunsten dessen das Pfandrecht später zustande kam, in gutem Glaube annahm, dass früher kein Pfandrecht auf den Gegenstand bestand. Der gute Glaube der die Vollstreckung fordernden Person hat nämlich- da das Pfändungspfandrecht nicht auf rechtlichem Wege entsteht- keine Bedeutung.[14]

In der obigen Lösung konkurrieren in der Tat Pfandrechte. Der Rechtsschöpfer beurteilt das im Laufe der Pfändung entstandenen Pfändungspfandrecht ähnlich wie das Faustpfandrecht, und ordnet die durch das Pfandrecht bekräftigten Forderungen vor die anderen. Das Prioritätsprinzip sichert nur unter den Pfandrechten einen Vorrang, was aus jenem Grund kein Kuriosum bildet, da unter den Pfandrechten – nach den Regeln des materiellen Rechtes – auch in anderen Rechtssystemen das Prioritätsprinzip entscheidend ist. Die charakteristische Spezialität der deutschen Regelung besteht also daraus, dass während der Pfändung das Pfandrecht entsteht, und die dahinter stehende Forderung dementsprechend gereiht werden soll.

Falls der Versteigerungserlös nicht ausreicht, die Forderungen aller Gläubiger zu befriedigen und die Verteilung zum Gegenstand einer Diskussion wird, hinterlegt der Gerichtsvollzieher den eingeflossenen Betrag und benachrichtigt das Gericht über den Sachverhalt. Das Gericht klärt die Befriedigungsrangfolge der endgültigen Gläubiger in einem Verteilungsverfahren, und entscheidet über die Verteilung des Versteigerungserlöses. Gegen die Entescheidung des Gerichtes können die Beteiligten Widerspruch erheben.[15]

Die Zwangsvollstreckung in das unbewegliche Vermögen hat in Deutschland drei Wege. Im Fall der Anwendung *der Eintragung einer Sicherungshypothek* kommt es im Rahmen eines Vollstreckungsverfahrens zur Eintragung ins Grundbuch. Diese Rechtsinstitution entspricht einer Versicherungsmaßnahme in Ungarn. Im Fall der *Zwangsverwaltung* bleiben die Immobilien im Eigentum des Schuldners, die Begleichung erfolgt aus dem Ertrag, für die mit den Immobilien zusammenhängende Bewirtschaftung wird ein Sperrenverwalter ernannt. Das ungarische Recht kennt in dieser Hinsicht keine entsprechende Rechtsinstitution. In Ungarn kann es bei der Vollstreckung der Versicherungsmaßnahmen dazu kommen, dass die Immobilien zur Verwaltung einem Sperrenverwalter übergeben werden, im Fall einer Befriedigungsvollstreckung kann es aber bei den beschränkt in Umsatz zu bringenden Wertpapieren – unter Mitwirkung des Sperrenverwalters – zur Befriedigung aus dem Ertrag kommen.[16] Bei der *Zwangsversteigerung* wird die Forderung durch den Verkauf der Immobilien befriedigt.[17] Letzterer enspricht der in ungarischem Recht angewendeten Immobilien-Vollstreckung, so beschäftigen wir uns in Weiterem mit dem Thema der *Zwangsversteigerung.*

13 InsO. 50. § II. und 51. §

14 S. Hans BROX – Wolf-D. WALKER: Zwangsvollstreckungsrecht. Köln, Berlin, Bonn, München, 2003. (BROX-WALKER: Zwangsvollstreckungsrecht) S. 232-233.

15 BROX-WALKER: Zwangsvollstreckungsrecht S. 285-289.

16 S. János NÉMETH – István VIDA: A bírósági végrehajtás magyarázata. (szerk: János NÉMETH – Daisy KISS) Budapest, 2004. S. 619, bzw. S. 824-827.

17 Ilona BERTALANNÉ KOREK: a. a. O., S. 507, bzw. BROX-WALKER: Zwangsvollstreckungsrecht S. 491

Im Rahmen der Zwangsversteigerung wird die Versteigerung vom Gericht auf Antrag des Gläubigers durch einen Beschluss verordnet, und das Gericht sucht die Grundbuchbehörde auf, damit sie die Verordnung der Versteigerung ins Grundbuch einträgt.[18] Nach der Anordnung der Versteigerung können sich auch die anderen Gläubiger des Schuldners der Möglichkeit bedienen, sich am Verfahren teilzunehmen.[19] Nach der Versteigerung wird im Rahmen des sog. Verteilungsverfahrens festgestellt, auf welche Weise sich die einzelnen Berechtigten an dem Versteigerungserlös beteiligen können. Im Rahmen dieses Verfahrens wird vom Gericht ein Verteilungsplan erstellt, und die Interessenten können Widerspruch gegen das im Plan gefasste erheben. Im Bereich der Anspruchsbefriedigung kommt eine spezifische Reihenfolge zur Geltung. Vor allem sind die Kosten des Verfahrens zu bezahlen, danach werden bestimmte Forderungen den anderen vorangehend befriedigt. In der Befriedigungsreihenfolge stehen – unter anderen – die im Zusammenhang mit der Zwangsverwaltung aufgetauchten Kosten, die Lohnforderungen des Personals der land- und lorstwirtschaftlichen Betriebe, die den Grundstück belastenden Gemeinlasten, sowie die aus dem sachlichen Recht stammenden Forderungen an den vorderen Stellen.[20] Unter den Forderungen vom gleichen Rechtstitel bzw. im Bezug auf die nicht privilegisierten Forderungen ist das Prioritätsprinzip entscheidend, in dieser Hinsicht ist der Zeitpunkt der Eintragung der Zwangsversteigerung ins Grundbuch maßgebend.

Im rumänischen Recht ist das Prinzip der Befriedigung laut Rechtstiteln als Grundregel zu betrachten. Aus der Summe der im Laufe der Vollstreckung eingeflossenen Beträge sollen in erster Stelle die im Zusammenhang mit der Geltendmachung der Forderung entstandenen Kosten (Prozesskosten, Kosten der Versicherungsmaßnahmen, Vollstreckungskosten, etc.) befriedigt werden. Zu den privilegisierten Forderungen gehören noch – unter anderen – der Arbeitslohn, die Unterhaltskosten für die Kinder, die Beerdigungskosten, die Gemeinschulden, und die Ersetzung der dem Staat verursachten Schaden. Die Zinsen und die sonstigen Abgaben werden in der gleichen Reihenfolge wie die Hauptforderungen bezahlt. Die Forderungen vom selben Rang müssen proportional beglichen werden. Bei den mit Faust- oder Hypothekenrecht gesicherten Forderungen wird der Pfandberechtigte aus dem vom Pfandgegenstand eingebrachten Betrag an zweiter Stelle hinter den im Zusammenhang mit der Geltendmachung des Anspruches aufgetauchten Kosten befriedigt.[21]

Der Verteilungsplan wird vom Gerichtsvollzieher erstellt, und ins Protokoll aufgenommen. Gegen den Verteilungsplan kann jeder Gläubiger innerhalb von 3 Tagen nach Erstellung des Protokolls Widerspruch (contestaţie) einlegen. Der Widerspruch wird vom Gericht im Rahmen eines ausserordentlichen Verfahrens, mit Anhörung der Parteien zensiert.[22]

4. Die ungarische Regelung

Im ungarischen Recht galt früher – laut des Gesetzes über das Vollstreckungsverfahren aus dem Jahr 1881 – eine Regelung, die dem deutschen ähnlich war. Wie die Gläubiger befriedigt werden *bei der Zwangsvollstreckung in das bewegliche Vermögen,* das wurde nach der Reihenfolge der

18 BROX-WALKER: Zwangsvollstreckungsrecht S. 492, S. 496.
19 BROX-WALKER: Zwangsvollstreckungsrecht S. 501-502.
20 BROX-WALKER: Zwangsvollstreckungsrecht S. 538. und 512.
21 Codul de procedurâ civilâ (Rumänischer Kodex des Bürgerlichen Verfahrens) § 563-565. In: LaZi – Codul de procedurâ civilâ. Bucureşti, 2005, S. 125-126.
22 Codul de procedurâ civilâ (Rumänischer Kodex des Bürgerlichen Verfahrens) § 570. In: LaZi – Codul de procedurâ civilâ. Bucureşti, 2005, S. 127.

Pfändungen bestimmt. Die Gläubiger wurden also nach der zeitlichen Reihenfolge ihrer Pfändungen befriedigt. Zum anderen mussten aber die Ansprüche derjenigen, die vor der Pfändung mehr Vollstreckungen beansprucht haben, „auf einmal und zusammen" befriedigt werden. Wenn der Kaufpreis der Mobilien die Ausgaben nicht decken konnte, dann waren die Gläubiger nach der Proportion ihrer Forderungen befriedigt.[23] Die bewegliche Sachen, die schon gepfändet worden waren, konnten nur „übergepfändet" werden,[24] diejenigen aber, die sich ans Verfahren später angeschlossen haben, hätten nur dann vom Verkaufpreis teil, wenn der ursprüngliche Berechtigte schon völlig befriedigt wurde.

Da die Forderungen gewährt werden mussten, hatte das Gericht das Pfändungspfandrecht (In Ungarn: Vollstreckungspfandrecht) von der Grundbruchamt übernommen,[25] und der Zeitpunkt dieser Bemerkung hat die Reihenfolge der Befriedigung bestimmt.

Es galt also in dem ungarischen Privatrecht vor dem zweiten Weltkrieg das Prioritätprinzip sowohl im Vollstrechungsverfahren der Mobilien, als auch der Immobilien. In verschiedenen Rechtsvorschriften wurden aber mehrere Ausnahmen von dem Grundsatz der zeitlichen Priorität festgestellt, für mehrere privilegierte Forderungen sind sogenannte Vorzugsansprüche abgesichert worden.

Man kann zwischen die Vorzugsrechte, welche bei der Aufteilung des Versteigerungserlös, aus der Verkauf der Mobilien sind, u.a. die folgende erwähnen: die gesetzliche Priorität des Schatzamtes (z. B. gesetzliches Pfandrecht hat den übertragte Vermögensgegenstand für die Versicherung von der Gebühr zur Vermögensübertragung belastet) dem Vermieter und dem Verpächter zustehendes Pfandrecht, das Vorzugsrecht von Gewerbetreibenden auf ihre Wertsachen, das Pfandrecht der Arbeiter, der Hilfsarbeiter auf durch ihre Arbeit erworbenes Gehalt in bares oder in landwirtschaftliches Produkt.[26]

Durch den Verkauf der *Immobilien* konnten bestimmte, mit den Immobilien verbundene Gemeinsteuern (z. B. Grund- und Haussteuern), Gebühren (z.B. Vermögensübertragungsgebühr), und im Bezug auf den an der Versteigerung der Wirtschaftsimmobilien eingeflossenen Kaufpreis – nach den Gemeinlasten – die sich auf den „wirtschaftlichen Arbeitsverhältnissen" beruhenden Forderungen eine vorteilhafte Befriedigung gewinnen.[27]

Wenn in der Zwangsvollstreckung in das bewegliche Vermögen mehr Gläubiger teilgenommen hatten, und die durch den Versteigerungserlös nicht alle Ansprüche befriedigt werden konnte, mussten sich die Beteiligten sofort nach der Verhandlung über die Verteilung der Summe vereinbaren. Nachdem diese Vereinbarung getroffen worden ist, wurde ein Protokoll aufgenommen und der Gerichtsvollzieher hat die eingegangene Summe sofort gezahlt. Wären die Gläubiger nicht übereingekommen, dann wurden die Summe und die Wertsachen zur Sicherheitsleistung hintergelegt. In diesem Fall wurde eine gerichtliche Verhandlung gehalten, wo eine Entscheidung für die Reihenfolge felstgestellt wurde, gegen die Berufung zulässig war.[28]

Das Gericht hat amtliche Verhandlung über die Frage von der Reihenfolge der Befridigung in der Sache Zwangsvollstrechkung in das unbewegliche Vermögen angesetzt, an dem Verteilungstermin wurden die Interessenten angehört und die einzelne Forderungen wurden zu Protokoll genommen – die bemängelte und die mit Bemängelung nicht betroffene Forderungen in verschiedenen Rubiken. Das Gericht hat über die Reihenfolge der Befriedigung

23 S. Das Gesetzes über das Vollstreckungsverfahren aus dem Jahr 1881. § 86.
24 S. Das Gesetzes über das Vollstreckungsverfahren aus dem Jahr 1881. § 70.
25 S. Jenő BACSÓ: A végrehajtási eljárásjog tankönyve. Debrecen, 1917., S. 130-131., bzw. Andor SÁRFFY: A végrehajtási eljárás jogszabályainak magyarázata. Budapest, 1938., S. 361.
26 S. SÁRFFY: a. a. O., S. 309-312.
27 S. SÁRFFY: a. a. O., S. 483-493.
28 S. SÁRFFY: a. a. O., S. 300., 305-306.

einen Beschluss gefassen, in dem das Gericht selbst über einige Bemängelungen entscheidet hat (z.B. in der Sache von Steuern und Gebühre, welche als vorveilhafte Posten eingemeldet sind).Andere wurden auf der Prozessweg verwiesen, d. h. dass einige Streitfragen auf ihrem eigenem Prozessweg geregelt werden konnten.[29]

Solange das Prioritätsprinzip im ungarischen Recht vor dem zweiten Weltkrieg galt, betrachtete das Gesetzes über das Vollstreckungsverfahren aus dem Jahr 1955 das Prinzip der Befriedigung laut Rechtstiteln als das wichtigste Prinzip der Befriedigung. Das Ausgleichsprinzip und das Prioritätsprinzip funktionierte nur als Hilfe. Dieses Regelungssystem reservierte das Gesetzes über das Vollstreckungsverfahren aus dem Jahr 1979, und auch das heute geltende Vollstreckungsgesetz.

Die Richtlinien des heutigen Vollstreckungsverfahrens basieren auf dem Prinzip der Befriedigung laut Rechtstiteln, wenn die Summe, die durch die Versteigerug eingegangen ist, nicht alle Ansprüche befriedigt werden kann. Nachdem die Vollstreckungskosten befriedigt worden sind, können die nächsten Geldforderungen befriedigt werden: der Kinderunterhaltsbeitrag, andere Unterhaltsbeiträge, der Arbeitslohn und das Gehalt, das dem Arbeitslohn gleichgestellt werden kann, dem Staat zu bezahlende Strafgeld, bzw. die Vermögenseinziehung, die Forderungen auf Steuer und Sozialversicherung, und andere öffentlichen Schulden und schließlich die im Vollstreckungsverfahren verhängte Ordnungsstrafe. Nachdem die Forderung, die zuerst steht, völlig befriedigt worden ist, kann die Nächste abgefunden werden.

Wenn der Versteigerungserlös nicht alle Froderungen befriedigen kann, müssen die Froderungen nach dem Ausgleichsprinzip befriedigt werden. Das Ausgleichsprinzip kann also bei Forderungen mit mehreren selben Rechtstiteln in Betracht kommen.

Der Pfandgläubiger kann auch eine günstige Befriedigung beanspruchen. Den Wert der Verwertung der Mobilien muss zur Befriedigung der Pfandgläubiger verwendet werden. Wenn der Wert der Verwertung der Immobilie zur Befriedigung einer Hypotheke dient, dann muss der oben genannten Reihenfolge folgern, also die Forderung muss nach der Befriedigung der Arbeitslöhne, aber vor den Strafgelder befriedigt werden.

Das Prioritätsprinzip wird heute nur begrenzt angewendet. Einerseits in welcher Reihenfolge die Abzüge vom Arbeitslohn bei dem Arbeitgeber erscheinen sind. Andererseits wenn die Forderungen belastet sind, dann zählt die Reihenfolge, in der die Hypotheken belastet worden sind. Das Prioritätsprinzip kann noch in einem Fall Bedeutung gewinnen, obwohl nicht in klassichem Sinne. Während der Aufteilung des Versteigerungserlöses bildet der Gerichtsvollzieher zwei Gruppen. Zuerst werden die Forderungen befriedigt, die in der ursprünglichen Bekanntmachung vorgekommen und deren Urkunden vor der Versteigerung angekommen sind, so dass der Befugte die Kosten des Verfahrens bevorschusst hat. Die Befriedigung der Befugten der später angeordneten Zwangsvollstreckung kann aus der übrig gebliebenen Summe abgefertigt werden, nach den Regeln der allgemeinen Abfindung. Diese Regel bevorzugt also die Gläubiger, die sich vor der Bekanntmachung und dem Verkauf gemeldet haben, um ihre Ansprüche befriedigt werden zu können.

Wenn der Versteigerungserlös nicht alle Forderungen deckt, der Gerichtsvollzieher stellt einen Verteilungsplan zusammen. Aufgrund des originalen Textes des Vollstreckungsgesetzes musste der Gerichtsvollzieher den Plan vor das das Zwangsvollstreckungsverfahren durchführende Gericht bringen und dieses Gericht hat den Teilungsplan bestätigt und mit einer Anordnung die Entscheidung getroffen. Die Vollstreckungsgesetz-Novelle aus dem Jahr 2000 hat die automatische Befugnis des Gerichts zur Revision eingestellt.

Nach der neuen Regelung schickt der Gerichtsvollzieher den Teilungsplan den Parteien, welche in 15 Tagen von der Aushändigung bei dem die Vollstreckung vornehmende Gericht,

29 S. SÁRFFY: a. a. O., S. 515-531.

einen Widerspruch gegen den Entwurf anbringen können. Das Gericht entscheidet über den Widerspruch mit einem Beschluss. Das Gericht kann mit Widerspruch nicht betroffene Teil des Teilungsplans verändern, wenn es darin Schreibfehler oder Rechnungsfehler zu finden sind, oder wenn der Gerichtsvollzieher den Plan nicht der Rechtsvorschrift entsprechend verfertigt hat. Hier kommt also das Prinzip der Gebundenheit an den Antrag nicht zur Geltung, wenn der Verteilungsplan wegen des Widerspruchs der Partei vor Gericht kommt, dann kann sie das Gericht beurteilen, ob der Widerspruch zu Recht besteht. Gegen diesen Beschluss des Gerichts kann eine Berufung zulässig werden.[30]

Wenn wir die Entwicklung der ungarischen Regelung ab dem 19. Jahrhundert bis heutzutage betrachten, sind die nächsten Behauptungen festzustellen:

– Die Reihenfolge der Befriedigung ist in allen Epochen zur gleichen Zeit das Prioritätsprinzip, das Ausgleichsprinzip und das Prinzip der Befriedigung laut Rechtstiteln zur Geltung gekommen, wenn auch mit unterschiedlichem Akzent.
– Das System der verschiedenen Vorzugsansprüche hatte unter die Geltung des Gesetzes über das Vollstreckungsverfahren aus dem Jahr 1881 die gleiche Funktion, wie später die Befriedigung laut Rechtstiteln.
– Die Vorzugsansprüche sicherten in der Regelung vor dem Zweiten Weltkrieg eine privilegisierte Situation nur in Hinsicht auf einzelne Vermögensgegenstände, für die bestimmte – mit dem gegebenen Vermögensgegenstand Verbindung zeigende – Forderungen der Gläubiger. Im späterem, als das Prinzip der Befriedigung laut Rechtstiteln entscheidend war, bezogen sich die Vorzugsansprüche auf alle möglichen Vermögensgegenstände des Schuldners.

5. Folgerungen

5.1. Allgemeine Bemerkungen

a) Aufgrund dessen, welche Grundprinzipien in einem Rechtssystem entscheidend sind, können wir zwischen die Rechtssysteme keine strenge Grenzlinie ziehen, wir können überall privilegisierte Forderungen finden, ausserdem kommen auch die Prinzipien der Proportionailtät und der Priorität in verschiedenen Ländern auch zur Geltung.

b) In der ungarischen Rechtsliteratur[31] und auch nach der Begründung des Gesetzes über das Vollstreckungsverfahren können wir mit dem Standpunkt treffen, dass in einzelnen Rechtssystemen das Prioritätsprinzip und das Prinzip der Befriedigung laut Rechtstiteln für die Rechtssysteme charakteristisch sind, und diese ergänzt das Ausgleichsprinzip. Nach meiner Ansicht ist das Prioritätsprinzip und das Prinzip der Befriedigung laut Rechtstiteln nicht hervorgeheben, alle drei Prinzipien können eine besondere Rolle in einem Rechtssystem spielen, die sind komplex zu untersuchen. Wenn wir aber die Rechstsysteme für ihre Grundprinzipien gruppieren möchten, dann sollte lieber die Rechtsysteme, welche das Prioritätsprinzip und das Ausgleichsprinzip folgen einen Unterschied aufgestellt werden, da diese Prinzipien den Charakter der Systeme bestimmen.[32]

30 Olga BALOGH – Ilona BERTALANNÉ KOREK – Gábor GADÓ – Edit JUHÁSZ (szerk: Ágnes SÁRINÉ SIMKÓ): A megújult bírósági végrehajtás. Budapest, 2001., S. 396.

31 S. János NÉMETH – István VIDA: A bírósági végrehajtás magyarázata. (szerk: János NÉMETH – Daisy KISS) Budapest, 2004. S. 730-731.

32 S. Pelayia YESSIOU-FALTSI: a. a. O., S. 216-217.

Privilegisierte Forderungen, Vorzugsansprüche laut Rechtstiteln gibt es in allen Rechtssystemen, darausfolgend wird auf dem Stand der Prinzipien der größte Unterschied, wie der Gesetzgeber zwischen Forderungen mit dem selben Rechtstitel oder die nicht privilegisiert sind, im Laufe des Vollstreckungsverfahren eingegangene Summe verteilt:nach dem Prioritätsprinzip (wie z. B. in Deutschland) oder nach dem Ausgleichsprinzip (wie z. B. in Griechenland).

5.2. Bemerkungen im Zusammenhang mit dem Prinzip der Befriedigung laut Rechtstiteln

a) Es muss zwischen zwei Präzedenzen der Bfriedigungsprioritäten unterschieden werden. In einem Fall sichert der Vorzugsanspruch nur in Hinsicht eines Vermögensgegenstands die privilegisierte Situation sichert, um die Befriedigung der bestimmten, mit dem gegeben Vermögensgegenstand im Zusammenhang stehenden Forderung des Gläubigers. Anders bezieht sich die vorteilhafte Befriedigung auf alle Besitzstück des Gläubigers. Diese Befriedigungspriorität, welche privilegisierte Situation für den Versteigerungserlös aus Verkauf einiger Vermögensgegenstände sichert, sind für die Fälle charakteristisch (aber nicht ausschließlich), die im Zusammenhang mit dem Pfandrecht stehen. Dieses Privileg ergibt sich im Allgemeinen aus materiellen Rechtsnormen, d. h. im Verfahren vom materiellen Recht die Befriedigungspriorität gesichert ist. Für das Struktur, welches die Befriedigungspriorität beziehen auf bestimmte Vermögensgegenstände anwendet, ist die deutsche und die ungarische Mobiliarvollstreckung der Vorkriegszeit des Zweiten Weltkriegs gute Beispiele.

Es gibt auch die Regelung, die für die besonders wichtige Forderungen der Berechtigte – wie z. B. der Unterhalt – generelle Befriedigungspriorität sichert, also beziehendauf alle Besitzstücke des Gläubigers. Die Rechte der Staaten, welche dieses Modell folgen, zählt man zu Rechtssystemen, die das Prinzip der Befriedigung laut Rechtstiteln folgen. In dieser Gruppe gehört auch das ungarische Recht. Ich muss aber bemerken, dass auch in diesen Rechstsystemen die Befriedigungspriorität, auf einzelnen Vermögensgegenstände beziehend, gilt. In diesem Fall wird die Vergünstigung ausgesprochen für die Berechtigte des Pfandrechst gesichert.

b) Die Tatsache, dass eine Forderung Pfandrecht garantiert, ändert selbstverständlich nicht an den Rechtsgrund der Forderung. Was immer der Rechstgrund des Gläubigers gegen die Berechtigte ist, im Allgemeinen ist nicht ausgeschlossen, dass ihn der Gläubiger mit Pfandrecht erwirbt, damit – in Hinsicht auf ein bestimmtes Besitzstück – eine Gelegenheit zur günstigeren Regelung der Befriedigung schafft. Im Hinblick auf die oben genannten Frage, die Befriedigungspriorität der Pfandgläubiger ist eigentlich unabhängig von der Reihenfolge nach dem Prinzip der Befriedigung laut Rechtstiteln, darausfolgend muss das Thema getrennt behandelt werden, sowohl theoretisch als auch in der Praxis der Rechtsetzung.

c) Im Zusammenhang mit dem Prinzip der Befriedigung laut Rechtstiteln taucht einerseits die grundlegende Frage auf, *ob die Verfolgung dieses Prinzip richtig ist.* Im Wesentlichen wurde die selbe Frage von mehreren Antragstellern gestellt, als sie sich an das Verfassungsgericht wendeten, um die sich auf die rechtsgemäße Befriedigung des Gesetzes über das Vollstreckungsverfahren aus dem Jahr 1979 beziehenden Regelungen als verfassungswidrig erklären zu lassen, und ausser Kraft setzen zu lassen. In der Begründung des aufgrund der Initiative entstandenen Beschlusses Nr. 50/1991. (X. 3.) hat das Verfassungsgericht erklärt, dass „der Rechtsschöpfer auf keine Weise gegen das …Verfassungsprinzip verstößt, wenn er die Wichtigkeit und die Bedeutung der verschiedenen Forderungen erwägt, und eine Befriedigungsrangfolge festlegt. Er leistet sogar Beihilfe, die Verfassunggrundrechte durchzusetzen, wenn er an die erste Stelle z.B. die dem Schutz der Mütter und der Unterhaltung der Kinder

(Verfassung, § 66. Abs. (2), § 67 Abs. (1)) dienenden Vollstreckung stellt." Die Privilegisierung der Forderung auf Arbeitslohn wurde als Garantie des im § 70/B. Abs. (2) der Verfassung gefassten „Recht auf gleichen Lohn für die gleiche Arbeit" bewertet. Laut Begründung des Beschlusses ist jedoch „auch eine konstitutionelle Forderung, dass die rechtmäßigen Forderungen der Allgemeinmacht- nicht als Eigentümer, sondern als Vertreter des Allgemeininteresses (Verfassung, § 2. Abs. (2), § 5.) – im Hinblick auf Steuer-, Gebühren-, andere Gemeinschuld-, und aus bestimmten Verfahren stammenden Forderungen – auf einen vorteilhafteren Befriedigungsrang als die nicht lebenswichtigen Schulden, gesetzt werden."

Die rechtsgemäß aufgestellte Befriedigungsrangfolge selbst verstößt gegen keine konstitutionellen Prinzipien, in ihrer heutigen Form treibt sie – mindestens nach dem Standpunkt des Verfassungsgerichtes- sogar gerade die Durchsetzung einzelner Verfassungsrechte und prinzipien voran. Ich halte diese Begründung von meiner Seite für annehmbar, und sehe die Aufrechthaltung des Prinzips der Befriedigung laut Rechtstiteln für begründet.

Wenn die Anwendung des rechtsgemäßen Befriedigungsprinzips angenommen wird, so taucht nahezu selbstverständlich eine weitere Frage auf: *Welche Forderungen und unter welchem Rechtstitel sollen vom Rechtsschöpfer privilegisiert werden?* Auf den ersten Blick sieht es so aus, dass die Beantwortung dieser Frage vollständig unter den Kompetenzenbereich der Rechtspolitik fällt, und die jeweilige Staatsführung die Forderungen nach ihren eigenen Prioritäten rangreiht. Ich bin jedoch davon überzeugt, dass diese Entscheidung über bestimmte – Verfassungs-, zweckmäßige, rechtssystematische Kohäsions – und Gläubigerbeschützungs-Beschränkungen verfügt.

Die Verfassungsbeschränkungen haben zwei Seiten: die Befriedigungsrangfolge soll einerseits die Durchsetzung bestimmter Verfassungsprinzipien fördern (z.B. Schutz von Müttern und Kindern), andererseits darf sie bestimmte Verfassungsrechte (z.B. Gleichberechtigung der Eigentumsformen, Rechts- und Chancengleichheit) nicht beschränkt werden. Ich betrachte die Ermöglichung der Durchsetzung der Gemeinlasten als eine zweckmäßige Beschränkung. Im Interesse der Kohäsion des Rechtssystems müssen die verfahrensrechtlichen Regelungen die in den materiellen Rechtsregelungen gesicherten primären Befriedigungsregelungen sichern (z. B. Pfandrecht). Der Gläubigerschutz fordert letztendlich, dass der Entzug den Berecih der rechtsgemäß privilegisierten Forderungen möglichst minimal betrifft, da die Durchsetzbarkeit der- den größten Teil der vollzuziehenden Forderungen ausmachenden- einfachen Ansprüchen (wie z. B. die aus einem Darlehensgeschäft stammende Forderung ist,) von den überzähligen, privilegisierten Forderungen wesentlich beschwächt wird. Im Zusammenhang mit dieser letzteren Frage ist es erwähnenswert, dass die den rechtsgemäßen Befriedigung folgenden früheren ungarischen Vollstreckungskodexen – die Gesetze über das Vollstreckungsverfahren aus den Jahren 1955 und 1979 – im Vergleich zu den heutigen, mehreren Ansprüchen einen Befriedigungsvorrang gesichert haben. Durch das Vollstreckungsgesetz wurde der Bereich der privilegisierten Forderungen eingeschränkt. Meinem Ermessen nach privilegisiert die gegenwärtige ungarische Regelung gerade den entsprechenden Bereich der Forderungen, und ich halte die Erweiterung dieses Gebietes für nicht notwendig. Ich halte es jedoch für erwägungswert, dass – ähnlich zum Insolvenzverfahren[33] – die mit den Gemeinlasten verbundenen Schulden in Form von Verzugszinsen, Verzugszuschlägen, sowie anderen Zuschlägen und Strafen von dem Rechtsschöpfer hinter die anderen Forderungen gereiht werden, im Gegensatz zu der gegenwärtig wirksamen Regelung, wonach diese Forderungen gleichrangig mit den Gemeinlastenforderungen befriedigt werden sollen.

33 Gesetz über das Insolvenzverfahren aus dem Jahr 1991., § 57. Abs. (1)

5.3. Bemerkungen zur Prioritätsprinzip

a) Das Prioritätsprinzip kann auch Vor- und Nachteile haben. Nach manchen Autoren sei dieses Prinzip ungerecht, da es kein grüdliche Grund dafür gibt, aufgrund des Prioritätsprinzips dem Gläubiger Vorrechte zu garantieren. Nach dieser Annäherung wird mit diesem Vorrecht derjenige Gläubiger belohnenswert, der sich mit Pfändung beeilt.Daraus ergibt sich der falsche Eindruck, dass der Gesetzgeber der sorgfältige Gläubiger gegen den nachlässigen preferiert wird. Das alles ist aber nicht zu begründen, weil die Forderungen im Allgemeinen zu unterschiedlichen Zeitpunkten fällig werden, so, dass die unterschiedlichen Gläubiger zu verschiedenen Zeitpunkten handeln können.[34]

Es gibt aber Autoren, die die allgemeine Geltendmachung des Prioritätsprinzips bevorzugen und empfehlen.[35] Bei dieser Frage muss erwähnt werden, dass vom Gesetzgeber bei der Ausbildung der Reihenfolge mehrfache Zeitpunkt als Grundlage annehmen werden kann: es kann der Zeitpunkt betrachtet werden, als der Zwangsvollstreckungsantrag eingereicht wurde, oder als die Ausgabe der Vollstreckungstitel sowie der Zeitpunkt der Abfassung.

b) Mehr Autoren machen darauf aufmerksam, dass mit der Anwendung der Prioritätsprinzip die Vollstreckung der Sicherheitsmaßnahmen zu große Rolle haben, da die Antragssteller der Vollstreckung eine Sicherungsmaßnahme um die Interesse des früheren Vollzugs von der Abfassung anregt, welche eine Befriedigungspriorität bietet.[36] Darausfolgend muss man offensichtlich mit der Steigerung der Aktennummer rechnen, obwohl meiner Meinung nach sie nicht bedeutend wäre.

c) Ich galube, dass ein schwerliegenderes Problem ist, dass während dem Prioritätsprinzip zur Geltung kommt – wenn bei der Bestimmung von die Reihenfolge der Befriedigung der Zeitpunkt der Abfassung entscheidend ist –, hängt der Schicksaal des Gläubigers nur davon ab, wie schnell und aktiv der Gerichtsvollzieher (gegebenenfalls selbst das Gericht) handelt. Der Gläubiger hat also fast keine Mitwirkung, dass in dem Vollstreckungsverfahren, das von ihm eingereicht wurde, die Abfassung rechtzeitig vollgezogen wird. Ich halte es also richtiger, die Reihenfolge der Forderungen danach behaupten, wann der Vollstreckungsantrag dargelegt wurde.

d) Heute in Ungarn kommt das Prioritätsprinzip nur in engem Kreis zur Geltung, die Hauptregel ist unter den selben Rechtstiteln das Ausgleichsprinzip. Nach meiner Ansicht müsste die Verbreitung von Priorotätsprinzip in Gegenteil zu Ausgleichsprinzip gedrungen werden. Ich halte es nicht als Problem, dass die Forderungen zu verschiedenen Zeitpunkten fällig werden (und so auch das Verfahren zu unterschiedlichen Zeitpunkten in Gang gesetzt werden kann), sondern genau das wäre in meiner Interpretation ein Grundprinzip der Verwendung von Prioritätsprinzip.

5.4. Bemerkungen zur Ausgleichsprinzip

a) Das wichtigste Argument ist für das Ausgleichsprinzip, dass es im Gegensatz zu dem Prioritätsprinzip viel mehr gerecht ist, es schützt die Rechtsungleichheit der Gläubiger.[37] Nach einiger Meinungen ergibt sich aber im Vergleich zu dem Prinzip der Befriedigung laut Rechtstiteln eine größere Ungerechtigkeit.[38]

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34 S. Pelayia YESSIOU-FALTSI: a. a. O., S. 218.

35 S. László GÁSPÁRDY: Kihívások és kísérletek az európai polgári eljárásjogban (a Code Louis-tól napjainkig). In: Magister artis boni et aequi – Studia in honorem Németh János. Budapest, 2003. S. 227.

36 István VIDA: a. a. O., S. 453.

37 S. Pelayia YESSIOU-FALTSI: a. a. O., S. 218.

38 Der Beschluss des Verfassungsgerichts Nr. 50/1991. (X. 3.)

b) Das Ausgleichsprinzip – nach meiner Meinung – bringt eine gewisse Interessengemeinschaft zustande, wo die Gläubiger, die gegen den gleichen Schuldner aufgetreten sind, das gleiche Risiko und die gleichen Schaden auf sich nehmen müssen. Wenn der Gesetzgeber sich dafür entscheidet, dass so eine Interessengemeinschaft gesetzmäßig zustande kommt, kann das nur so entsprechend funktionieren, wenn das Vollstreckungsverfahren mit der Beteiligung von mehreren Gläubiger, die Vollstreckung beantragen, an Regelung kommt, d. h. die Rechte und Verpflichtungen der Gläubiger. Das ungarische Recht der Zwangsvollstreckung regelt diese Fragen nicht, es wird praktisch nur in der Reihenfolge der Befriedigung hingewiesen.

c) Die Verwendung des Ausgleichsprinzips kann aber die konkurrierende Gläubiger anregen, die Zwangvollstreckung jedem der möglichen Vermögensgegenstände anzuordnen, damit sie so die Befriedigung ihrer Forderungen am größten Teil sichern können.[39] Diese Bestrebungen der Gläubiger verletzen aber die Interessen des Schuldners, bzw. Die Anwendung des Prinzips, nach dem der Zwang proportional und stufenweise befriedigt werden muss.

5.5. Das Verteilungsverfahren

a) Wenn unter mehreren Gläubigern der Versteigerungserlös aufgeteilt werden muss, muss das Verteilungsverfahren geregelt werden. In den Rechtssystemen, die ich untersucht habe, wird ein Verteilungsplan vorbereitet für den Fall, wenn diese Summe nicht alle Forderungen befriedigen kann. Eine Ausnahme erkennt nur das frühere, ungarische Recht, und das auch nur in der Zwangvollstreckung in das bewegliche Vermögen, nach dem Gesetz über das Vollstreckungsverfahren aus dem Jahr 1881 war in diesem Fall nur die Vereinbarung der Gläubiger maßgebend und wenn es keine Vereinbarung gab, dann kam es zur Verteilung.

b) Jedes Rechtssystem unterscheidet sich voneinander im Wesentlichen darin, welches Organ welche Aufgaben in der Verfertigung, in der Übernahme der Verteilungsplanes hat. Die Vorbereitung des Verteilungsplanes gehört zum Kompetenzbereich des Notars als Vollstreckungsorgan in Griechenland, in Ungarn wird sie früher vom Gericht, heute vom Gerichtsvollzieher durchgeführt, solange in Deutschland das Gericht sie zur Aufgabe hat. In allen drei Ländern gibt es möglichkeit, gegen den Verteilungsplan Rechtsmittelverfahren einzuleiten, das vom Gericht beurteilt wird. Dementsprechend wird in Deutschland auch schon die erste Entscheidung vom Gericht beurteilt, solange das Gericht in den zwei anderen Staaten nur bei der Überprüfung der Tätigkeiten von Vollstreckungsorganen, bei der Beurteilung des Rechtsmittels eine Rolle spielt.

c) Solange das griechische Recht im Teilungsplan sogar materielle Rechtsforderungen überprüft, im ungarischen Recht werden nur Prozessregeln, die nach Einsprüche von Parteien dargelegt werden, vom Gericht beurteilt.

d) Solange früher in Ungarn auch verhandelt wurde, wie die Reihenfolge zusammengestellt werden kann, es konnte sogar Verweisung auf den Prozessweg in zahlreichen umstrittenen Fragen eingelegt werden, heute gibt es keinen Vorschrift, die Beurteilung der gegen den Teilungsplan eingereichten Widerspruch in einer Verhandlung zu bestimmen. Das Gericht ist wohl nicht verschlossen, im Laufe der Beurteilung den Parteien zuzuhören und andere Beweise aufzunehmen.[40]

e) Ich habe also zusammenfassend von dem Teilungsplan bemerkt, obwohl die geltende ungarische Regelung nicht so viel Garantie enthält, wie zum Beispiel das deutsche Recht, aber

39 S. Pelayia YESSIOU-FALTSI: a. a. O., S. 218-219.

40 Olga BALOGH – Ilona BERTALANNÉ KOREK – Gábor GADÓ – Edit JUHÁSZ (szerk: Ágnes SÁRINÉ SIMKÓ): A megújult bírósági végrehajtás. Budapest, 2001., S. 393.

sie ist trotzdem genügend, Zeit- und Kosten-sparend. Es ist aber interessant, solange die Gläubiger in anderen Rechtssystemen (z. B. griechisches Recht) nach der Zusammenstellung des Teilungsplans, mit Einreichung von Einrede sogar in materiellen Rechtsfragen um Beurteilung bitten können, in Ungarn kann das Gericht bei der Beurteilung des Widerspruchs die Rechtsgrundlage der Vollstreckung nicht überprüfen sowie die Feststellungen, die die Forderungen in Frage stellen oder genau einstellen wollen.

f) Diese letzte Frage ist erwänenswert auch, weil dadaurch ein eigenartiges Problem des ungarischen Rechts aufgeworfen wird, dass das ungariche Recht das Verhältnis, die Rechte und Pflichte der am Verfahren teilnehmenden Gläubiger nicht regelt. Da es keine Rechtsnorm angewendet werden kann, es gibt keine rechtmäßige Möglichkeit, dass ein Gläubiger die Forderungen eines Anderen nicht bestreiten kann. Ich halte es für nicht ausgeschlossen, dass der Schuldner von bestimmten fiktiven Forderungen (z. B.: 1., Unterhalt, der in einem Vertrag steht, oder 2., ein größeres Darlehen) Schuldanerkenntnis gibt, das von einem Notar beurkundigt wird. Aufgrund der mit Vollstreckungsklausel versehene Urkunde kann noch vor dem Vollstreckungsverfahren das Vollstreckungsrecht im Grundbuch eingetragen werden. Auf dieser Weise kann der Befriedigungsfonds des Gläubigers beeinträchtigt werden, entweder mit dem Missbrauch der Regel des Prinzips der Befriedigung laut Rechtstiteln, oder – in dem zwietem Fall – mit dem Missbrauch der Regel des Ausgleichsprinzips. Das oben genannte Beispiel zeigt auch, dass es sich lohnen würde, darüber nachzudenken, wie man das Vollstreckungverfahren regeln kann, wenn es meherere Gläubiger daran teilnehmen, mit besonderer Hinsicht auf das Verhältnis der konkurrierenden Gläubiger.

Summary

This article sets out to examine the principles and rules regulating the conflicts in the case of multiple creditor interests. The author exhaustively analysed the questions concerning the three principles applied in the order of satisfaction, described the advantages and disadvantages of satisfaction by title, temporal priority, and proportioning. In addition to giving an analysis of legal theory, the article also reaches a number of conclusions, which may prove useful for legal practitioners and legislators alike.

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Posting of Workers in the EU with Specific Regard to Temporary Agency Work in Hungary

1. Introduction

What does „posting of workers" mean? The posting of workers represents a form of the freedom to provide services within the Community guaranteed by the EC Treaty;[1] companies based in one Member State are free to send their workers to another Member State within the framework of provision of services.[2] This situation is brought about if someone – be it a venture or a private person – undertakes provision of service into another Member State. The firm that provides service can post its workers temporarily to carry out work in a Member State other than that in which they normally work.[3] The engagement of workers aimed to provide transnational services in the framework of a civil contract concluded between the sender employer and a third party can usually be effected in two ways: either on the basis of the already existing employment relationship, in the name and under the guidance of the venture, in accordance with the contract between that venture and the addressee of the service provided, or, in the framework of hiring

1 Free movement of services; Consolidated version of the Treaty establishing the European Community: Title III., Chapter 3.

2 Eeva KOLEHMAINEN: The Directive concerning the Posting of Workers: Synchronization of the Functions of National Legal Systems, HeinOnline – 20 Comp. Lab. L & Pol' y J. 71. 1998-1999; p. 72.

3 Rush-case (C-113/89): The ECJ held that an undertaking established for example in Portugal may provide services for the construction and public works sector in the territory of another Member State with its own Portugese workforce. Furthermore, a host state may not impose on the supplier of services conditions relating to the recruitment of manpower in situ or the obtaining of work permits for the Portugese workforce.
Vander Elst-case (C-43/93.): „Articles 59 [now 49.] and 60 [now 50.] of the EEC Treaty must be interpreted as precluding a Member State from requiring undertakings which are established in another Member State and enter the first Member State in order to provide services, and which lawfully and habitually employ nationals of non-member countries, to obtain work permits for those workers from a national immigration authority and to pay the attendant costs, with the imposition of an administrative fine as the penalty for infringement." In this case the idea created in the Rush-case was extended to cover the whole issue of transnational provision of services.

out workforce.[4] According to the case-law of the European Court of Justice, hereinafter referred to as the ECJ, hiring out workforce is regarded as a special service by itself,[5] which may also fall within the the sphere of „posting". However, if a person travels abroad on his or her own in order to undertake a job, this cannot be regarded as a case for „posting". In the latter case, with regard to the mobility of people in the EU without limitations, the local regulations of the place of work ("lex loci laboris") will be of authoritative force. In the case of „posting", however, to define the applicable law is not so easy, since the idea of „posting" tends to be comprehended in terms of the mobility of various services rather than in terms of the mobility of individuals.

As far as posting is concerned, the identification of „applicable law" is constituted as key issue. In other words, the following question is to be decided: Which law applies to the contract of employment of the posted workers? In defining the relevant law applicable, the Rome Convention of 1980 (Rome Convention on the law applicable to contractual obligations) may be of help. The Convention of Rome provides, as a general rule, for freedom of choice as regards the law applicable by the parties (Article 3. Sec. 1.): „A contract shall be governed by the law chosen by the parties." The Convention makes it clear, however, that: „To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected." (Art. 4. Sec. 1.). There is an additional statement referring to individual employment contracts: „…a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable in the absence of choice." (Art. 6. Sec. 1.) From the point of view of „posting" Article 6. Sec. 2. lit. b. turns out to be very considerable: „a contract of employment shall, in the absence of choice in accordance with Art. 3, be governed by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country." In the meantime, the Rome Convention also formulated the idea of directly applicable mandatory rules

4 See further: József RADNAY: A munkavállalók külföldön történő foglalkoztatása (The engagement of employees abroad), Gazdaság és Jog (Economy and Law), April, 2002.; p. 22.

5 Case C-279/80., Alfred John Webb judgement:

„1.Where an undertaking hires out, for remuneration, staff who remain in the employ of that undertaking, no contract of employment being entered into with the user, its activities constitute an occupation which satisfies the conditions laid down in the first paragraph of Article 60 [now 50] of the EEC Treaty. Accordingly they must be considered a „service" within the meaning of that provision.

2. The essential requirements of Art. 59. [now 49.] of the Treaty became directly and unconditionally applicable on the expiry of the transitional period, those essential requirements abolish all discrimination against the person providing the service by reason of his nationality or the fact that he is established in a Member State other than that in which the service is to be provided.

3. The freedom to provide services is one of the fundamental principles of the Treaty and may be restricted only by provisions which are justified by the general good and which are imposed on all persons or undertakings operating in the Member State in which the service is to be provided in so far as the interest is not safeguarded by the provisions to which the provider of the service is subject in the Member State of his establishment.

4. Art. 59 [now 49.] of the Treaty does not preclude a Member State which requires agencies for the provision of manpower to hold a license from requiring a provider of services established in another Member State and pursuing such activities on the territory of the first Member State to comply with that condition even if he holds a licence issued by the state in which he is established, provided, however that in the first place when considering applications for licences and in granting them the Member State in which the service is provided makes no distinction based on the nationality of the provider of the services or his place of establishment, and in the second place that it takes into account the evidence and guarantees already produced by the provider of services for the pursuit of his activities in the Member State in which he is established."

in order to protect the party considered to be in a weaker situation: „When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application." (Article 7. Sec. 1.)

According to these rules the employment relationship of a posted worker is governed, in most cases, by the law of the country from where he/she is posted. Consequently, a firm which is posting workers from a country with low labour standards to a country with higher labour standards can profit in terms of competition by the cheap domestic working conditions, especially wages. On the other hand, it is important to add that the core mandatory rules of the national labour law of the host country are applicable according to Art. 7, Sec. 2. of the Rome Convention, irrespective of a foreign law otherwise applicable. This latter consideration will constitute the basis of the Directive of 96/71/EC, to be discussed below. (Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services, hereinafter referred to as the posting Directive or the Directive).

The political sensitivity of the situation becomes plain if we come forward with an example in which a company residing in a country with lower wages and employment costs resorts to the means of „posting", that is, in order to carry out certain services they send employees to another Member State with higher wages and employment costs. The undertakings, established outside the host state, compete with domestic undertakings for the same tender in the free community market of services. „Member States cannot accept the consequence that their own national labour legislation and national collective agreements „discriminate" against domestic undertakings."[6] In the previous example, however, the foreign company resorting to the means of „posting" in the framework of the principle of the free provision of services, would have a comparative advantage in competition, resulting from the acquisition of cheaper manpower. This would be the situation if the (higher) standards of the labour law of the host country would concern their home companies only, and it would be allowed that, by way of „posting" and making use of the free streaming of services within the Union, the posted employees sent to provide service by a company having its residence in a country of lower standards would remain under the effect of their own country, thus making competitive advantage of the situation. „The interest of the host state would require it to extend domestic standards to the workers posted to its territory. The interest of the posting state, its competitive advantage, lies in non-extension of the higher standards."[7] These conflicting interests must be properly handled within the European Union. The EU endeavors to strike a balance between economic freedoms and employee's rights.

2. The Labour Law Directive Concerning the Posting of Workers

The above described complex dilemma also occured in the case law of the ECJ. In the Rush Portuguesa – case[8] the ECJ outlined their standard attitude. The Portuguese-owned service

6 Eeva KOLEHMAINEN, supra, n. 2.; p. 72.
7 Ibid.
8 Case C-113/89.

company, appearing in the case, was building a TGV railway-line in France, where Portuguese workers were employed to carry out the job. The French Immigration Office („Office national d' immigration") questioned the right of the company to employ their own workers in France without a previous permission. The Court announced, that „the Treaty preclude a Member State from prohibiting a person providing services established in another Member State from moving freely on its territory with all his staff and preclude that Member States from making the movement of a staff in question subject to restrictions such as a condition as to engagement in situ or an obligation to obtain a work permit" (para. 12.). On the one hand this concern means the victory for the free movement of services, but on the other hand this victory is not total. The ECJ announced, at the same time, that „… Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means" (para. 18.). All in all, the ECJ held that the host state is entitled to extend the application of its labour standards to posted workers.

The above way of thinking inspired the EU to accept the Directive concerning „posting". At the same time, there was a question that had to be asked: „How can we ensure that corporations increasingly competing on a global scale do not engage in social dumping practices?"[9] It also had to be taken into consideration, how to maintain „social peace" in the EU, and to avoid conflicts among member States with different levels of labour law standards, once the possibility of a social dumping was given. Ways had to be found to prevent Member States from possible responses of „arbitrary" social protectionism[10] on chances of social dumping, thus placing barriers in the way of the free flow of goods, manpower, services and that of the capital.[11]

But what does social dumping mean?[12] After all it is nothing else but the fear that the less advanced Member States might get into a more advantageous competitive position by profiting from the fact that their workers are provided with a lower ("cheaper") standard of labour rights and social security. In theory, there are two ways of this kind of profiteering:[13] corporations can either relocate in countries or regions with lower labour and social costs,[14] or, vice versa, posting

9 M. BIAGI: The 'posted workers' EU directive: from social dumping to social protectionism, in: Labour Law and Industrial Relations in the European Union, Bulletin of Comparative Labour Relations 32-1998, Kluwer Law International; p. 179.

10 Especially Germany and France would be likely to behave so. This is symbolised by the fact that, for example, Germany belongs to the group of EU Member States which enacted their own national Posting of Workers Act before the EU Posting Directive was adopted. The objectives of the so-called Arbeitnehmer-Entsendegesetz (AEntG) were similar. The AEntG entered into force on 1 March 1996, nine months before the European directive was adopted. See further: Olaf DEINERT: Posting of Workers to Germany – Previous Evolutions and New Influences throughout EU Legislation Proposals, The International Journal of Comparative Labour Law and Industrial Relations, Volume 16/3, pp. 217-234, 2000.

11 See further: M. BIAGI, supra, n. 9.; pp. 173-180.

12 Bob HEPPLE's definition of social dumping is the "export of products that owe their competitiveness to low labour standards", New Approaches to International Labour Regulation (1997) 26 I.L.J. 353, 355. The danger of posting is that the worker himself may become the "product".

13 M. BIAGI, supra, n. 9.; pp. 173-180

14 This is also described as the phenomenon of the "race to the bottom". The „race to the bottom" is said to arise when in a deregulated internal market, a state unilaterally lowers its social standards in an attempt to attract business from other states. See, for example the interesting case of the State of Delaware in the United States. Catherine BARNARD: Social Dumping and the Race to the Bottom: Some lessons for the EU from Delaware, European Law Review, 2000, 25(1), pp. 57-78.

workers abroad in order to take advantage of the less expensive employment conditions.[15] Obviously, from the point of view of our topic, the second type of social dumping is more relevant.

There is a number of warnings that the fear of a social dumping – especially in Europe – is not realistic or justifiable, and that there are not enough facts to prove its presence. From the point of view of labour law it is clear though, that even if the defence methods and their structural details are considerably different in the particular Member States, European states provide a relatively high level of the defence of labour rights. Even if there are differences, it does not necessarily follow that they will be made ill use of. Neither have the fairly strong deregulational reform tendencies spreading all over Europe since the 80-ies, essentially changed this picture. However, „the reforms were stimulated by a need to modernise employment regulation in the light of changing technology and methods of production,[16] accompanied by a desire to encourage as many people into work as possible."[17] Furthermore, social dumping is not the consequence of labour law standards only, this phenomenon can be brought about by an intricate interaction of several other factors, such as taxes, infrastructure, cultural and linguistic aspects, etc.

It would be an exaggeration to claim that the only purpose of the „posting" Directive was „merely" the fight against social dumping, even though this also played an important role in its acceptance. Blanpain[18] also argues that „it should be clearly stated that this measure combats social dumping only to a certain extent, as not all working conditions are covered,[19] neither does it contribute to greater convergence of working conditions in the Common Market, nor does it make things simpler." Moreover, the Directive deviates from other „traditional" labour law directives, in so far as „ it is not supposed to harmonise labour standards across the EU, but simply to co-ordinate domestic legislation."[20] Consequently, this Directive does not, or only partly harmonises, this one, on the basis of a different form of integration, only tries to bring the dissimilar worker-defending functions of the labour laws of the Member States into step with each other, while having other general interests of the European integration in sight, such as the neutrality of competition, the freedom of service, the elimination of the occasional distortions of the market, etc. The Directive enshrines the belief that a unified market can coexist with a plurality of legal (sub)systems which are, at partly unharmonized.[21] Consequently, it does not interfere with the fundamental essentials of

15 Many warn, that in practice companies rarely send masses of relatively poorly paid workers abroad temporarily, in the framework of „posting". This is more characteristic in cases of businessmen, accountants, engineers, etc., (in such professions, where the relevance of minimal standards is smaller). Based on experience, poorly paid employees tend to make use of the freedom of mobility themselves. This fact already in itself disclaims the theory of „posting"-generated social dumping. Let us be fair, the very opposite of all this is also true.

16 "We have been catapulted, forcefully and brutally, out of the industrial society into what may be termed an information society…."Fordism" is over; „Gatism" named after Bill Gates or Microsoft, is ushering us in a new world. Freer, but less secure." See further: Roger BLANPAIN: Guidelines for Multinational Enterprises, for Ever?, The International Journal of Comparative Labour Law and Industrial Relations, KIJ, Volume 14/4, 337-348.; In other words: „The last fifteen years have witnessed a shift away from industrial vertical integration toward vertical disintegration", See: Eeva KOLEHMAINEN, supra, n. 2.; p. 74.

17 Catherine BARNARD, supra, n. 14.; p. 8.

18 Roger BLANPAIN: European Labour Law, Kluwer Law International 2002; p. 294.

19 Consequently, as regards employees at home as well as those who have arrived in the framework of "posting", the requirement of equal treatment is not maintained in every respect. Its regulation is still lagging behind European law, somewhere in its „penumbra", See Eeva KOLEHMAINEN, supra n. 1.; p. 79.

20 M. BIAGI, supra, n. 9.; p. 178.

21 Eeva KOLEHMAINEN, supra, n. 2.; p. 94.

the individual national systems, it only tries to co-ordinate them by making the extension of the minimal, obligatory core of the protective labour regulations of the host state possible, so that they can be applied to workers employed in the framework of „posting", in their own interest.[22] Thus the Directive provides regulations very intricate and full of compromise, hard to be enforced in practical life because it prerequisites a thorough knowledge (as well as observation) of the rules and regulations of the Member States on the part of the appliers of „posting" (especially employers who send or hire out workforce). To sum it up, the Directive mobilizes autonomous national labour law systems for the purpose and in the interest of pan-European economic goals.

The targets of the Directive 96/71/EC (Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services) are more complex and, at certain places, even competing with each other: promotion of the freedom to provide services, promotion of the free movement of persons, enhancement of legal certainty, prevention of the distortion of competition, protection of common European goals, protection of workers and, of course, prevention of social dumping. The Directive aims to abolish the obstacles and uncertainties that impede implementation of the freedom to supply services, by improving legal certainty and facilitating identification of the employment conditions that apply to workers temporarily employed in a Member State other than the Member State whose legislation governs the employment relationship.

The Directive itself indicates the Treaty provisions[23] concerning the mobility of services among the Member States as its legal base. Strictly speaking, the Directive is not based on Treaty provisions regarding social policy. According to many,[24] this reference is not quite appropriate, because the Directive not only presses for the free stream of services, but it also places restrictions on it by providing for some protective rules that providers of services must observe.[25] In this wise the Directive adds some social „shade" to the free internal market, although the legal base reflects more economic concerns than „solidarity."

The latter consideration is confirmed by the fact that the present, very much debated proposal in connection with the directive of the European Parliament and those of the Council, concerning internal services of the market (the so-called Bolkestein – directive), also takes this into consideration. In order to increase the competitiveness of the EU, the draft of the Directive would like to further deregulate the internal market of services by generalizing the „principle of the country of origin" as well as empowering it with an overall effect in this sphere. Though this principle has long been accepted by international commerce, the attitude of the EU has so far been slightly restrictive, which can best be illustrated by the Directive of „posting", being one of the symbols of the "European Social Model", in this respect. In the European model of „posting" – as we shall see – employees posted in the framework of service provided in another Member State fall under the general regulatory principles of the host country (in so far as minimum standards are concerned, at least), with the only exception of very short-term missions. The conception of the Bolkestein-directive, which is often thought to be extremely liberal and politically determined, makes an effort „to evade Community achievements and utilize the joining of less developed countries so as to be able to inaugurate, for the first time, a welfare and cutbacks competition in the fields of social and taxation

22 See, for example, the views of Kolehmainen: This is „a symptom of a supranational 'renationalization' of labour law", Eeva KOLEHMAINEN, supra, n. 2.; p. 101.

23 Treaty establishing the European Community, Articles 57 paragraph 2 and 66 of the EC Treaty.

24 For example, during the lengthy debates before accepting the Directive, Portugal and Great Britain also took this view.

25 M. BIAGI, supra, n. 9.; p. 175.

affairs",[26] by applying the principle of „the country of origin", thus making national systems compete with each other. It is poor consolation, that – according to the draft – the principle of „the country of origin" cannot be applied, if the principle of „posting" is in question.

So, the Directive of „posting", which came into effect in December, 1999, compels the Member States to secure the same minimal labour and wage conditions for posted employees in the framework of the provision of services, as those in force at that place where the service is carried out, in so far as the corresponding measures of the sender country (that is, the usual place of the service) are not more advantageous. So the Directive stipulates the important idea of equal and fair treatment of posted workers at least in terms of the host state's minimum protective labour standards.

The Preamble of the Directive refers to its context:"Whereas the completion of the internal market offers a dynamic environment for the transnational provision of services, prompting a growing number of undertakings to post employees abroad temporarily to perform work in the territory of a Member State other than the State in which they are habitually employed."[27] This suggests a background, politically and economically under the changing, together with a global economic competition as a starting point, where the role of subcontracting, outsourcing, franchising, concessions, supply chains, complex networks, etc. is increasing, the cost-efficiency of the labour market becomes more and more important, the previously vertically integrated industrial structures are replaced by complex company networks with vaguely definable barriers, and the traditional forms of employment are also dissolving.[28] In this „climate" the importance of „posting" will naturally be upgraded.[29]

As far as the hiring-out of workforce is concerned, it is put down in the Preamble: „…this Directive does not entail the obligation to give legal recognition to the existence of temporary employment undertakings, nor does it prejudice the application by Member States of their laws concerning the hiring-out of workers and temporary employment undertakings not established in their territory but operating therein in the framework of the provision of services."[30] Attention must repeatedly be called to the fact, that the Directive regards the hiring out of workforce between Member States only as one of the aspects of the provision of services extending over boundaries.[31]

The Directive applies to undertakings which post workers to work temporarily in a Member State other than the State in which they habitually carry out their work in performance of their contract. It covers three transnational posting situations, namely:[32]

- posting under a contract concluded between the undertaking making the posting and the party for whom the services are intended („subcontracting"),[33]

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26 OFA Kht., Európai Szociális és Foglalkoztatási Hírlevél, 88. szám (European Newsletter on Social and Employment Affairs, issue 88.)

27 Posting Directive, Preamble, Section 3.

28 See further: Eeva KOLEHMAINEN, supra, n. 2.; p. 75.

29 There are other advantages for employers if they employ workers in the framework of „posting" (e.g. hiring out) instead of a standard working relationship: numerical flexibility according to the actual needs, savings in labour costs, avoiding quasi fixed costs associated with standard employment relationship, avoiding the collective defence of labour rights (temporary workforce is not likely to organise themselves), curtailing the wage demands of employees at home by making them feel the threat of competition brough about by „posting", etc. Ibid.

30 Directive, Preamble, Section 19.

31 György KISS (szerk.): Az Európai Unió munkajoga (György Kiss – editor: Labour Law in the European Union), Osiris, Bp. 2001.; p. 453.

32 Directive, Art. 1., Section 3.

33 This legal institution corresponds, according to Hungarian law, to „posting" („kiküldetés"), taken in the narrow sense. Labour Code, Section 105.; See: footnote 71.

- posting to an establishment or an undertaking owned by the group („group"),[34]
- posting by a temporary employment undertaking to a user undertaking operating in a Member State other than that of the undertaking making the posting („temporary work for a user"),

with the provision, in all three situations, that there is an employment relationship between the undertaking making the posting and the posted worker.

Summerizing the above said: the Directive applies to all cases of posting of workers between Member States[35] (including „posting"), provided that:

- „the undertaking which post the worker is established in a Member State;
- the posting occurs in the framework of the transnational provision of services, that is, there must be a contract between the undertaking providing the services and the recipient which requested the services;
- there is an employment relationship in existence between the posting undertaking and the worker during the period of the posting."[36]

Undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State.[37] In this context, Section 20 of the Directive's Preamble indicates that the Directive does not affect either the agreements concluded by the Community with third countries or the laws of Member States concerning the access to their territory of third-country providers of services. The Directive is also without prejudice to national laws relating to the entry, residence and access to employment of third-country workers.

The Directive seeks to guarantee that posted workers will enjoy, whatever the law applicable to the employment relationship (see in particular the above mentioned Rome Convention), the application of certain minimum protective provisions in force in the Member State to which they are posted. To this end, Article 3., Section 1. of the Directive lays down the minimum mandatory rules[38] to be observed by employers during the period of posting in regard to the following issues (the list referring to this „hard core" has been compiled with consideration to the temporary character of legal relationship):[39]

- maximum work periods and minimum rest periods,
- minimum paid annual holidays,
- minimum rates of pay,
- the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings,
- health, safety, and hygiene at work,
- protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people.
- equality between men and women, non-discrimination.

The rules must be laid down by the legislation of the host country and/or by collective agreements or arbitration awards which have been declared universally applicable in the case of

34 In the terminology of Hungarian Labour Law this basically corresponds to the category of „temporary assignments" („kirendelés"). Labour Code, Section 106.; See: footnote 72.

35 The Directive shall not apply to to merchant navy undertakings as regards seagoing personnel. Art. 1., Section 2.

36 M. BIAGI, supra, n. 9.; p. 173.

37 Directive, Art. 1, Section 4.

38 See further: Directive Art. 3., Section 7.: The Directive shall not prevent application of terms and conditions of employment which are more favourable to workers.

39 Thus rules concerning for e.g. the termination of the employment relationship, or collective labour law are not to be found here.

activities in the construction sector, while Member States are left the choice of imposing such rules laid down by collective agreements in the case of activities other than building work.

Member States are free to add further items to this list, since the Directive, in order to complement the „hard core", built in an optional „safety valve",[40] thus providing an opportunity for the extension of defence. According to some people, this represents the real potential for the further development of the Directive: The Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equility of tratment of

- terms and conditions of employment on matters other than those referred to in the Directive in the case of public policy provisions,
- terms and conditions of employment laid down in generally binding collective agreements, other than construction, as indicated above.[41]

In the following we are going to give a survey of the „system of exemptions". There is only one obligatory exemption: Minimum pay and holiday provisions will not apply to posting lasting eight days or less where these concern initial assembly and/or first installation work that forms an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking (except where this is in the building work sector). In these spheres, consequently, a short initial threshold period is to be defined, though, according to the main rule, no such grace period is mentioned in the Directive otherwise.[42] So the Directive, in addition to the only obligatory exception, mentions three more possible exceptions which, however, cannot be applied in cases of hiring-out, only in the other two, above described forms of „posting" (which proves that, within „posting", the hiring-out of labour is the most sensitive point that requires more severe limitations). Arbitrary exceptions are as follows:

- Member States – after consulting employers and labour –, in accordance with the traditions and practices of each Member State, are free to decide whether or not they wish to apply minimum pay provisions to posting under a month.[43]
- Member States are free to allow collective agreements to provide exemptions from both minimum pay provisions, or from a Member States' decision not to apply these provisions again under the condition that the length of a posting does not exceed one month.[44]
- Member States may provide for exemptions to be granted from minimum pay and holiday provisions on the grounds that the amount of work done under the posting is not significant.[45]

The Directive also contains a jurisdiction clause[46] which states that judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted. This clause constitutes a provision governing a specific matter, as authorised by Article 67. of Council Regulation (EC) No. 44/2001. on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, and is without prejudice to the right to institute judicial proceedings in another State pursuant to the above mentioned provisions of the Regulation or pursuant to international conventions on the subject of jurisdiction.

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40 Kolehmainen, Eeva, supra, n. 2.; p. 88.
41 Directive, Art. 3., Section 10.
42 Ibid. Art. 3., Section 2.
43 Ibid. Art. 3., Section 3.
44 Ibid. Art. 3., Section 4.
45 Ibid. Art. 3., Section 5.
46 Ibid. Art. 6.

To ensure the practical efficiency of the system established by the Directive, it provides for a cooperation on information between Member States.[47] The latter have therefore designated liaison offices and authorities responsible for monitoring the terms and conditions of employment, serving as correspondents and contact points for authorities from other Member States, for undertakings which post workers, as well as for posted workers themselves. The main tasks for the liaison offices and monitoring authorities are:[48]

- Make the information on the terms and conditions of employment referred to in the Directive generally available;[49]
- Monitor the compliance with the terms and conditions of employment referred to in the Directive;
- Reply to reasoned requests from public authorities for information on the transnational hiring-out of workers, including abuses or possible cases of unlawful transnational activities;
- Examine eventual difficulties arising in the application of public policy provisions.

Member States shall also take appropriate measures in the event of failure to comply with the Directive.[50] Two types of specific measures are used by Member States to ensure compliance with the provisions of the Directive: measures to monitor the legality of postings and measures to penalise possible irregularities ascertained.

Besides the usual inspections of undertakings or workplaces, certain States have adopted two other types of methods to facilitate monitoring of compliance with the transposition rules: the keeping of records at the place where the services are provided (e.g. in Germany and in Austria), and the declaration of the provision of services to the national authorities (e.g. in France, in Germany – concerning the building work sector in the latter). As regards penalties, some Member States have not introduced any new penalties to cover posting situations. In these countries, the remedies and penalties applicable are the same as those applicable under domestic law. Some countries introduced special sanctions (like the exclusion out of tenders of those who have violated the law [e.g. Denmark and Spain]; or the regulation in Germany, according to which the prime contractor bears the responsibility in that case if his subcontractor fails to pay the minimum of wages to the workers in the construction industry.[51] There are similar regulations in Austria and in Italy.)[52] The Commission, by the way, found in 2003, that there was no need to modify the Directive in any way, at the same time they identified quite a few defaults connected with its implementation in the Member States.[53]

47 Ibid. Art. 4.

48 http://www.europa.eu.int/comm/employment_social/labour_law/index_en.htm („Posting of workers").

49 To facilitate the access to information on the terms and conditions of employment referred to in the Directive, several Member States have created websites to that effect. The Commission is continuously examining the possibilities to improve the cooperation on information.

50 Directive, Art. 5.

51 See: Case C-60/03. Wolff & Müller GmbH & Co. KG vs. José Filipe Pereira Félix: "Article 5 of Directive 96/71, interpreted in the light of Article 49 EC, does not preclude, in a case such as that in the main proceedings, a national system whereby, when subcontracting the conducts of building work to another undertaking, a building contractor becomes liable, in the same way as a guarantor who has waived benefit of execution, for the obligation on that undertaking or that undertaking's subcontractors to pay the minimum wage to a worker or to pay contributions to a joint scheme for parties to a collective agreement where the minimum wage means the sum payable to the worker after deduction of tax, social security contributions, payments towards the promotion of employment or other such social insurance payments (net pay), if the safeguarding of workers' pay is not the primary objective of the legislation or is merely a subsidiary objective" (para. 45.).

52 See COM(2003) 458 final, The implementation of Directive 96/71/EC in the Member States.

53 Ibid.

The difficulties encountered in implementing the Directive have so far tended to be more of a practical nature than a legal nature.

Since the decision of the ECJ in the Case Rush Portuguesa, it is clear that the freedom to post workers must be recognized as a part of the freedom to provide cross-border services. This includes the freedom to post workers from third countries. Therefore, the Commission proposed in 1999 two directives on entry (and residence) of third-country nationals into other Member States in the framework of the cross-border provision of services within the Community. One affects third-country nationals who provide services cross-border,[54] the other concerns the entry of third-country national workers posted crossborder by their employer.[55] From the point of view of labour law the second proposal is of main importance. The entry shall be facilitated by an „EC service provision card" issued by the domestic Member State to the employer at his/her request. The purpose of this card is to guarantee the host Member State (where the service is provided) that the seconding company as well as the seconded worker are in a lawful situation. This proposal for a Directive would also provide that the host Member State would not be able to impose its own requirements as regards entry, residence and access to a temporary paid activity (except on grounds of public policy, public security or public health). According to the proposal, the card can be issued only for 'normal' posting situations in the framework of the provision of services for posting within a group. Therefore, the card would not be available for crossborder agency work. The host Member State must treat posted workers with regard to their qualifications as if they were Union citizens. The proposed directive is only intended to promote the freedom of the entrepreneurs to provide cross-border services and not to entitle their workers to freedom of movement within the EU. The European social partners and the organisation of employers welcomed the proposals in general but demanded clarification and modifications.[56]

3. „Posting" and Social Security[57]

In addition to the advantages concerning the costs of labour law, employers from low wage countries are enjoying the further advantage that in most events of posting for a duration shorter than 12 months, the often cheaper domestic social security law is applicable according to Art. 13 of the Coordination Regulation (EEC) 1408/71.[58] On the basis of the posting provisions of Regulation 1408/71 it is possible to send workers for a brief period to another Member State, in order to do temporary activities for the sending employer, while this is done for the account of the original employer, and while keeping them insured under the social security system of the country of origin.[59] Posting is a politically sensitive issue. Differences in

54 Proposal for a Council directive extending the freedom to provide cross-border services to third-country nationals established within the Community, OJ C 67, 10 March 1999, (=COM (99) 3 final – CNS 99/13).

55 Proposal for a directive of the European Parliament and the Council on the posting of workers who are third-country nationals for the provision of cross-border services, OJ C 67, 10 March 1999, (=COM (99) 3 final – COD 99/12).

56 Olaf DEINERT, supra, n. 10., pp. 229-234.

57 It should be stressed that the "Posting Directive's" scope does not extend to social security; the provisions applicable with regard to benefits and social security contributions are those laid down by Council Regulations (EEC) No. 1408/71 of 14 June 1971.

58 Coordination Regulation (EC) 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

59 See, for example: Paul SCHOUKENS: EC social security coordination law, Study material, Master in European Social Security, Academic Year 2005-2006 Katholieke Universiteit Leuven, Institute of Social Law, p. 23.

social security contributions may encourage the use of posting rules, the use of which may be criticized because of unfair competition.[60]

Persons moving within the EU – to whom Regulation 1408/71 applies –, are subject to the social security legislation of a single Member State only (Art. 13. Section 1. of the Regulation). According to the general rules of Regulation 1408/71 this applicable law is the „lex loci laboris". In other words: the law of the state where a person is working determines the applicable law. However, this is true only in the case of employees working abroad for a longer period of time (in the circle of the „mobility of persons"). According to Article 14, Section (1) of the Regulation, „posting" is exempt from the main rule: „A person employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 12 months and that he is not sent to replace another person who has completed his term of posting." The maximum period for occurent prolongation amounts to another term of 12 months.[61] The difference with the first posting period is that in case of prolongation the Member State to which the worker is posted should agree with the prolonged period. All in all, the posting provisions give exemption from the payment of insurance contributions in the state of employment.

The social security law criteria of "posting" have been made more precise by the Administrative Commission, focusing on the application of regulations, in their decision No. 181.[62] In line with the above mentioned provisions of the Regulation, a person employed in the territory of a Member State by an undertaking „to which he is normally attached" is deemed to be posted when he is sent by that undertaking to the territory of another Member State to perform work there „for that undertaking" and „provided that an anticipated duration of posting does not exceed 12 months" and that he is not sent to replace another person who has completed his term of posting. Chain-posting is also not being allowed. Accordingly, in addition to the temporary nature of the posting and the fact that it is not designed to replace another worker, the vital defining features of a normal posting are the continuing nature throughout the period of posting of the subordinate relationship of the worker to the posting undertaking and the condition that the work is carried out on behalf of that undertaking. These defining features must be deemed to exist when there is and there continues to be throughout the whole period of posting a direct relationship between the posting undertaking and the posted worker.[63]

A demand for further conditions became necessary concerning temporary employment agencies in particular. Decision 181 – which follows ECJ guidelines on this issue – adds that in order to remain within the context of posting, the posting undertaking must „habitually carry on significant activities in the territory" of the posting state (from which they are sending out personnel). Purely internal management activities cannot of itself justify the application

60 Frans PENNINGS: Introduction to European Social Security Law, Studies in Employment and Social Policy, 2001 Kluwer Law International, p. 93.

61 The new Regulation (Council Regulation No. 883/2004 of the European Parliament and of the Council of 29th April 2004 on the coordination of social security systems), planned to replace the existing Coordination Regulation in the dubious future, would raise the duration of "posting" to 24 months.

62 Administrative Commission of the European Communities on Social Security for Migrant Workers, Decision No. 181. of 13 December 2000 concerning the interpretation of Articles 14(1), 14a(1) and 14b(1) and (2) of Council Regulation (EEC) No. 1408/71 on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State.

63 Practical guide for the Posting of Workers in the Member States of the European Union and the European Economim Area and in Switzerland, p. 2.

of the posting system. The purpose of that condition is solely to combat abuses and in particular to prevent „brass plate companies" from taking unfair advantage of posting. These additional requirements developed by the ECJ are designed to hinder the phenomenon of the so-called „post-box-offices" from which employees would continuously be sent to other Member States (especially countries with higher labour and social security costs).[64]

These companies are trying to put their employees in a social security system which is not very costly. In other words: regulations connected with posting can only tempt to use tricks and abuse, if social security contributions in the potential sender country are lower than those in the potential host country in which the employment takes place.[65] This phenomenon can be called „social security shopping" as well. A further problem is that some elements of posting are hard to check.[66]

There are at least four situations in which the provisions in force rule out a priori the application of the provisions on posting.[67] In particular, when:

- the undertaking to which the worker has been posted places him/her at the disposal of another undertaking in the Member State in which it is situated;
- the undertaking to which the worker is posted places him/her at the disposal of an undertaking situated in another Member State,
- the worker is recruited in a Member State in order to be sent by an undertaking situated in a second Member State to an undertaking in a third Member State;
- the worker is recruited in one Member State by an undertaking situated in a second Member State in order to work in the first Member State.

In such cases the reasons which prompted stringent exclusion of the applicability of posting is clear: the complexity of the relations stemming from these situations, as well as offering no

64 See: Case C-35/70, Manpower judgement; case C-202/97, Fitzwilliam judgement. In the Manpower judgement the Court ruled that temporary employment agencies can use – under some specific circumstances – the posting system set out in Article 14. In the Fitzwilliam judgement the Court clarified the conditions of temporary work agencies. The Court considered that in order to benefit from the advantage afforded by the posting provisions, an undertaking engaged in providing temporary personnel which, from one Member State, makes workers available on a temporary basis to undertakings based in another Member State must normally carry on its activities in the first State. An undertaking engaged in providing temporary personnel normally carries on its activities in the Member State in which it is established if it habitually carries on significant activities in that State (the principle of "direct link").

65 Let us illustrate this with a recently occurred case (source: OFA Kht., Európai Szociális és Foglalkoztatási Hírlevél, 88. szám – European Newsletter on Social and Employment Affairs, issue 88.): Supervision carried out with the purpose of restriction of "black work" in the German meat industry on 12-13 April, 2005 revealed a number of abuses all connected with the mobility of services as well as with freedom of settlement. Most of the controlled undertakings could only be qualified as being subcontractors, even though they possessed an apparent independence. In most cases these subcontractors employed in the host country employees other than theirs and, in most cases, they did not carry out own assignments, either. Their given headquarters in the mother country often served as a mere "job centre". The foreign employees were, in reality, often employed by the German assignors, consequently, they ought to have been insured in Germany. Since, in their case, social insurance institutions – mistakenly – were thinking in terms of „posting" being exempt from this kind of contribution, that was retained by the employers. German authorities have already entered into talks with some of the new Member States of the Union (Poland, Hungary), in order to restrain abuses. In the framework of the talks with Poland, for example, an agreement came into being in connection with the legal bases concerning services extending over the borders.

66 Frans PENNINGS, supra, n. 60.; p. 90.

67 Practical guide, supra, n. 63.

guarantee as to the existence of a direct relationship between worker and posting undertaking contrasts starkly with the objective of avoiding administrative complications and fragmentation of the existing insurance history which is the raison d'être of the provisions governing posting. A temporary employment agency is also not allowed to concentrate on posting employees to another Member State if it wishes to use the posting rules.[68]

In the case of posting, the employer and the employee have to apply for an E101 form at the competent institutions of the sending Member State. In an E 101 certificate, the competent institution of the sending Member State declares that its own social security system will remain applicable to posted workers for the duration of their posting. By virtue of the principle that workers must be covered by only one social security system, the certificate, in comprising this declaration, necessarily implies that the other Member State's social security system cannot apply.[69] In order to be able to obtain sickness and maternity benefits for himself and the other members of his family, the posted worker, in addition to form E 101, must obtain from the competent institution in the posting Member State evidence of entitlement to sickness benefits in kind, i.e. either form E 106 (in the event he has transferred residence or place of abode to the State of employment) or the European health insurance card or form E 111 (if he has kept on his residence in the posting State).

4. „Posting" in the Hungarian law, with a special emphasis on the possibilities of hiring out worforce

In Hungary the Labour Code (Act XXII of 1992 on the Labour Code, hereinafter referred to as: L.C.), was modified with effect from 1st July, 2001, thus the EU conform legal background of „posting", „temporary assignment" and „hiring out" being established (Sec. 106/A. and 106/B.). Also in 2001 (together with the Act XVI of 2001) the regulations concerning employment relationship of the Law Decree 13/1979 about international private law were changed in harmony with the above described principles of the Rome Convention (the right to choose the applicable law, for example). By the way, orders defining the scope of the Labour Code (L. C. Sec. 1.) are also in line with the corresponding regulations of our international private law.

The effect of the Act LXXV of 1996 concerning labour inspection covers work carried out by employees employed by foreign employers on the basis of Sec. 106/A of the Labour Code (Section 1., Subsection 2. b.). What is more, the National Inspectorate of Labour Safety and Labour Affairs (Országos Munkabiztonsági és Munkaügyi Főfelügyelőség) prepares reports on the findings of inspection carried out with the purpose of control of the keeping of regulations laid down in

68 For instance, a business based in the UK which wants to recruit Portuguese workers cannot open an office (letter box company) in Portugal, with the sole objective of employing the Portuguese workers by means of his office in the UK and of using the posting system in order to benefit from lower Portuguese social security contributions. Frans PENNINGS, supra, n. 60.; p. 94.

69 Case C-202/97, Fitzwilliam judgement: "As long as an E 101 certificate is not withdrawn or declared invalid, the competent institution of a Member State to which workers are posted must take account of the fact that those workers are already subject to the social security legislation of the State in which the undertaking employing them is established and that the institution cannot therefore subject the workers in question to its own social security system" (para. 55.). According to Case-C178/97 (Banks judgement) the posting certificate can be awarded with retroactive effect. Due to the above mentioned concerns, one can doubt whether social security institutions can effectively control the workers who claim to be posted from another state.

paragraphs 106/A-106/B of the Labour Code, to the competent office of the Ministry responsible for the information necessary for the keeping of these regulations and also the findings of inspection. (Sec. 2. 3.). The inspection of labour is extended over regulations related to the employment of foreigners, as well. In this respect important regulations are to be found in Decree No. 8/1999 (10th November) SzCsM On Work Permits Issued to Foreign Nationals in Hungary.

As far as social security aspects are concerned, any employee sent to a EU Member State from Hungary in the framework of posting, will obligatorily remain insured in the Hungarian social security system, he is obliged to pay social insurance contributions to the Hungarian funds. As seen, the previously described rules of the Coordination Regulation are strictly and obligatory applied in Hungary.

We do not find it necessary to further go into the details of the above mentioned legal rules at this place, since they wholly follow the orders and logic of the norms of the European Union which have earlier been presented in a fairly detailed way. In the following we would like to refer to certain Hungarian legal relations, dilemmas, which concretely concern hiring out extending over the borders and being also relevant from the point of view of posting. Before doing so, we are going to give a brief survey of the regulatory rules of „posting" as they appear in the Labour Code of the Hungarian law.

4.1. Posting of workers in the Hungarian Labour Code

The special labour regulations of „posting" are contained in paragraphs 106/A and 106/B of the Labour Code, almost copying the text of the Directive. According to Gyula Berke these regulations can be called as the „prohibition of the export of working conditions being disadvantageous for the employee."[70]

As regards the employment – by virtue of agreement with a third party – of a foreign employer's employee in the territory of the Republic of Hungary in accordance with the provisions of Section 105 („posting"),[71] 106 („temporary assignment")[72] and Chapter XI („hiring out")[73] of the

70 Külföldiek foglalkoztatása Magyarországon (The employment of foreigners in Hungary) Kjk-Kerszöv, 2002.; p. 109.

71 In the Hungarian legal terminology "posting" is used in a narrower sense, and it covers the legal institution to be found in § 105 of the Labour Code, the meaning of the expression being "commissioning" ("kiküldetés"): "For economic reasons the employer may oblige its employee to work temporarily at places other than the normal place of work (posting) on condition that the posted employee continues to work under the employer's direction and instructions." In the rest part of our paper we shall use the broader concept of posting, which is suggested by the Directive and which we also have used so far. Posting as defined in § 105 of the Labour Code, together with temporary agency work as well as temporary assignment, covers only part of the concept.

72 "An employee may be ordered to perform work on a temporary basis at another employer by virtue of an agreement between the employers concerned (temporary assignment – "kirendelés") on condition that there is no consideration of any kind involved and that (a) the owner of the other employer is also the owner – in part or in full – of the employer; or (b) at least one of the two employers holds some percentage of ownership in the other employer; or (c) the two employers are connected through their ownership in a third organization." Unless otherwise agreed, the employer to whom the employee was assigned shall be entitled to the rights and fulfill the obligations originating from the employment relationship. The right of termination of the employment relationship may only be exercised by the original employer. (L.C. Section 106.) In the terminology of the Hungarian labour law "temporary assignment"is part of the boader approach of "posting" as laid down in the Directive.

73 In other words: "temporary agency work", or "triangular employment relationship". This is also a part of "posting".

Hungarian Labour Code, such employees shall be subject to Hungarian labour laws in terms of

a) maximum working time and minimum rest periods,
b) minimum annual paid leave,
c) minimum wages,[74]
d) conditions of the hiring-out of workers,
e) occupational safety,
f) access to employment or work by pregnant women or women who have recently given birth, of children and of young people, furthermore
g) the principle of equal treatment.[75]

As regards employers engaged in specific construction work, in terms of the above mentioned minimum requirements the workers employed for these activities shall be subject to collective agreements covering the entire industry or an entire sector in the stead of legal regulation, provided the given collective agreement provides more favourable conditions concerning the entitlement in question.[76]

The above mentioned provisions need not be applied if the employee „posted" (assigned, hired out) is subject to more favourable regulations in terms of the above mentioned minimum („core") requirements by virtue of the relevant labour law or the parties' agreement to the contrary.[77]

All of these provisions shall be duly applied to the foreign posting (assignment, hiring-out) of workers employed by Hungarian employers if these aspects are not covered by the laws of the country where the work is performed.[78]

According to the Section 106/B of the Labour Code the posting provisions shall not apply to merchant navy enterprises as regards seagoing personnel.[79]

This is an exemption from the above mentioned minimum standards: In the case of initial assembly and/or first installation of goods where this is an integral part of a contract and carried out by workers posted by the supplying enterprise, the provision of Section 106/A. shall not apply in terms of minimum paid annual leave and minimum rates of pay if the period of posting does not exceed eight days, with the exception of the above mentioned construction activities defined under Subsection (2) of Section 106/A.[80]

It is an important rule that domestic employers must ensure that the posting of workers provisions laid down in the Labour Code are applied to employees posted at their facilities by foreign employers in the manner defined in Section 106/A.[81] This rule is mainly designed to subserve the activities of the Hungarian labour inspectorate.

74 The term "minimum wage" shall cover the personal basic wage, the consideration paid for special work duty and the remuneration paid for work performed abroad. Supplemental payments to pension funds and the part of reimbursed expenses in connection with work abroad, such as the costs of travel and room and board, that are not subject to personal income tax shall not be included in the minimum wage. Labour Code Section 106/A., Subsection (4).
75 L.C. Section 106/A., Subsection (1).
76 L.C. Section 106/A., Subsection (2).
77 L.C. Section 106/A., Subsection (3).
78 L.C. Section 106/A., Subsection (5).
79 L.C. Section 106/B., Subsection (1).
80 L.C. Section 106/B., Subsection (2).
81 L.C. Section 106/B., Subsection (3).

4.2. The case of the temporary employment business with permanent residence abroad

In the following we are going to see the possibilities of how to employ foreigners in the framework of posting in Hungary. In doing so we must consider the regulations of posting as expounded above, as well as the changed conditions brought about by Hungary joining the Union. To start with, let us examine the situation when the temporary employment agency[82] has its head office abroad, and wishes to employ its foreign employee in Hungary, by way of hiring him out to a Hungarian user undertaking.[83]

It must be made clear, by way of introduction, that in accordance with Section1., Subsection 4. of the Labour Code, this legal relationship will not be subject to the effect of the Hungarian Labour Code: „Unless otherwise prescribed, the Hungarian Labour Code shall not apply to employment relationships on the basis of which employees of foreign employers perform work in the territory of the Republic of Hungary within the framework of posting, temporary assignment or hiring out[84] of workers." In the spirit of this announcement the hard limitations of the internal law concerning hiring-out (Labour Code, Chapter XI.) do not represent a general prohibition in this respect, simply because they are not relevant in this case. In the spirit of the latter: „A placement agency must be a limited liability business association or a nonprofit company that is domiciled in Hungary, or a cooperative in respect of employees other than its members; it must satisfy the requirements prescribed in this Act and in other legal regulations and must be registered by the employment centre responsible for the place where the placement agency is established."[85] It is to be repeatedly emphasized that, since the Labour Code has nothing to do with this kind of labour relationship (L.C. Section 1., Subsection 4.), this rule cannot possess any prohibiting effect, that is, it cannot be excluded that the foreign national employee of a temporary employment agency with a head office in another country will carry out work activities in Hungary.[86] Neither is such a prohibition justified by the presently prevailing practice in everyday life.

Naturally, one can observe opinions in the relevant literature, contrary to the above said. According to these opinions, taking the presently valid legal rules into consideration, there is no possibility for an employee hired out by a foreign temporary employment agency to undertake a job in the territory of the Republic of Hungary (e.g. in such a case when a Hungarian company would like to hire out manpower from abroad). The already mentioned restricting order (L.C. Section 193/D., Subsection 1.), they say, lays down, that at the moment in Hungary the hiring out agency must have his head office in Hungary. This, in principle, can be justified by what is contained in Section 1., Subsection 5. of the Labour Code: "The provisions of Chapter XI of Part Three of the Labour Code (the rules of „hiring out") shall apply, as defined therein, to relationships which are governed by the Civil Code as pertaining to

82 "Temporary employment company or placing agency" shall mean any employer who places an employee, with whom it has an employment relationship, under contract to a user enterprise for work and exercises the employer's rights and obligations jointly with the user enterprise. L.C. Section 193/C. lit. b.).

83 "User enterprise" shall mean any employer who employs a worker hired out by a placement agency and exercises the employer's rights and obligations jointly with the placement agency. L.C. Section 193/C. lit. c).

84 "Hiring-out of workers" shall mean when an employee is hired out by a temporary employment company or a placement agency to a user enterprise for work, provided there is an employment relationship between the worker and the temporary employment company or the placement agency. L.C. Section 193/C., lit. a.).

85 L.C. Section 193/D., Subsection (1).

86 See: A mukaerő-kölcsönzésről és a külföldiek foglalkoztatásáról (Concerning the hiring of foreign manpower and the employment of foreigners), Munkaügyi Értesítő November-December, 2004.; pp. 354-357.

contracts for the hiring-out of workers between placement agencies or temporary employment companies and user enterprises and/or establishments." True, this part, in an extended interpretation, can also be understood as the effect of Chapter XI. of the Labour Code (with the ominous, restricting 193/D section in it), also concerns the legal relationship between hirer and lender. Thus it seems, that Hungarian law excludes, from the first, the employment of a person hired out by a foreign employment agency to Hungary. Supposedly, at the same time, it is not very probable that the original purpose of the creator of the law would have been the setting up of an overall prohibition. What is more, practice often overwrites theoretical explanations. Obviously, such an interpretation would lead to false and unintelligible consequences, which, by the way, would also contradict to European law (the free streaming of services, etc.). It is ambiguous in Hungarian law, too, in the absence of confirming legal orders. Considering the above said, a more coherent regulation of this legal institution would be very necessary.[87] It should be considered, for example, whether it is necessary at all, that in Sec. 193/D. of the L. C. the hiring out of manpower be dependent on an internal head office of the company, if the rest of the conditions meet the necessary requirements.

As a conclusion of the above analysis we can announce that the legal rule does not include any such prohibition, according to which the foreign employee of a foreign placement agency or temporary employment company cannot be hired out to an enterprise or establishment functioning in the territory of the Republic of Hungary. At the same time we must distinguish between the permission-based and the non permission-based cases of employment of foreigners in Hungary.

Following our joining the European Union – by way of the application of the Union law of the free mobility of people – exemption from permission has become a fundamental thing.[88] In principle, no employment permit is required for the employment in Hungary of EEA (European Economic Area)[89] nationals and their relatives authorized to reside. Different provisions may be enacted by an act of Parliament or by a government decree[90] consistent with the contents of the treaty on the accession of the Republic of Hungary and other States to the European Union.[91] This also means that foreigners enjoying general immunity can be employed in the framework of posting (and in the framework of hiring-out as well) in Hungary. Those who enjoy general immunity may fill any job they are qualified for and which their status of health allows them to fill, furthermore, they are treated equally with Hungarian citizens in every respect in the market of labour.

It is the following persons who enjoy general immunity:

- The citizens of those countries (except Malta and Cyprus) which joined the European Union at the same time when the Republic of Hungary did (Czech, Estonian, Lithvanian, Latvian, Polish, Slovenian, Slovakian citizens and their relatives, whose occupation must be, however, announced).
- British, Irish, Swedish citizens and their relatives.
- Spanish, Portuguese, Austrian, German, Italian, Norwegian, Luxembourger, Liechtensteiner, Icelander, Dutch, Greek French, Finnish, Danish, Belgian citizens, in so far as they have been in legal working relationship in Hungary for minimum 12 months.[92] Relatives also belong to this group, under certain conditions.

87 József RADNAY, supra, n. 4, p. 25. has come to the same conclusion.

88 Act IV of 1991 on Job Assistance and Unemployment Benefits, Section 7., Subsection 2.

89 Member States of the European Union, and Island, Liechtenstein, Norway.

90 See: 93/2004. (April 27) Government Decree concerning the rules of mutuality and defence of the labour market to be applied following the joining of the Republic of Hungary in the European Union.

91 The Act of the Parliament of the Republic of Hungary No. XXX., year 2004 on the announcement of the contract about the joining of the European Union.

92 Apart from these "12 months-rule" citizens of these states do not enjoy immunity on the basis of "mutuality".

- The husband or the wife of a Hungarian citizen who lives together with her/him or his widow or her widower if they had been living together with the deceased in Hungary at least for one year.
- Foreign nationals granted refugee status or asylum under specific other legislation and for holders of permanent residency or immigration permits (independent of citizenship).
- The students of Hungarian educational institutions, foreigners under the legal relationship of training.

From among foreigners only these persons can be employed by internal (Hungarian) user enterprises or companies.

What is the situation in the case of those, who do not fall under the effect of the above mentioned? If the foreign employee of the foreign temporary employment agency is such a person whose employment is subject to licence, then there is no possibility for hiring him out to work for a Hungarian user in Hungary. Job assignment can usually be permitted in such a case if the legal relationship of employment concerns two parties only, the domestic employer and the foreign employee. Work can usually be carried out in the sphere and at the place of the employment defined in the work permit. In accordance with the SzCsM order concerning the employment of foreigners in Hungary: "An application for work permit shall be rejected if the exclusive object of the service is transferring the capacity of the foreign worker for an extended period of time as stipulated in a private contract concluded with the foreign employer."[93] As it has been seen, employment in Hungary by hiring out foreign workforce may not be permitted. In such a case, on the basis of a civil agreement between the parties (agency hiring out and the user employer), the foreign employee would be working for a domestic employer other than the foreign employer of his own. No permit can be issued in such cases with the exception of seasonal employment in agriculture.[94] It has to be emphasized again, that the aim of the Hungarian law was not the setting up of a general prohibition against the employment of foreigners in the framework of the hiring-out system, the Hungarian law only meant to exclude the possibility of the employment of foreign employees based on a contract which is aimed to pass over the long-lasting use of the working power of a foreign employee in cases with permit obligations.

It is to be noted, however, that in so far as the foreign employee carries out assignment for a domestic employer other than the foreign employer of his own, based on the agreement of the parties, employment can be permitted if the non-Hungarian citizen is in working relation with such a foreign employer, who is in possession of a valid civil contract with a domestic citizen (with the aim of carrying out service, for example), and, in order to fulfil the contract (e.g. foreign national in a key position, carrying out work that involves commissioning, warranty repair, maintenance or guarantee service activities performed on the basis of a private contract with a foreign-registered company). In this case the foreigner is permitted to perform his duties towards the domestic subject of the civil contract in Hungary.[95]

In addition to "direct" hiring-out of foreigners to Hungarian users there are ways to make it possible for foreign employees hired out by placement agencies with foreign head offices to carry out work in Hungary. This is made possible by the special, triangular character of the

93 Decree No. 8/1999 (November, 10th) SzCsM On Work Permits Issued to Foreign Nationals in Hungary, Section 4., Subsection 1 lit. g).

94 Ibid., Section 5/A., especially Subsection 7.

95 See: An application for work permit shall be rejected if the employment relationship is not concluded between the applicant employer and the applying foreign national, with the exceptions set forth in Paragraphs b) and i) of Subsection (1) of Section 6, and Subparagraph bb) of Section 17 of Decree No. 8/1999 (November 10.) SzCsM On Work Permits Issued to Foreign Nationals in Hungary. See: Decree, Section 4., Subsection 1. lit.f.). It would be too lengthy to go into these details at this place.

hiring-out of workers, in that case if the employer (agency) with foreign residence hires out the foreign person employed by him to such a foreign user whose business is situated in Hungary (e.g. in the framework of transnational provision of services). In this case the foreign user „brings along" his foreign employee hired out abroad. The possibility of this solution is supported by the following order of the Labour Code: "For the purposes of Sections 106/A-106/B of the Labour Code (the rules of „posting"), the placement agency and the user enterprise shall both be deemed employer."[96] Thus, in the light of European norms, the employment of foreigners in Hungary in this way needs to be exempt from permit (regardless of citizenship). With this coincides that domestic licencing principle, according to which „the activity of the foreign employee sent to Hungary by a foreign employer is exempt from permit, if the work is not carried out for the interest of a domestic employer: that is, there is no such domestic employer to whom the carrying out of the job is subject."[97] Such a situation cannot be regarded as a legal relationship subject to the effect of the order SzCsM about the permit of the employment of foreign citizens in Hungary.

The legal relationship in all those cases where a foreign employee of a temporary employment agency with a head office abroad carries out legal work (passed over to a Hungarian user) in Hungary, according to the leading rule, is not subject to Hungarian law (L.C.Section 1., Subsection 4.).[98] And here the above mentioned domestic rules of „posting" (L.C. Section 106/A and 106/B.) come into the picture. According to them work carried out in Hungary is, also in this case, under the effect of the protection of the minimal working conditions of the Hungarian Labour Law (in so far as the directing law related to the given working relationship or the agreement of the parties do not provide more advantageous conditions). It is to be noted, that this intricate regulation makes abuses possible in more than one respect.

In principle there is no obstacle – according to the Hungarian law, at least –for Hungarian citizens to making use of their right of free movement (which is not unlimited, though, not even in the European Union)[99] and undertake work abroad by a placement agency (in accordance with the corresponding regulations of the given host state).

It turns out from the previous examples, that the insertion of the regulations of „posting" into the Hungarian law is not without problems, the taking over being a technical approximation of laws rather than an essential solution of the emerging question.

4.3. The case of the temporary employment business with permanent domestic residence

An outlender (placement agency) with his residence in Hungary and working in Hungary may enter into an employment relationship with a foreign person with the aim of hiring him/her

96 Labour Code, Section 193/P., Subsection 4.

97 Istvánné SOMODI: Munkavállalás az Európai Unióban. A magyarok munkavállalása Európában, a külföldiek magyarországi foglalkoztatása (Ms. Somodi: Undertaking work in the EU. The employment of Hungarian citizens in Europe and the employment of foreigners in Hungary), Bp. Saldo 2004; p. 56.

98 Thus, for example, neither is the following legal rule of directing force:118/2001. (June, 30). Government Decree about the registration of hiring-out and about private labour exchange as well as about the conditions of their activities.

99 In addition to this see the provisional rules of "2+3+2 years", which are not intended to be discussed at this place.

out only if this foreign person has a general immunity [100] according to the law. These persons have already been listed, that listing is also authoritative here.

Foreigners who possess immunity on the basis of the above, if they enter into employment relationship with an outlender with permanent domestic residence, can be hired out to users both in Hungary and abroad (with repect to the regulations of that country). The legal relationsip – regardless of the country where the work is carried out – will be subject to the effect of the Hungarian Labour Law but, in case they are hired into another Member State, the requirements of the „posting" Directive will also come into action. This is naturally true in those „normal" cases, when the Hungarian employee of an outlender falling under the effect of Hungarian law, is hired out abroad (with respect to the regulations of the host country).

In these cases both the beginning and the continuation of the hiring out are subject to Hungarian law. Conditions:

- A placement agency must be a limited liability business association or a nonprofit company that is domiciled in Hungary, or a cooperative in respect of employees other than its members; who places an employee, with whom it has an employment relationship, under contract to a user enterprise for work and exercise the employer's rights and obligations jointly with the user enterprise. It must satisfy the requirements prescribed in the Labour Code and in other legal regulations.[101]
- It is a registered company.
- The possibility of hiring out is included in the Founding Document of the Company Contract.
- It possesses the necessary personal and material conditions necessary for the pursuing of its activity.
- The obligatory material security has been deposited.
- A placement agency must be registered by the employment centre responsible for the place where the placement agency is established.[102]

Foreigners without general immunity will not be allowed to work with Hungarian outlenders since they would need a permit in order to be employed in Hungary. But: An application for work permit shall be rejected if employment of the foreign national is to occur at a place other than the applicant employer.[103] But just this would be the point of outlending, wouldn't it?

Finally, some topicalities also need to be mentioned briefly: According to Bill T/17877 the regulations of legal rule LXXV. of 1996. concerning the inspection of labour will probably change from January 1, 2006. (When this paper was written,[104] the bill had not been passed yet.) The special purpose of the Bill is to put an end to ambiguity about the positive effect of labour inspection related to the employment of foreigners in the framework of "posting". On the one hand, the legal rule itself will be made more precise, on the other, the inspection of

100 See, among others: 93/2004 (April 27) Government Decree concerning the rules of mutuality and defence of the labour market to be applied following the joining of the Republic of Hungary in the European Union.

101 See further: 118/2001 (June 30) Government Decree about the registration of agencies hiring manpower and those of private labour recruitment centres as well as about the conditions of the maintenance of their activities.

102 It may be of interest that, according to the 2003 inspection aimed to examine the keeping of legal regulations concerning the hiring of manpower, the OMMF (National Inspectorate of Labour Safety and Labour Affairs) concluded, that 24% of these agencies were working illegally, without having been registered. Furthermore, 55% of the outlenders and 46% of the users were caught to have violated the law in one way or another.

103 Decree No. 8/1999 (November 10) SzCsM On Work Permits Issued to Foreign Nationals in Hungary, Section 4., Subsection 1 litg. E.). It should be noted, that seasonal employment in agriculture is also an exception here.

104 October, 2005.

the observance of the orders – laid down in another legal rule – in relation to the obligation of announcement of employment of citizens and their relations of those states which entered the Union at the same time as Hungary did, will be defined. Supposedly the regulations which concern "hiring-out" will also be slightly changed from January l, 2006. (Bill T/17876 about the modification of the legal rule XXII. of 1992. connected with the Labour Code and others, also connected with labour.).

Zusammenfassung

Europarechtliche Aspekte der Arbeitnehmer Entsendung mit spezifischem Respekt zur temporären Agentur-Arbeit in Ungarn

Die Absicht dieser Studie ist die umfassende Vorstellung und Bewertung der Normen und Hintergründe des europäischen Arbeits- und Sozialrechtes, die sich auf die Entsendung von ausländischen Arbeitnehmern beziehen. Die Einführung schildert den Kontext, der nächste Teil analysiert *„die Richtlinie 96/71/EG des Europäischen Parlaments und des Rates über die Entsendung von Arbeitnehmern im Rahmen der Erbringung von Dienstleistungen"*. Der nächste Teil stellt die betreffenden, relevanten sozialen rechtlichen EU-Maßnahmen (Bestimmungen in Bezug auf die soziale Sicherheit) dar. In der Studie wird die Leiharbeit und ihre Rolle in diesem System also diese spezielle Problematik besonders berücksichtigt. Die letzte große inhaltliche Einheit des Aufsatzes bietet einen Überblick der ungarischen Normen in diesem Bereich. In diesem Zusammenhang wird mit besonderer Hinsicht untersucht, welche Möglichkeiten die Ausländer im Rahmen der *Leiharbeit* in Ungarn haben. Besonders aktuell ist dieses Thema nach dem EU-Beitritt von Ungarn (1. Mai 2004), da sich die Regelungen der Beschäftigung von Ausländern in Ungarn geändert haben. Weiterhin gewinnt dieses Thema Aktualität, da die Bedeutung von Leiharbeit immer wichtiger wird und damit in diesem Zusamennhang die Position der Ausländer immer mehr problematisch ist. In dieser Hinsicht, eine viel mehr eindeutigere Regelung und dadurch die effektive Kontrolle sind besonders aktuellen Anforderungen.

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Critical Remarks on Hungarian Law Regulating Minor Offences

I. Codification preconceptions – Act LXIX of 1999

1 The Hungarian penal law codification has maintained the conception of the substantive law unity throughout the past 122 years. Apart from the interlude of Act II of 1951 (General Part of the Penal Code, hereinafter GPPC) when a uniform concept of criminal act was introduced, the tripartite unity of the division of punishable acts by weight has remain unbroken. However, this solution, which was strongly disputable from the aspect of legal policy, as realised in the GPPC, had to be neglected as soon as possible, which Act XVII of 1955 actually did by sanctioning the jurisprudential principle that trespass is not an indispensable penal-law category but an independent legal institution, recently call infraction of the rules (Ordnungswidrigkeit).

The new maiden-efforts of the classification system, however, failed. On the one hand, Act XXVIII of 1970 reinstated the former state, declaring that a criminal act may be either crime or delict depending on the extent to which it is socially dangerous. Substantive law, thus, became reinstated, while infraction of rules, designed for independence, won legal recognition by the adoption of Act I of 1969 on the infraction of rules and by the related government decree 17/1968 (IV. 1) on some infractions of rule.

2 The preconception of the legislator, however, led to an impossible situation. Although in principle the infraction of rules may be declared a behaviour detached from crime, but its adaptation to inherently mixed-type circles of protection was an unpromising venture. Trespass as part of substantive penal law was of a double character. Neglecting the concept of trespass or the renaming of this legal institution, however, failed to eliminate these Janus-faced acts themselves. All this is truly mirrored by the preamble to the infraction act of 1968. This law aimed „to punish persons who impede the work of bodies of public administration and break the rules for social co-existence, and to institute successful proceedings against them". Though behaviours offending the public administration were numerically predominant, acts braking the rules for social co-existence, the so-called minor offences were somehow „smuggled back", indeed, during later regulations, their circle was even widened.

Hence it followed that the legislative effort aimed to relive the perpetrators of minor offences of criminal accountability, also met with failure.

3 The legal construction of infraction, then, was built on the hypothesis of administrative legal liability. In reality; however, it was connected with administrative law only in that it was the duty of administrative bodies to proceed in matters concerning public duties and utilities. The kinship of this institution to penal law only lies in that it also pays attention to facts of crime and delict. In material terms the institution of infraction will inflict „milder" punishment on those that commit offences less dangerous to society. The two re accountabilities are connected with behaviour which differ from each other only from the aspect of the weight of offence, but their direction, indeed even their external appearance, is often identical. It is on this account that infraction law borrows its concept and regulation-systems as well as its terminology from penal law.

4 Although denying the penal-law correlation, the 1968 legislation on infraction has undergone particular changes over the past decades. Decriminalising formed one of the trends – though „interlarded" with recriminalising processes –, the other being the marked extension of the classical subjective liability associated with the liability of legal personalities.[1] Adding to these as a third trend was the professional supervision and control, a gradually emerging branch of professional activity alongside the financial supervision. As is wide known, other bodies (supervisory bodies) that proceed in infraction matters are also engaged in such supervisory activities. Thus he possibility of the parallel sanctioning of unlawful behaviours was granted. This double accountability along with the alternative option in themselves became factors arousing conflicts. In cases of defined kinds of supervision, the affected, i.e, an administrative body, could also function as an authority in charge of infractions, while in other cases it was only entitle to initiate proceedings.[2]

II The road leading to a new codification of infraction of the rules

1 The 1968 act was replaced by Act XXIX of 1999. Over the past three decades changes have become steady, and almost thirty significant changes were made. It is interesting that the professional consultations started in 1982 on the initiative of the representative of legal science approached the problems, throughout the period, mainly from the aspect of dogmatics, rather than from that of the forum system.

2 It should be noted that infraction as a specific unlawful act (not being a criminal act – in the view of the mentioned legislator) would be judged exclusive by administrative bodies. The Act on the Infraction of Rules (Act I of 1968, hereinafter AIR) did not know of the judicial revision. Although there were ideas about how to put an end to this situation, but met with no success. Thus the proposal for transforming the various authorities in charge of infractions into independent law-courts is a case in point. The starting point of this conception was that instead of setting the administrative judicature against its judicial counterpart, the judicial powers have to be transferred to the constitution-maker. The proposed new forum network,

1 Tibor MADARÁSZ: „A gazdasági tevékenység államigazgatási befolyásolásának elméleti modelljei" (Theoretical model of influencing economic activities by state administration). Jogtudományi Közlöny, 1981, No. 4.

2 Gábor MÁTHÉ: „Megoldhatatlan a szabálysértési felelősség?" (Is the responsibility problem of infractions an insolvable question?). Jogtudományi Közlöny, 1989 No. 2.

that of justices of the peace, could have solved this centennial problem of judging on such unlawful acts of mixed character. It could have met the constitutional requirements, ensured a rational settling of the organisation with special attention to the „law-seeking" citizens. Last but not least it could have also the enforcement of civil rights by appointing independent justice of the peace and be involving them in differentiated infraction proceedings.[3] This further development was also aimed by another professional proposal – as an alternative – to the effect that in towns so-called magistrates' court should be set up. It is well known that local law-courts were also functioning in towns, but these new independent courts were meant precisely to lessen the workload of the former.[4]

3 Most codification efforts set it as their objective to revise the infraction branch of law in it entirety. Legal experts, both theoretical and practical, finally confronted two conceptions with each other. One of them was the so-called „drive-back" theory that revived the historical trichotomy. This by breaking up the infractions and by taking out the minor offences aimed to the re-infiltration of the former into penal law. Thus it announced a recriminalisation, opening the way to judicial proceeding. The rest of offences against administration – according to this approach – reduced to misdemeanours, would have been fallen within the jurisdiction of administrative bodies. The other, the so-called „drive-away" theory, aimed to maintain the unity of mixed acts, infraction, excluded from penal law, in such a way that in wanted to build their judgement on a uniform network of forums to be organised newly. (See also the alternatives discussed above.)[5] It may be stated that the codification process started commenced essentially along the way of disputes. The first committee on codification was set up in 1986. On the initiative of the minister of justice, matters concerning the infraction of rules were transferred to the ministry of justice, where from 1990 onwards several draft were prepared. These preparatory works, however, were increasingly determined by the fact that Hungary – simultaneously with her membership in the Council of Europe – on 6 November 1990, signed the European Convention of Human Rights and Fundamental Freedoms (Acts LXXI-LXXII of 1991). And what is more, on the basis of article 64, made a reservation in connection with infraction decisions for the opening of the judicial way. Until then, however, Act XXII of 1990 ensured the judicial revision of infraction decisions on the commutation of unpaid fines.[6]

Problems of the judicial way affected not only those of the unity of infraction law, but – by implication – also influenced the organisational reform of the administration of justice, as it was precisely in the early 1990s that a new impetus was given to codification of matters concerning the judicial organisation and procedural law. Finally Government Decree 1078/1996 (VII. 19 Korm.) on the regulation of infraction law summarised, in 12 points, the legal-policy requirements that were held to be the most important. This also gave a new impetus to the work of the Committee on Codification organised within the Ministry of the Interiors (and was functioning between 1993 and 1998).

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3 Gábor MÁTHÉ: op.cit.

4 Lajos BODNÁR: „Új szabálysértési intézményrendszer. Átgondolatlan reformkoncepció helyett: magisztrátusi bíróságok" (A new institutional system of infraction of rules. Instead of ill-considered reform conceptions: magistrates' courts). Magyar Nemzet, 10 September, 1996.

5 A szabálysértési jogterület (The legal field of infraction). Volumes of Studies 13. Ministry of Justice. Budapest, 1986; Gábor MÁTHÉ and András SZABÓ: „A szabálysértési jogterület kodifikálása (Prekoncepció)" (Codification of the legal field of infraction. A preconception.) In: A szabálysértési jog továbbfejlesztésének (elméleti) megalapozása (Laying (theoretical) foundations for the further development of infraction law.) Hungarian Academy of Sciences, Program Office of Researches in Legal and Administrative Sciences, Budapest, 1987.

6 Márta BITTÓ: „Az európai emberjogi egyezmény és a szabálysértési jog" (The European convention on Human Rights and the law on infraction). Magyar Közigazgatás, 1993, No. 5.

Apart from the catalysing role of the government, another event played a decisive role in the elaboration of the new code, namely Resolution 63/1997 (XII. 12) AB of the Constitutional Court (hereinafter: CC).

III The CC Resolution „deciding" the fundamental questions

The Resolution of the Constitutional Court (CC) started out from the fact that Hungary promulgated the so-called Convention of Rome as Act XXXI of 1993 and made a reservation in connection with its paragraph l of article 64 that ensured „right to go to law". This reservation so read: „In proceedings going on before administrative authorities in matters of infraction of rules, Hungary for the time being cannot guarantee the right of applying to courts of law since the presently effective Hungarian rules of law do not allow such right of appealing against the final decision of administrative bodies in matter of infractions of rules". Accordingly the honourable judicial forum marked the re-codification of infraction law as the only way of the earliest possible withdrawal of the former regulations. To help this work, the following theoretical theses were declared.[7] Theses:

1 Infraction of rules is a „two-faced" legal institution: an offence against public administration and a criminal act;
2 Resorting to judicial proceeding should be ensured in respect of punishments imposed on both types of acts;
3 The Constitution has made it a universal right of courts of law to exercise a legality control over administrative decision;
4 Authorities in charge of infraction, authorities of public administration and decisions on infraction of administrative rules all qualify as administrative decisions;
5 If the punishable acts are directed against public administration, the related decisions shall be revised according to the rules of administrative judicature;
If the decision relates criminal behaviours, then an independent and impartial court shall make a just decision in a public trial;
6 It is not unconstitutional if the criminal infractions are judged by an authority in charge of infractions, but a comprehensive judicial revision shall be ensured to the offender;
7 Under the AIR, fine for infraction also carries a conditional confinement, and it is not a sufficient condition that in case of non-payment of the fine, the legality of the decision on its commutation to confinement will be revised by the court of justice;
8 The procedural rules for infraction proceedings are nearing those of administrative proceedings, but those also build on some elements of penal procedure;
9 Infringement accountability – means in both types of unlawful acts a „guilt responsibility", that is, responds to an offence committed by a natural person in the past, and so involves a prejudice of a repressive nature determined on the basis of accountability;
10 As a fundamental principle of the Rechtsstaat, the presumption of innocence shall be adopted, especially in criminal-type cases, thus in administrative proceedings, a well.. Hence it follows that
11 it is the duty of the acting authority to present the evidence and in certain cases e.g. the police as investigating authority may also be involved;

7 Resolution 63/1997 (XII. 2.) AB of the Constitutional Court. Magyar Közlöny, 1997, No. 111.

12 a procedure, in which neither of the related fundamental principle can prevail, cannot be regarded as constitutional from the viewpoint of security in law.

The 12 theses raise the question of the extent to which they could decide, or contribute to resolving this long-protracted dilemma of legal dogmatics. What are the useful consequences that can be drawn from them, and which of them were built on uncertain premises? And finally to what extent and how these could become constituent parts of the new code of infraction?

Before answering these questions, it seems justifiable to refer to some elements of dissenting opinions expressed by CC judges concerning the discussed Resolution, as well as to Resolution 6 of the Supreme Court of Justice (hereinafter SCJ).[8]

Some elements of the dissenting opinions

In its chapter on the judicial organisation, the Constitution declares that the courts of justice shall revise the legality of administrative decisions (par. 2 sect. 50).

At the same time, the chapter on rights and duties rules that everyone has the right to it that any accusation against one or one's rights and duties in any action shall be judged by an independent and impartial court set up by law in a just and public trial (par. 1 sect. 57).[9]

The judicial competence referred to above is of different quality. Paragraph 2 of sect. 50 formulated the classic thesis of the Rechtsstaat, which is tantamount to the judicial control of public administration working contra legem.

The tautology of one of the 12 points of the cited CC Resolution is recalled here. If the infraction authorities are administrative authorities, then decisions on infraction are administrative decisions. Hence, a court of justice controls the legality of administrative decisions.

A dissenting on opinion (held by CC justice Sólyom) by contrast, argued – rightly – that decisions on infractions are not determined by the Act on Administrative Procedure hereinafter: ACP, /pars. 3/7/, but by the relevant procedural sections of the infraction law (then still Act I of 1968).

Thus the respective organisational and procedural approach led to different conclusions.

But here it also seems necessary to refer to further differences of substance. (See what have been written about the origins of these problems.)

Resting on the European legal solutions and on the similar Hungarian codification practice in historical retrospect, the model of unity in substantive law – division in procedural law should be underlined. Namely that from 1878/79 up to 1955 infractions were double-natured acts forming part of penal law, which would be judged by administrative bodies on the one hand and by law-courts, on the other. But against the decisions of administrative bodies appeal may be lodged with law-courts. This judicial revision, however, had already been distinguished in the contemporary legal literature from the judicial control of general administrative decisions. Thus, e.g., „We do not deem it justifiable either that in judging on police trespasses falling within the jurisdiction of administrative bodies a role can be assigned to the administrative courts also. Namely the procedure of the latter is not directed to annul or rectify the unlawful acts of administrative bodies, but to force private persons to behave so that it might ensure the smooth working of the state organisation, or to abstain from faults and from act engendering the public order."[10]

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8 LB (SCJ) KK6, JD 1992/432.

9 This provision otherwise is adequate to section 6 of the Convention of Human Rights.

10 János MARTONYI: Közigazgatási bíráskodásunk továbbfejlesztése (Further development of the Hungarian administrative judicature). Budapest, 1944. pp. 12-13.

If this legal tradition of more than 50 years is compared the theses included in the CC Resolution, it appears that the majority of premises is identical, except the one under point 5. This, in a less understandable manner, separated the offensive behaviours towards public administration from the so-called „criminally colourless behaviours", and wanted to base them on procedure before independent and impartial courts. The logic of these lies in what has been referred to; namely that infraction courts acting in the double-natures matters are administrative authorities. This formal logic approach, however, had no dogmatic foundations. Though trespass really formed part of penal law, but was relegated to the competence of administrative authorities and courts. Furthermore, infraction also had an additional quality as compared to trespass. The legislator handles the infraction „separated" from penal law, making even a terminological distinction from trespass (Ordnungswidrigkeit as against Übertretung). It is true, however, that the notion of all-embracing judicial revision was essentially unknown until 1999, when the new code was adopted.

Scrutinising the reasons of the CC Resolution, it can be brought up that it recognised the mixed character, and also the unity, of infraction law out of reliance on experiences in codification. It is interesting to note that this unity related to protected objects, but not to the unity of penal-law dogmatics, although in the AIR the accountability – sanctioning systems are laid upon the same dogmatic foundations. What the CC Resolution inferred from this was not that this unity constituted the Verwaltungsstrafrecht, not even that it constituted the Nebenstraftrecht, Instead it maintained that this unity constituted such an Ordnungswidrigkeit, the anti-administrative parts of which had to be revised under administrative court procedure, and its criminal parts under judicial procedure. However, the Resolution did not want to adopt a separate procedure to this, but those procedure that existed in the Ordnungswidrigkeit. What is more, it also hastened to declare that criminal infractions can be judged by the infraction authority as well with the requirement of a subsequent revision in merito by ordinary court. With this Resolution, the CC, although declared the above-discussed theses, failed to solve the related problems. It did not recognise the Verwaltungsstrafrecht, but held out the prospect of a doubled procedure: before the administrative body and before the judicial body. Though it promised procedure without open trial to the former, and a fair procedure to the latter, yet – with regard to 55, l of the Constitution – it placed a just and public before an impartial trial court into the centre.

Finally it is noted that the discussed dissenting opinion called the attention to a specific collision in the high-level legal decision-making. This is based on the fact that while the CC is to intervene in protection of the rule of law (constitutionality), the Supreme Court of Justice is to secure law and order. This specific role o is reflected by the SCJ resolution that disapproves the interpretation of 3 (1) of the Act on Administrative Procedure to the effect that a decision made in the course of an infraction procedure will qualify an administrative decision (Judicial Decisions /hereinafter: JD/ 1993/125). It should be realised that this assessment in its content goes beyond the CC Resolution, because – in my view – by this characterisation of infraction procedure draws near to the recognition of administrative penal law. „The 'distinctive plus' of an administrative procedure lies in the fact that the acting body – to promote the effectiveness of administrative activities and prevent infractions of law – uses punishment which is a repressive sanction and general means of prevention." Accordingly, in case of infraction procedure, no administrative no legal relations exist.[11]

The CC resolution 63/1997 (XII. 1.) AB is, then, a strange dogmatic performance, because its tautological thesis (I. 41) is denied – argumentum in contrario – by the dissenting opinion of the justice who participated in is elaboration.

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11 Cf. Ferenc PETRIK: „Búcsú a szabálysértési jogtól" (Farewell to the infraction law). Magyar Közigazgatás, 1998. No. 9. pp. 518-519.

It should be mentioned that in parallel with the Resolution, the cause of the reform of the judicial organisation also made headway. There was a conspicuous anxiety about the increasing number of infraction cases that required judicial revision. It is to wit, a serious problem in Hungary that the judiciary government is not inclined to take note of the fact that the West-European legal development has transcended the theory of the exclusiveness of a uniform judicial organisation. Namely, administrative tribunals divided according to the nature of affairs – labour, social, bagatelle and so-called minor administrative cases – are functioning as bodies set up ahead the courts. Tribunals provide an easy access facilitating a rapid, simple, but qualitatively reliable judgement of such simple cases. These can be linked up with the ordinary judicial organisation, but the „appeal contact" also exists. These circumstances are not insignificant, because – in view of them – the CC Resolution did nothing else but underpinned the so-called „drive-away theory". The facts, however, show something different in the West-European legal development. The theory of the administrative penal power has unambiguously gained ground; the legislation has developed several organisational techniques, and successfully applies the system of parallel sanction – which has been recognised by the Strasbourg practice as well.

IV The new code – following the German pattern

The tradition of trichotomy on the one hand, the novel independence of the infraction of rules on the other, and in connection with all this, the massing of the follows of the „drive-away" and „drive-back" theories into separate camps, and last but not least the analysed CC Resolution all encouraged the Government to speed up the process of codification. So much the more as the CC Resolution set a deadline: obliging the Parliament to perform its legislative task by December 1998.

This effort resulted in Act LXIX of 1999 with after a short period of preparation entered into force on 1 March 2000.

The main characteristics of the law

1 The rule infraction act retained the unity of the two types of acts – offences against public administration and the penal law-related unlawful acts –, and put down these in a law (hereinafter AIR) and in a closely related government decree (hereinafter D)[12] Furthermore, the AIR retained the tripartite unity of the former structure where a general part, procedural part and minor offences are discerned. These are the punishable acts – known as trespasses prior to the introduction of the institution of infraction of rules – which were included in the law

12 The „distinctive plus" of infraction of rules, and the conceptual elements of administrative penal law were well summarised – with reference to Pál ANGYAL's work – by Zoltán MAGYARY in his fundamental work Magyar Közigazgatás (Hungarian Public Administration) Budapest, 1942, p. 564; „There is positively no doubt that the punishment of trespass is not a sensory evil use in retalian of of some unlawfully committed act, not a malum passionis, propter malum actionis, but an effective warning of proper conduct as required by public administration; is a legal means that is not repressive, but exclusively preventive in nature, is not aimed to inflict a blow on offenders, but tends to make those who offend against public administration accustomed to proper conduct and order (,,,) The trespasser is a dangerous to the public, but it is only a careless, negligent, gemeinlässlich individual who is unaware of his public administrative duties."

on the basis of the principle of nullum crimen sine lege, nulla poena sine lege, while offences against public administration were brought together in chapter XIII under 151 facts listed in the particular part of the D.[13]

Penal-law facts included in the D constitute the following infractions: offences against human dignity, personal freedom and public order (Chapter XIV), offences against property (Chapter V) and financial offences (Chapter XVI).

To be mentioned as a specific technique of codifying the field of infractions is that the D was made some half a year following the issue of the AIR, and it was simultaneously with the former that Act CXX of 1999 on the amendment of penal rules of law (the so-called Novella) was issued. The latter extended – among others – the scope of acts to be punished with confinement, and also made the sections concerning the coercive measure to be taken in the infraction procedure more precise. Further examples for the temporally serialised law-making include: the joint decree of the justice and interior ministers on the detailed regulation of the execution confinement punishment, and the fine-substituting confinement (7/2000 (II. 23.) IM-BM e. r.). And finally the decree of the minister of the interior on the detailed rules for fines on the spot (10/2000 (II. 23) B. M.) were issued immediately preceding the AIR+D's entry into force.

2 Although the reasons of the AIR intended to sum up the novel elements of the code in several point, it can be established that in reality only two meritorious innovations have been found. Both of them can be traced back to the provisions of the European Convention on Human Rights and Fundamental Freedoms (hereinafter Convention). As is well known, the ominous paragraph 6 guarantees the possibility of the judicial way as a civic right to the affected. The other follows from some occasional decisions of the European Court of Human Rights in Strasbourg, namely that in such cases the rule for a „fair" procedure should prevail, that is the law-court in each given case should make its decision in compliance with the procedural rules and should avail itself of the possibility of proving the facts.

3 According to the Strasbourg practice – the Reasons emphasise – there is nothing to prevent that minor offences „in the first round" may be judged by administrative bodies under summary procedure. In case the affected do not agree with the decision of the given administrative body, they shall be entitled to have recourse to a court of justice within the framework of a procedure protected by all guaranties provided under paragraph 6. At the same time, attention should be also paid to long lasting and extremely heavy workload of the administration of justice; therefore, the rules should be made so that the majority of the affected could be interested in accepting the decions of administrative bodies.

If the offender did not agree with the decision of the administrative body, the law would allow him/her to place a plea with delaying force with the infraction authority, on the basis of which the authority – in agreement with the former regulation – could make a self-revision. That is, it could withdraw or modify the decision to the advantage of the complainer. Against the decision of the infraction authority, the offender may apply to the court by way of making an objection.

4 Thus what the legislator did was nothing else but to take a step forward from the side of the reservation referred to above, and opened the judicial way that involves a double procedure, administrative and judicial. This, however, does not form a parallel process, but one where the two are built upon and closely related to each other.

Conceptually, the codifier fully identified himself with what had been included in the CC Resolution. Indeed, he made then even more clear-cut. Nor can the committee on codification be blamed for this attitude, as its debt of the theory should be not necessarily repaid by the

13 Government Decree 218/1999. (XII. 28.) Korm. r. on the individual infractionst of the rules. Magyar Közlöny, 1999. No. 125.

practice. However, what it can be blamed for is that changed a concept of jurisprudence into a category of penal law, and from this it drew false consequences.

5 „Infraction of rules constitutes the penal law of public administration, in case of which – irrespective of whether the given state's internal law define these acts as offences against public administration or as criminal acts [sic!] – proceedings should be conducted in the same way as in case of criminal acts."

I believe that the standpoint of the codification committee, hidden in the Reasons, is based on a misunderstanding. This may call the diverse but unified fields of law – otherwise rightly – administrative penal law, the latter is not identical with the classical penal law. (See: Verwaltungsstrafrecht vs. Justizstrafrecht!) What is implied in the administrative penal law is quite a different thing. It relates to a human behaviour that manifests itself in unlawful and accountable acts that the laws, government decrees or municipal statutes state as acts of crime, and the perpetrators of which are liable to punishments as defined by the AIR, and also to prejudice.

6 In respects of prejudices, nor does the new code offer a markedly enriched system of sanctions. It is true that the reinstatement of the eventual confinement punishment is somewhat surprising, but – as it appears from the Reasons – it is nothing but the ultima ratio of the penal-law punishment. Three amendatory statutes to the AIR and the one to PC have designated three further facts as punishable with financial penalty not exceeding HUF 150,000 or with confinement as an alternative. These facts are disturbance of the peace, dangerous threat, illegal prostitution, squatting, theft of produces (forestry), violation of the ban on driving. Act to be punished with confinement fall – „in the first round" – within the jurisdiction of law-courts, and at second instance to the county courts of justice.

Fine is recognised as a typical penalty with a minimum of HUF 1,000. By a statute a local government may set the highest sum of fine at HUF 30,000. The amount of fine on the spot may range from HUF 500 to HUF 10,000. At the same time, the ways and methods of fining have been widened. Non-payment of the fine was followed by stoppage of payment or by its collection in the same way as taxes or by commuting it to confinement or to public works, if the offender agrees to it. The related measures include judicial allocution (warnings) and confiscation, and as new elements, bans on driving or expulsion – in case of foreign citizens.

7 As has been mentioned, for lack of a sound theoretical foundation, the code could bring any qualitative change only in its procedural part. In other works: the judicial way was built on the forum-system of the former AIR.

The notary of the local government invariably remained an infraction authority with general competence, police authorities continued to proceed in cases of traffic violation (accounting for 70% of infractions). Moreover customs and excise authorities remain in charge of offences against customs, ditty, tax and foreign exchange relations.

Supervisory authorities – not necessarily infraction authorities – with their parallel sanctioning powers are now meting out some 45 kinds of fines-on-the-spot. It is regrettably that the AIR failed to make arrangements for this problem and the labour-related fines competing with the infraction fines do not promote the evolvement of an expected law-abiding behaviours.[14]

14 Ibid. List of infractions by field and by the chapters of the code: public order (Chapter I), endangering the undisturbed operation of public administration (Ch. II), traffic violation (Ch. III), telecommunication (Ch. IV), protection of consumers (Ch. V), labour affairs (Ch VI), health and welfare (Ch. VII), agriculture, forestry and water management (Ch. VIII), industry and mining (Ch. IX), construction (Ch. X), offences endangering the order of public education cultural good (Ch. XI), the press (Ch. XII), measurement, standardisation and invention (Ch. XIII) – pp. 8942-8967.

8 Having the judicial way complemented, the AIR has become essentially conform to the European standards. This was achieved through praiseworthy, though less differentiated procedural solutions. By way of illustration, the following remarks seem useful to be made.

The procedure before the infraction authority is two-staged. The abating or penal decision can be contested by an objection with delaying effect. On the basis of the objection – as second stage – the decision will be either withdrawn or modified to the advantage of the complainer. If the infraction authority did not modify the contested decision, and if a repeated objection was placed [sic!] – then the procedure before the court could start with even a doubled objection. It is to be noted here in parentheses that prosecutor's role is a particular one in such a procedure. He, in fact, acts as a forum of complaints against infraction decisions which have not been brought up for trial (e.g. coercive measures, legality control, etc.).

The law-court may revise the decision of the infraction authority both legally and factually, may maintain it in effect or annul or alter it, but is bound by the ban on reformatio in peius.

The procedure before the court of justice is also two-staged: with or without trial. In the former the secretary of the court might also proceed as sole judge. If the affected person did not agree with the decision, the trial could not be omitted. The decision made at the trial is binding and can be executed. The legislator deemed the trial as a possibility for a first-instance legal remedy, but this can be preceded by two objections. Thus in case of a financial penalty-bound procedure, at the stage of the infraction authority the AIR permits two, at the judicial stage one, i.e. altogether three, possibilities of specific legal remedy.[15] In case of infractions entailing confinement, the judicial decision of first instance made under special procedure can be contested through a normal plea for remedy because the case has not been preceded by an administrative procedure, and so an outstanding fundamental right has to be accorded legal protection.

Finally chapter VII of the AIR on coercive measures deserves special attention as it is concerns infractions of procedural rules that are more closely related to penal procedures (see: arrest, taking into custody for infraction, search of robes, packages and vehicle, seizure, fine on-the-spot).

Following the German pattern

As is widely known, the committee on codification carefully took stock of and deliberated the foreign legal solutions, and decided on the selection of the legal construction designed to serve as a model.

Without making claim to comprehensive coverage, it is worthwhile recalling some features of he German infraction law – with regard to their Hungarian „impressions".[16]

1 In Germany – just like in Hungary – the tripartite division of criminal acts had been used, but in connection with the major reform of penal law in the 1960s and 70s, trespasses were abolished to be replaced with what is called infraction of the rules (infraction for short).

2 The effective law on infraction include only a formal definition of infraction. Accordingly, infraction is regarded as an unlawful and accountable act constituting a legal fact that carries a financial penalty (fine). At the same time, the delineation of the content was transferred to the legislature that be. Although the legislator has the freedom action as to how to class the individual

15 For the more recent valuable findings of researches in this topic, see: Marianna NAGY's monograph: A közigazgatási jogi szankciórendszer (The sanction system of administrative law), Osiris, Budapest, 2000.

16 Cf. László PAPP (ed): Új szabálysértési jogszabályok magyarázatokkal. I-II. (New legal rules for infraction with explanations) 2 vols. HVG-ORAC, Budapest, 1999.

acts, but he also has to face one serious limit and it is the Constitution. The Constitution provides extraordinary penal-law protection to the essential interest of community life: thus to the life, corporeal integrity and property of citizens.

It is conspicuous that in the comparative study of crimes, there is a steady field that that indisputably belongs to the classical penal law, and the number of those belonging to that field constantly increases as the legislator has decriminalised the delicts to be re-defined as infractions.

Of the formal definition of infraction, accountability also deserves mention. Accountability in the field of infraction means that the offender acted unlawfully although under the given circumstance he may have been fit and able to behave in a law-abiding manner. It is impossible to take no notice of the fact that here the legislator attached particular significance to socio-ethical disapproval and conscious opposition, and wilful commission of criminal act. It is also to be noted that the law also punishes negligent behaviours with financial penalties.

3 In making distinction between penal law and infraction law the German law also assigns a decisive role to sanctions. It is a general tendency that in the fields of substantive penal laws the confinement punishments should be averted so far as possible. While penal law envisages confinement together with the possibility of its commutation to financial penalty according to a certain „commutation rate", the infraction law knows only financial penalty. Under the related German law this penalty ranges between DM 10 (as lowest) and DM 2,000 (as highest). But he federal laws might also set higher limits than that. For example, in 65 federal laws the upper limit of financial penalty is set at DM 5,000, in 88 at DM 10,000, in 49 at DM 20,000, in 46 at DM 100,000, an in 3 laws at DM one million. The law on securities envisages even the upper limit of DM 3 million.

In meeting out financial penalties the principle of differentiation prevails. Depending on the degree of accountability, perpetrators of intended acts of negligence are to be punished according to the upper limit. Apart from this, in cases of infraction of minor weight, the offender's financial standing will also be taken into account.[17] With individualisation, however, the financial standing is not only a circumstance calling for equity, but – on he contrary – in exceptional cases might also justify the exceeding of the upper limit, if it was not achieved as an objective that that the penalty should exceed the economic gain derived from the infraction.[18]

In order that a uniform standard could be applied to massive traffic violations, a decree was issued, under authorisation by the Act on the public highway traffic, which contained a so-called catalogue of fines.

Finally, in connection with the system of sanctions, reference should be made to a specific institution worthy of being followed. This is the coercive apprehension. This can take place in case when the penalty inflicted by final decision has not been paid by the stated deadline. The court can only make the decision on the confinement.

The latter is inapplicable only if the affected person notified the court of his insolvency, or if such circumstances have emerged as can convince the court of his being really insolvent. The duration of coercive apprehension may not be longer than six weeks, in case of several infractions, it might last six months as maximum. This institution is a coercive means for the punishment of those who are otherwise able, but not willing to pay the penalty. It is important that this kind of punishment does not substitute for financial penalty, i.e. it should not be regarded as a „commuted" sanction for infraction. In this sense it differs from the financial penalty-substituting confinement which means a real imprisonment.

17 Erik GÖHLER: A szabálysértésekről szóló törvény 12. kiad. (The Act on Infractions of law. 12th edition). München (Munich), 1998.

18 „A szabálysértési törvény" (The Infraction Act). OWIG, par. 17.

The second part of the German AIR, which in its structure is identical with its Hungarian counterpart, contains also the most original procedural regulation. The starting point of the regulation is already quite different from that of the Hungarian codifier. Although the German AIR contains procedure for financial penalty, but does not relate it administrative procedure – as the Hungarian does – but to penal procedure, reduced to a simplified form. It always refers to the rules of penal procedure, unless independent rules are also included.

Under the German AIR the administrative body might apply allocution and financial penalty-oriented procedure. To prosecute infractions, the administrative body the same rights and duties as the public prosecution. However, while the prosecution acts according to the penal procedure and to the principle of legality, the administration – under the AIR – is entitle characterised to deliberate the individual cases opportunely. In the financial penalty-oriented procedures no intervention limiting the personal freedom (apprehension, seizure of postal consignments, cables) is not permitted.

The procedure of the administrative authority is generally going on in written form. It is, however, always made possible for the affected to present their statement concerning the charges brought against them. In traffic affairs, for example, they will receive a form, sheet of hearing as it is called, to fill in. Inasmuch as the administrative authority opts for financial penalty, the decision will be sent to the affected, in which reference is also made tote possible legal remedies and to the consequences of non-payment.

Apart from financial penalty, mention has to be made of another process, too. This is a method applied to simpler cases of infraction (traffic violations, ban on parking, etc.). This method can be adopted in cases where the administrative authority might charge a fine of DM 10 to DM 75. It is to be noted as a general rule the no admonition exists without fine. The adoption of this sanction requires a consent by the affected. If the fine is paid immediately or within the stated term, generally one week, the cased is regarded as settled. No legal remedy is possible against judicial admonition (allocution), although the Constitution prescribes it that everyone who feels one's rights to be violated by the public authority might go to law. Here, however, the consent and the due payment of the related fine make this superfluous. Should the affected not pay, the case would be transferred to a normal procedure resulting in financial penalty.

Coming back to decisions on financial penalty, the AIR permits that – within two weeks following the reception of the decision – an appeal could be lodged with the administrative authority that made the contested decision.

As a provision successfully transplanted to the related Hungarian regulation, the administrative authority might reject the appeal or withdraw its decision. In the former case it might transmit the case though the prosecution to a district court of justice.

Under this situation, the prosecutor masters the procedure. He is the contact person between the administrative authority and the district court of justice. In Hungary his role is somewhat reduced to act merely as a forum of complaints.

Under the German AIR, the prosecutor is the main actor of the intermediate procedure. He might stop the procedure, but might also proceed with his investigation. If the administrative body happened to reveal the case inadequately, the justice of the district court is to return the case, along with the reasons – also through the prosecutor – to the administrative authority for further investigation. Should the court come to the conclusion that there is no good ground for the procedure, he has to return the case to the district court to withdraw its decision on financial penalty and to put an end to any further procedure. The reason of this regulation is that it presses the administrative authority for conducting thoroughgoing investigation. Namely the body the superior authority of which has stopped the procedure should cover the costs.

Procedure before the district court of justice

If the prosecution did not stop the case and the court of first instance did not return it to the public administration, the procedure would continue before the district court. District courts have separate department for cases entailing financial penalties. On such cases a professional judge, a justice of the district court, will always make the decision.

The district court might reject the appeal, against which, however, a complaint can be lodged within one week.

If the appeal is accepted, there are once more two ways open: procedure with trial or without trial.

At the final trial – as with penal cases connected with crimes – all affected persons affected shall be present, if their presence is indispensable to clear all facts of the case. Should the affected fail to be present without good cause, his/her appeal shall be rejected. The prosecution is not obliged to be present. But the representative of the administrative authority might participate in the trial with a right to speak. At the trial the decision is made in the form of a sentence. In the other version, procedure without trial, only a decision is made. The latter is possible only in case if the court does not hold a final trial necessary, of which it informed both the affected, and the prosecution, and neither of them has raised any objection.

The problem of reformatio in peius

Perhaps it is this problem that might justify our taxing Reader's patience so far.

The German law, to wit, finds a quite original and logic solution in this matter. Its starting point is that the resolution of the administrative authority on the infliction of punishments will be assigned – through the appeal process – a function similar to what complaint fulfils in the penal procedure. The law-court is no way bound by this resolution on inflicting financial penalties. It might also formulate the judgement in an other way, and more importantly, might inflict other penalties, lower or higher, than the resolution does. The latter possibility, however, dos not stand if the court made is decision without final trial. In this case, to wit, the court might not depart from the mentioned resolution to the detriment of the affected person.

It adds a special value of the discussed German law, in which the intrinsic logic and coherence of the German regulation also come into full display that it falls in line with paragraph 6 of the European Convention on Human Rights and Fundamental Freedoms from the aspect of legal dogmatics a well – To support what has been stated above, two statements are made below.

Ad 1 The consequence of giving the legal status of penal procedure to a financial penalty-oriented procedure before the court is that the court in its decision-making should act quite independently of the mentioned resolution, and should not simply approve that resolution.

Ad 2 The affected by his permitted appeal against the decision on penalty will be reduced to the state of an accused who has to defend himself already against only a culpability-based reprimand, and not against an administrative procedure.

This argumentatio ad veritatem is the essential point necessary to fully enforce paragraph 6 of the Convention. That is, everyone is entitled to a fair procedure before a court in case of charges brought against one.

If the demand of falling in line with the repeatedly mentioned paragraph 6 of the Convention has been a decisive aspect, then the consequent adaptation of the dogmatic solution of the German AIR which has served as a model is also of a great moment.

The new Hungarian AIR has been in effect for a year. Its numerous defects, problematic and incoherent solutions call for urgent corrections. Practical experts in several analyses and on scholarly college meetings have discussed the experiences so far gained.[19]

Time is no doubt pressing on the part of codification, too. It is an urgent task to make up for many defects, and to carry through the proposed new solutions. The work has commenced, and the draft of a sizeable package of amendments has also been worked out.[20] These urge mainly on the elimination of inaccuracies. The draft deals with such problems as the scope and validity of the AIR, limitation, problems of competence, detailed rules of procedure before the court, commutation to confinement, fining on the spot, and what is more, it considers even the introduction of equity as a new institution. Driving the prerogative of mercy, according to the draft the President of the Republic would exercise the equity against decisions related to confinement.

These professional initiatives are indispensable in the revision of this field of law. But for lack of theoretical considerations and of taking well-founded stands in these problems, codification might hardly achieve success.

If the Hungarian legislator proves unable to receive the institution of the German Verwaltungsstrafrecht, he should make every effort for the reception of the German model, which realises the Nebenstraftrecht, to which he has committed himself.

V The most recent attempt at codification in Hungary

Act LXIX of 1999 and the related Government Decree 218/1999 (XII. 28) Korm. r. – in view of the practical experiences so far gained – called for a comprehensive revision of the currently effective AIR and raised demand on forming a conception of a new regulation of this field in 2003.

Codifiers of the Ministry of the Interior have done their work circumspectly. They too stock of all anomalies of the parallel system of forums (courts of justice – administrative authorities of infraction affairs), took the necessary revision of facts, as well as the procedural „emergencies" also into account, tackled with the increasingly problematic confinement as punishment, with the problems public works, which as an alternative punishment have partly become impossible, and also with procedural problems involved in the execution of punishments, with especial view to Hungary's accession to the EU.

Agreement on the mutual judicial assistance in criminal matters

The harmonisation of legislation concerning penal law produces an effect on Hungarian legislation in a particular way. As has been seen in the above discussed historical outline of

19 Oskar KATHOLNIGG: Enyhébb szabálysértések kezelése Németországban – a szabálysértési törvény (The handling of milder infraction in Germany – The Infraction Act) (Manuscript, 1999.)

20 Of the summarising critical studies. See: János SPITZ and Sándor SZABÓ: A szabálysértés miatti pénzbírság kiszabása gyakorlat értékelése. A szabálysértésről szóló 1999. évi LXIX. törvény alkalmazási gyakorlatában felmerült egyes kérdésekről. A Vas Megyei Bíróság Büntető Kollégiumának ülésére (An evaluation of infraction as a practice of inflicting financial penalties. On some problems emerging in thee practical application of Act LXIX of 1999 on the infraction of rules. Paper presented at the meeting of the Vas County Court's Penal College) (Manuscript). Szombathely, 2000.; „Jogalkalmazói pillanatfelvétel az új szabálysértési törvényről" (A rapid juridical glance at the new law on infraction). Magyar Jog, 2001. No. 1. pp. 7-24. See also Törvényjavaslat a szabálysértésekről szóló 1999. évi LXIX. törvény módosításáról (Bill on the amendment to Act LXIX of 1999 on infraction).

Hungarian legal development, illegal acts, falling outside the overtly criminal acts, are of a double nature in Hungary, much in the same way as in the related German and Austrian legal solutions. Thus the diversity of the European legal dogmatics, except the „pattern", has no effect on the codification process. The mentioned patterns (i.e. the German and Austrian models) continue to retain their predominance. Therefore what is only left is the procedural approach, and so provisions concerning international judicial assistance have been revalue.

As is widely known, the aim of the agreement adopted by the EU Council in May 2002 is meant to promote the enforcement of the European agreement on mutual judicial assistance in criminal matters, concluded in Strasbourg in 1959, and its complementary protocol. The enforcement of the provisions of the Schengen Executive Agreement, which are related to judicial co-operation, is also aimed.

The Agreement on mutual judicial assistance in criminal matters envisages a co-operation among the judicial bodies of the EU member states. But if the form of this assistance happens to be related to police or customs authorities in some of the member states, then the co-operation of those authorities should come to the fore. At the same time, Article 3 of the Agreement requires the application of such co-operation in „procedures instituted by administrative authorities and also in cases, which are related to criminal acts, when the decisions made by an administrative authority may lead to instituting a procedure before the territorially competent court of justice."[21] From reading the text of the agreement, a double-obligation can be inferred. On the one hand it refers to the general procedure instituted by the administrative authorities, on the other, it refers to contesting that administrative decision by lodging an appeal with a court of justice.

From this norm text several things may follow. First, there is a terminological uncertainty, more particularly about the term „administrative authority". The formerly discussed CC Resolution declared that the infraction authority is at the same time an administrative authority, and as such its decision can be impugned before a court of justice.

However, there still remains the big question of whether all bodies judging infraction matters are infraction authorities as well? Or – with one more restriction – can, e.g., every body that metes out fines be regarded as an infraction authority? To settle this problem forms a task of codification. But from the particular manner in which this problems has been settled arises the question of whether or not the first part of par. 3 of the agreement on judicial assistance in criminal matters relates to the Hungarian obligation of co-operation? In Hungary, for the time being, „a significant number of infraction authorities seems to be quite superfluous". Namely, apart from a local council's notary with his general competence, dozens of other administrative bodies may also have the competence of an authority.

Now then, if the double nature of infractions remained, that is their division into offences against „purely" public administration, and into „purely" petty affairs, it would come logically that the agreement on judicial assistance in criminal matters relates only to infraction of somewhat criminal nature.

Owing to the widely different legal solutions, no practice based on a uniform and generally accepted interpretation has developed as yet, and the enlarged EU is likely to be even more problematic in this field. Therefore, inasmuch as the new conception of infraction regulation fails to find a quite new dogmatic solution, the really possible practice may only be that the legislator would appoint some of the authorities that have been invested with punitive powers in infraction matters to maintain contacts and act as subjects of co-operation. Forming a separate topic within this is the handling of the Schengen Executive Committee's decision of

21 A szabálysértési jog szabályozási koncepciójáról (On the conception of a new regulation of infraction law). Budapest, 2003. Manuscript.

28 April 1999 in context of procedures concerning traffic violations and infractions and the content of the obligation of co-operation. In this field conditions should be created for the mutual enforceability of foreign and Hungarian sentences and decisions. We can fully agree with the standpoint of the new conception's drafters that the latter should be realised as soon as possible. One of the essential preconditions for this is to lay the judging of infraction matters on informatics foundations which, in turn, depends on the nature of system of forums. Hence it follows that this also affects the existing structure of the legal remedy system. The reinstatement of administrative procedure at second instance may also follow from the appeal system, in which case the court of justice may act as an extraordinary forum of legal remedy. Finally the main new task will be to bring the new system infraction forums into harmony with the on-going reform of Hungarian public administration.

The diversity of the system of infraction forums

Presently, some 65% to 70% of infractions of rules committed are judged by the police, some 25% by the notary of the local government, and the rest (5%) by the so-called other authorities. Even in the knowledge of these data there remains the question of whether or not this highly diversified system of forums will be needed in the future too.

This question is justifiable because the currently effective Hungarian infraction law – in addition to the police, the notary, and in cases of financial offences the competent officials of the Customs Office – also recognises several other bodies as being invested with the right to judge in cases of infraction of rules. More particularly, such bodies are the following: branch offices of the National Service of Public Health and General Hygiene, National Inspectorate of Consumer Protection and its branch offices, the district inspectorates of mines and the Hungarian Office of Mining, inspectors of labour and work safety, the territorial bodies of the National Inspectorate of Telecommunications, directorates of national parks and the National Inspectorate of Gambling.

In the military field, too, professional members of the armed forces and – in the case of regulars – the competent commanders also act as infraction authorities.

An ordinary court may also act as a special forum, and not only in revising the decisions made by infraction authorities, but also as so-called „first-round" forum to judge infraction cases to be punished with confinement.

The above-listed forums, and here basically those invested with the rights of infraction authorities are relevant, are also vested with the right of fining on the spot.

Empowered to fining on the spot are also – though not in the capacity of an infraction authority – such organisations and bodies as the professional fireguard, officials so empowered by the board of representative of local governments, as well as guards of natural conservation, persons empowered to proceed in such matters on behalf of the nature conservation authority, furthermore, the authorised officials of the Inspectorate of Public Domains, Roads and Sanitation, plant hygiene and soil protection stations, veterinary medicine and food quality control stations, other official quality control organisations, and the supervisors of the Traffic Inspectorate.

From the experiences of the codification committee, I have come to the conclusion that as long as the specialised ministries will stubbornly insist on the additional infraction authority powers of their subordinated special inspectorates, no substantial change in this over-abundance of forums can be made. Adding to this is also the peculiar situations that the inspectorates may at the same time also act as forums meting out fines. This leads back to the problems of sanctioning, to the possible „double punishments". More particularly, to the

question of the extent to which the numerically significant differences between fines for infractions and those inflicted by the specialised inspectorates can serve to repress unlawful behaviours.[22]

The way the preliminary study to the new infraction codification summarises the topic in context of the „fascinating" abundance of forums is also worthy of attention.

„The standpoint that has unambiguously crystallised in the agreement procedure with public administration is that there is a need for such a wide range of infraction authorities and bodies with especial view to the fact that each of them is in possession of a highly special expertise which – in judging infraction cases relegated to its jurisdiction – can be seen as the guarantee of a rapid and competent proceeding."

However, another passage of the same study contradicts the above-cited statement, maintaining that a kind of „streamlining" the system seems to be appropriate anyway in the codification process. Namely, „if the professional basis of the behaviour of a relatively large number of authorities is supposed to be formed by the particular expertise of the individual infraction authorities – which is not available elsewhere –, there is no reason whatsoever for the practice that more than one authority may also proceed in one and the same infraction case." This document also informs us on the fact that while more than two-thirds (56) of the total of 152 infractions declared by the related Government Decree fall within the competence of two or more infraction authorities, the Infraction Act itself contains only one such fact.

I am convinced that the system of forums should be adjusted to the territorial-organisation reform of public administration, which is now in progress, and what this really needs is a uniform system of infraction authorities rather than an organisational diversity. Under this proposed system several experts will competently judge the individual cases in rapid and inexpensive procedure.

A new definition of the infraction of rules?

Professor Jeschek defined the concept of the infraction of rules by means of precise conceptual elements. Accordingly, Ordnungswidrigkeit is a factual, unlawful and accountable behaviour that the legislator punishes with fine.

The dogmatic problem of punishment apart from penal law has not been clarified up to now. Therefore, its comparison to penal law forms the basis of every theoretical thesis, and so the quantitative difference from penal law constitutes the differentia specifica of the infraction of rules. Adding to the quantitative difference from penal law is the obligatory existence of moral obligation, and this explains the usage of the German legal literature, namely that the infraction of rules is nothing else but „ein bloâes Kavaliersdelikt".

The new Hungarian codification in progress uses quite a new approach as compared to the former.

„Instead of referring to the application of the individual provisions of penal rule. It is the law itself that determines its own substantial- and procedural-law rules." Although it is true that the demand on separation from penal law do not follow from this statement, nor can inference be made for the existence of a new legal dogmatics. Yet it undoubtedly constitutes a plan to create a new penal system for a particular type of culpable behaviour.

It was precisely on this account that the proposed codification puts stress on the revision of facts, with especial view to defining new ones, and last but not least, to a possible

22 Cf. Hans W. TÖBBENS: „Die Bekämpfung der Wirtschaftskriminalität durch die Trojka der Par. 9, 130 und 30 des Gesetzes über Ordnungswidrigkeiten". Neue Zeitschrift für Stafrecht, 1999. Nr. l, pp. 1-8.

downgrading of some existing infractions of rules to simple delicts. Thus the codifier tends to leave the handling of this phenomenon, also known as decriminalisation, to the legislator at the stage of legislation during the revision.

Apart from the related efforts of the Ministry of the Interior, the Ministry of Justice has also made invaluable contributions to our ongoing major codification. It has done, and is still doing, much for the reform of procedural codes for the Penal Code (PC) and the Civil Code (Civ. C).

Thus the codifiers of the PC plan to make remarkable changes, some of which bear on the subject matter of this study also. One of them concerns the omission of the conceptual element of the „socially dangerous" nature of certain acts from the respective concepts of criminal acts and infraction of rules. The other is the introduction of what is called procedural „correctionalisation". It is improper to criticise not fully developed, workshop-level theoretical models or conceptions. Yet one can but hardly refrain from thinking over such a far-fetching model change.

In my reflections, first I should like to touch upon the mentioned „correctionalisation" that follows from the tripartite division of criminal acts. As is known, „correctionalisation" in its simplest form means the judicial downgrading of a criminal act to delict. Or circumscribing it from a legal aspect: in judging an act distinction must be made between its judgements before and after the judicial decision. This shared qualification was clearly explained by Ferenc Finkey in his penal law manual.[23] „As regards the qualification (denomination) of the given criminal act before the judicial decision, the act shall carry the legally defined punishment (in thesi), however, after the judicial decision, it is the form and weight of the punishment inflicted in concreto that really decides." „Correctionalisation", then, did not alter the criminal act the offender had committed. It remained the same even after the correctionalisation, nor did its legal nature change, so nothing but the punishment was change into one pertinent to a delict. This system was taken over by the Hungarian penal law (Act V of 1878) from the Belgian legal practice.

The Hungarian penal law, however, failed to recognise the so-called decorrectionalisation, that is, the commutation of delict to trespass, which was permitted by the Belgian law (under the name of contraventionalisation).

Inasmuch as I perceive this correctly, the possible appearance of correctionalisation in the new infraction procedure would involve an upgrading of the prosecutor's role. I.e., it would be the prosecutor who decide on whether the given offence would be judged in the administrative or in the judicial way. It is to be noted here that all this cannot be regarded as a correctionalisation in the classical sense.

As has been mentioned, another novelty is the omission of the consideration of the socially dangerous nature of a criminal act. Thereby the milder degree of endangering the society would be omitted from infraction cases too. This conceptual mutilation seems to me relevant mainly from the aspect of penal-law history. Of the numerous excellent monographs on this topic, I chose to look up László Viski's authoritative work on wilfulness and endangering of the society[24] for further explanation.

In his clear argumentation, the author points out that the notion of the community motive furnishes an adequate basis to establish a subjective accountability for offences that are

23 Ferenc FINKEY: A magyar büntetőjog tankönyve (Manual of the Hungarian Penal Law). 4th revised ed. Budapest, no imprint, pp. 153-158.

24 László VISKI: Szándékosság és társadalomra veszélyesség (Wilfulness and endangering of the society). Budapest, 1959. Az Állam- és Jogtudományi Intézet Tudományos Könyvtára 13. sz. (Scientific Series of the Institute for Legal and Political Sciences 13)

objectively dangerous and harmful to the society. Penal law demands abstention from and passes its negative value judgement on such acts as are hazardous to society. Unlawful acts, then, constitute a human behaviour that is fundamentally dangerous to society (interferes with the interests of society, thus society needs legal protection). Hence, what the lawmaker has to consider in the first place if the question of whether or not the behaviour that he wishes to criminalize is objectively dangerous to society. Similarly, the judges are also expected to take this aspect into particular consideration. In making decision in such matters, the judge must first scrutinise the condition of whether or not the behaviour at hand is factual and meets the legal requirements of the facts of the case. To wit, some elements of the fact of the case are relevant to establishing the socially dangerous nature of the act, other to establishing the guilt, and therefore distinction can be made among the criteria concerning the fact of he case. At the same time, those criteria can also be considered together – as Viski emphasised. „This distinction lies, first of all, in that the objective criteria are conceived as factors determining the socially dangerous nature of the act, while the subjective ones as factors determining the respective degrees of the guilt and the endangering of society."[25]

Finally it is also an important moment that the moral disapproval and rejection of the given offence on the part of the society may also make the offender realise the socially dangerous nature of his offence.

With all this considered, it seems important where he two codification committees will „meet" in their effort to define the conceptual elements of criminal acts – including the infractions of rule.

Apart from the outstanding problems, the new conception of infraction regulation also deals with the questions of system of sanctions. Revising the practice of confinement punishment, the new conception maintains the former view, namely that this punishment – which, otherwise, is alien to the regime of infraction affairs – is to be maintained in the future, too, as an ultima ratio. The new conception regards the formerly discussed possibility of commuting the non-paid financial punishments to public works as a complete failure.

In their assessment, the drafters of the conception call it a strongly objectionable situation that offenders in the countryside are at a disadvantage, because there is less opportunity for doing public works.

Finally the list of unsettled questions is closed with the question of how the administrative authorities for infractions affairs and the courts of law are supposed to be built upon each another.

Here the perennial dilemma is haunting once again. Since the formerly discusses resolutions of the Constitutional Court, decisions made by such authorities have been – otherwise wrongly – qualified as administrative decisions. Contesting an administrative decision before a court is not merely a constitutional issue, as it is a basic requirement of the European Convention on Human Rights, but also forms an important question of jurisdiction-competence.[26]

This is a particularly delicate field of the Hungarian legal literature as with the judicial way extended, experts in public administration fear that their administrative jurisdiction might be curtailed. It is on this account that the text of the conception thus worded the problem: it is justifiable to invest the court with the right of cassation. Be it a ruling practice – so the codifier requires – that decisions made in an infraction case in an administrative procedure could be abrogated and the administrative authority could be directed to institute a new process.

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25 László VISKI: op.cit., pp. 70-112; in connection with the disintegration of the classic concept of unlawful acts, see also WELZEL's study on such acts (pp. 88-104).

26 Hans Jürgen SCHROTH: „Europäische Menschenrechtskonvention und Ordnungswidrigkeiten-recht". Europäische Grundrechte Zeitschrift, 1985. Nr. 19, pp. 557-563.

Arising from this is that proposal that the administrative procedure of the second instate be reinstated as it seems practical „that an infraction affair stay within the public administration and the court function as extraordinary forum of legal remedy." This practically means „a single-instance legal revision, in the course of which the court may decide on whether it holds a trial or prefers to decide on the case on the basis of records."

In my opinion, this is a different – misunderstood – philosophy of legal remedy, which has historically developed owing to the distribution of the state's punitive power. The judicial revision of the sanctioning decision of the infraction authority means a quality that differs from the possibility of contesting the decision of an administrative body before the court.

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The recent codification efforts urge on the revision of the effective AIR. It is really a good thing that despite all the rubs and partly immature and controversial proposals, attempts are being mate to make up for faults, find legal solutions for problems in a new way, and last but not least, to exceed the former legal dogmatics. That this is an urgent need is well demonstrated by the 150-year history of the institution of infraction law outline in this study. This is a task to be solved not only in Hungary but also in most states of Europe where the expansion of administrative penal law seems to be irresistible.

Zusammenfassung

Die Studie überblickt die jüngste Regelungsgeschichte des Verwaltungsstrafrechtes. Die Kodifikation der an der Grenze der Kriminalität schwebenden, sowie die Verwaltungsordnung verletzenden oder gefährdeten Tätigkeiten ist besonders beachtungswert hinsichtlich der eigenartigen dogmatischen Lösungen und der Adaptationen der ausländischer Verfahrensmuster.

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Remarques sur le ius vitae necisque et le ius exponendi

La *potestas* désigne un certain pouvoir au droit romain dans tous les cas; la *potestas magistratus* a appartenu aux magistrats portant l'*imperium,* la *plena in re potestas* est le plein pouvoir du propriétaire sur la chose, au moyen duquel «tout le monde peut faire au sien tout ce qui ne dérange pas les autres».[1] Le *pater familias* avait une *patria potestas* sur ses enfants, et une *dominica potestas* sur ses esclaves.[2] La *patria potestas*, comme la *manus* qui veut dire le pouvoir sur la femme, est la conséquence de la même pleine puissance paternelle. Cette puissance est totale: d'une part puisque tant les membres de famille libres que les esclaves et que les choses sans vie sont soumis à celle-ci; d'autre part parce queelle permet aussi au *pater familias* de détruire ses choses et de tuer ces personnes.[3] Donc le pouvoir du chef de famille sur les personnes et sur les choses (*potestas, manus, mancipium, dominium*), tous se sont développés de la même puissance ancestrale, aucune formation de puissance ne servait comme un exemple à l'autre,[4] d' où vient la réfutation de l'opinion de Mommsen, selon laquelle le père aurait eu une propriété sur son enfant.[5] Selon Ulpien, le pouvoir appartient au *pater familias* dans sa maison[6] *(domus)* est également une expression sacrée, qui avait des propres dieux domestiques *(dii penates)*.[7]

Il est de notorité publique que selon le droit romain, certaines personnes sont majeures comme le *pater familias*, les autres sont sous dépendance, comme la femme *(uxor in manu)*, la personne qui se situe au *mancipium* et l'enfant qui est sous la *patria potestas*.[8] On peut

1 Ulp. D. 8, 5, 8, 5.

2 Paul. D. 50, 16, 215. *'Potestatis' verbo plura significantur: in presona magistratuum imperium: in persona liberorum patria potestas: in persona servi dominium.*

3 M. KASER: *Der Inhalt der patria potestas*. ZSS 83 (1971) (par la suite: KASER, 1971.) 62.

4 KASER, 1971. 63. *In Warheit beruht die Geleichartigkeit der Gewalten über die Personen und über die Sachen nur darauf, daß sie beide, auch noch lange Zeit nach ihrer Ablösung aus der einheitlichen Urgewalt, gleich total geblieben sind. Keine hat der anderen zum Vorbild gedient, sondern beide sind ebenso ursprünglich, wie die Teilung einer Sache in einheitliche Teile den Teilstücken im gleichen Augenblick ein selbständiges Dasein verleiht.*

5 Cf. Th. MOMMSEN: *Römisches Strafrecht*. Leipzig 1899. (par la suite: MOMMSEN, 1899.) 17. sq.; 20.

6 Ulp. D. 50, 16, 195, 2. *Paterfamilias est, qui in domo dominium habet.*

7 Cic. *dom*. 41. *Quid est sanctius, quid omni religione munitius quam Domus unuscuiusque civium. Hic arae sunt, hic foci, hic dii penates, hic sacra religiones ceremoniae continentur. Hoc profugium est ita sanctum, ut inde abripi neminem fas sit.*

8 Inst. 1, 8.

trouver plusieurs descriptions de la *patria potestas* dans les sources du droit romain, ainsi p.ex. chez Gaius[9] et dans les Institutes de Justinien.[10] Gaius annonce de façon presque surpris que telle puissance paternelle étendue n'existe nulle part ailleurs, peut-être seulement en Galatie. (Comme il est à présumer, il se méprend sur cela, puisque l'on est informé d'une *potestas* pareillement étendue dans l'antiquité chez les Celtes Gaulois,[11] dont César aussi nous informe.)[12] Bien que l'on puisse trouver plusieurs représentations de la *patria potestas* dans les sources, mais elle n'était pas définie de la même manière. Comme il est à présumer, on a pensé qu' il était superflu de la définir exhaustivement, puisque la patria *potestas* était unanimement la production de l' esprit romain, et elle ne pouvait pas remercier son existence à la législation d'État, car elle a fait appel au temps d'avant la naissance de l' État.[13] Le citoyen *sui iuris* de plein droit ne pouvait être qu'un *pater familias*,[14] ceux sur qui le *pater familias* n'exerçait pas ses droits par suite de la *dominica potestas* ou de la *manus* ont appartenu à la *patria potestas*: l'enfant procréé au mariage légitime,[15] l'enfant adopté,[16] l'enfant légitimé, la femme du fils consanguin et du fils adopté (au cas du mariage de *manus*), les petits-neveux, les arrières-petits-enfants etc. si leur père était sous une *patria potestas* et les femmes (au cas du mariage de *manus*).[17] Selon la définition de Watson, la *patria potestas* était la puissance qui a appartenu au chef de famille, et il la pouvait exercer sur les libres membres de famille soumis à lui, (sans compter la femme parcequ' elle était placée sous une *manus*).[18]

Les pouvoirs positifs suivants ont appartenu au *pater familias*: le *ius vitae ac necis*, le *ius exponendi*, le *ius vendendi* et le *ius noxae dedendi*.[19] Dans ce qui suit, on va se pencher sur le développement du *ius vitae ac necis* et du *ius exponendi.* Le *ius vitae ac necis* représente le

9 Gai. *Inst*. 1, 55. *Item in potestate nostra sunt liberi nostri quos iustis nuptiis procreavimus. Quod ius proprium civium Romanorum est; fere enim nulli alii sunt homines qui talem in filios suos habent potestatem, qualem nos habemus. Idque divus Hadrianus edicto, quod proposuit de his qui sibi liberisque suis ab eo civitatem Romanam petebant, significavit. Nec me praeterit Galatarum gentem credere in potestate parentum liberos esse.*

10 Inst. 1, 9. *In potestate nostra sunt liberi nostri, quos ex iustis nuptiis procreaverimus. Nuptiae autem sive matrimonium est viri et mulieris coniunctio individuam consuetudinem vitae continens. Ius autem potestatis, quod in liberos habemus, proprium est civium Romanorum: nulli enim alii sunt homines, qui talem in liberos habeant potestatem, qualem nos habemus. Qui igitur ex te et uxore tua nascitur in tua potestate est: item qui ex filio tuo et uxore eius nascitur, id est nepos tuus et neptis, aeque in tua potestate, et pronepos et proneptis et deinceps ceteri, qui tamen ex filis tua nascitur, in tua potestate non est, sed in patris eius.*

11 L. MITTEIS: *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs.* Leipzig 1891. 24.

12 Caes. *Gall*. 4, 19, 3–4. *Viri in uxores sicuti in liberos vitae necisque habent potestatem, et cum pater familiae inlustiore loco natus decessit, eius propinqui conveniunt et de morte si res in suspicionem venit, de uxoribus in servilem modum quaestionem habent, et si conpertum est, igni atque omnibus tormentis excruciatas interficiunt. … omnia quaeque vivis cordi fuisse arbitrantur in ignem inferunt, etiam animalia ac paulo supra hanc memoriam servi et clientes, quos ab iis dilectos esse constabat, iustis funeribus confectis una cremabantur.*

13 E. PÓLAY: *Az atyai hatalom intézményének alapvonalai a római jogban. (Les bases de l'institution de la puissance paternelle du pére dans le droit romain.)* Miskolc 1940. (par la suite: PÓLAY, 1940.) 7.

14 Inst. 1, 9, 1–2.

15 Gai. *inst.* 1, 55.

16 Gai. *inst.* 1, 97.

17 PÓLAY, 1940. 14.

18 A. WATSON: *The Law of Persons int he Late Roman Republic.* Oxford 1967. (par la suite: WATSON) 77.

19 A. FÖLDI–G. HAMZA: *A római jog története és institúciói (L' histoire et les institutions du droit romain.)* Budapest 2005[10]. (par la suite: FÖLDI–HAMZA) 239.

droit de disposition sur la vie et la mort de l' enfant, tandis que le *ius exponendi* représente le droit de l' exposition du nouveau-né. L' exposition de l'enfant incluyait souvent la mort ou plutôt l'homicide volontaire, comme p.ex. au cas du monstrueux, lorsque le but était la libération de la famille ou plutôt de la communauté du *prodigium* qui voulait dire le malheur. Par conséquence, il semble plus juste que les pouvoirs paternels contre le nouveau-né peuvent-ils avoir rapport à l' homicide ou seulement à l'exposition de l' enfant, – soient discutés au cadre du *ius exponendi*, puisque l'homicide d'enfant et l' exposition d'enfant étaient limités et sanctionnés plus d'une fois dans un seul édit impérial. Originalement, le *ius vitae ac necis* était un pouvoir de droit pénal et sacré. Son caractère sacré s'est mis en vedette à l' homicide du monstrueux, car ce droit était l'élément constitutif du pouvoir du père sur le nouveau-né, et cela sera discuté au titre du *ius exponendi*; son aspect de droit pénal devenait évident à l' usage contre l' enfant adulte.

D' abord, on voudrait présenter le développement du *ius vitae ac necis*, en faisant une digression aux limites de l'exercice, et aux solennités de cette puissance, que sont: la *iusta causa*, le *iudicium domesticum*, le *consilium necessariorum*, et la *lex Iulia de adulteriis coercendis* (**I.**). Ensuite, on va suivre la trace de la transformation du *ius exponendi*, par égard particulier à la législation du statut juridique de l'enfant exposé (**II.**).

I. On mentionne plusieurs fois le *ius vitae ac necis* dans les sources antiques,qui fait l'élément essentiel de la *potestas* du *pater familias*.[20] L'une des lois royales, qui est transmise à nous par Dionyse d'Halicarnasse sous le nom de Romulus, règle le pouvoir d'autorité existant contre l'enfant adult du père. Selon celui-ci, le père avait une pleine puissance sur son fils pendant toute sa vie, il pouvait limiter la liberté personnelle de son fils, il pouvait le battre, il pouvait l'exiler au travail rural étant au fer, et il pouvait le tuer aussi, donc la source énumérant le canon des sanctions applicables mentionne la possibilité de l'exercice du *ius vitae ac necis* comme une *ultima ratio*.[21] Bien que la loi ne dise rien ni du milieu d'emploi de ces sanctions et nie de la procédure qui est nécessaire à leur infliction, on peut rendre probable que l'enfant n'était pas à la merci du père, si on considère le contrôle strict que la *gens* a exercé sur la vie de la famille au début, et que le *censor* a pris plus tard.[22] On sait des oeuvres de Dionyse d'Halicarnasse, que les *censores* ont contrôlé de quelle manière le *pater familias* élève ses enfants et s'ils ont jugé l'éducation trop stricte ou trop douce, alors ils ont intervenu avec vigueur ; ils ont agi aussi de la même manière à l'égar du plan de la discipline des esclaves.[23] Comme il est à présumer, les *censor* ont veillé également à l'approvisionnement convenable de la culte religieuse des habitants d' une maison. Plutarque remarque avec l' ironie que les censeurs n' ont pas laissé sans contrôle ni les mariages, ni l'éducation d'enfant, ni les festins, mais ils ont exercé une surveillance sur la vie et la pensée politique de tout le monde.[24]

L'une prescription des XII Tables, qui peut être reconstruit par le texte du Gaius du *Codex Veronensis* et par le *Fragmentum Augustoduniense* avec plus au moins de certitude, sert comme la première preuve aux barres de l'exercice de *ius vitae ac necis* qui constitue le contenu de la patria potestas: «*Ergo tum praetor corpus te dedere dom…… parentem putes…… iure uti t ……<do>mino vel parenti etiam occidere eum et mortuum*

20 Cic. *dom*. 29. 77; *Pis* 40. 97; *fin* 1, 8; *rep* 2, 35; Val. Max. 5, 8, 2–5, 9, 1; 5, 10, 1; 6, 1, 6; Suet. *Tib*. 35; Liv. 1, 26; 2, 41; 8, 7; *epit*. 54; Plin. *nat*. 34, 4, 16; Auct. ad Her. 4, 16, 23; Sall. *Cat*. 39, 5; 52, 30; Sen. *clem*. 1, 11. 50; Quint. *decl*. 317; Dio Cass. 37, 36; Gell. 5, 19, 9.

21 Dion. Hal. 2, 26, 4.

22 Liv. 6, 20; Gell. 9, 2.

23 Dion. Hal. 20, 13, 3.

24 Plut. *Cato mai*. 16.

dedere in no<xam> …… ……patria potestas potest. n…… cum patris potestas talis est ut habeat vitae et necis po<testatem>. De filio hoc tractari crudele est, sed…non est….n post r… <occi>dere sine iusta causa, ut constituit lex XII Tabularum, sed deferre iu<dici> debet propter calumniam.»[25] Le *Fragmentum Augustoduniense* traite la puissance du *pater familias,* qui l' habilite à tuer l' esclave ou l'enfant qui a fait du tort à une troisième personne délictuellement, et à donner saticfaction à l'obligation de la *noxae deditio* par la cession du cadavre. Ensuite il déclare clairement que la *patria potestas* contient le *ius vitae ac necis* et que selon la prescription des XII Tables, le *pater familias* ne pouvait pas tuer son fils *sine iusta causa*. La lecture de Krüger n' est pas totalement certaine, mais malgré ces changements, on peut sans doute lire l' expression *«<occi>dere sine iusta causa, ut constituit lex XII tabularum»,* donc selon les dispositions des XII Tables, le pater familias ne pouvait pas tuer son fils sans *iusta causa*. L' authenticité de la citation serait douteuse, s'il fallait ou plutôt on pouvait supposer, que cela serait seulement l'interpolation indépendante du juriste qui a composé le *Fragmentum Augustoduniense* des textes de Gaius. Mais, au cas présent le texte tres fraigmentaire du *Codex Veronensis* contient le fragment *«…tabul…..»,*[26] qui ne pouvait guère vouloir dire d'autre chose que les *leges XII tabularum*, donc il est presque certain que le texte original de Gaius contient également ces dispositions qui proviennent des XII Tables.[27] Selon Kunkel, la *iusta causa* voulait dire qu'il fallait prouver que le fils avait commis un tel crime qui a légitimise l'emploi de la peine de mort.[28] Comme il est à présumer, la démonstration avait un ordre déterminé, pendant laquelle – après l' exposé et l'enquête précis de l' affaire –, l'enfant qui était accusé de la commission du crime avait la possibilité de se défendre. Les expressions suivantes renvoyent aussi à cela: *cognita domi causa,*[29] *inspecta diligentissime causa,*[30] *audita causa* et *quae adulescens pro se dixerat*[31] qui se trouvent aux cas postérieurs.

Le fragment *deferre iu<…> debet propter calumniam* était lu par son premier éditeur nommé Chatelain à *hoc,* que Krüger a repris. Premièrement, c'étaient Ferrini et Scialoja qui l'ont lu, et l'ont complété à *iu<dici>*. Plus tard, Krüger lui même a aussi accepté cette lecture. Mais, comme Kunkel[32] a prouvé, la lecture *iu<dici>* n'est pas judicieuse ni du point de vue de contenu et ni du point de vue philologique. Puisque si la traduction de *deferre iudici* est *beim Richter Anklage erheben*, ou *dem Richter anzeigen*, ainsi comprenant par *iudex* l'organe de juridiction *(öffentliche Justiz),* deux possibilités se présenteront. Ou le *pater familias* doit accuser son fils devant la loi, pour qu'il évite la *calumnia*; mais cette interprétation douterait l'existence et l'exercice du *ius vitae ac necis* aux bases et celui constitue le point cardiaque de la *patria potestas*. Ou *le pater familias* devait annoncer chez le *iudex* l'assassinat, qu'il a exécuté lui-même par le *ius vitae ac necis* qui appartenait à lui, dans ce cas là, l'obligation de déclarer était difficilement compatible avec la défense d'assassinat *sine iusta causa* du *filius familias.* Pour autant que l'on accepte la lecture *iu<….>* juste aussi, le complètement *iu<dici>* ne nous peut pas satisfaire, car il ne remplit pas la *lacuna* qui se trouve dans le texte. Puisqu'on a coupé le côté de la page en vue de la réutilisation dans un même largeur, ainsi sept-huit lettres manquent de tout les lignes et non pas quatre, donc le complétement *iu<dicibus>*

25 *Fragmentum Augustoduniense* 85–86. In: *Collectio librorum iuris anteiustiniani*. Edd. P. KRÜGER–Th. MOMMSEN–G. STUDEMUND. Berolini 1923. 160.
26 Gai. *inst*. 4, 80.
27 A. M. RABELLO: *Effetti personali della «patria potestas»*. Milano 1979. I. (par la suite: RABELLO) 90.
28 W. KUNKEL: Das Konsilium im Hausgericht. ZSS 83 (1966) (par la suite: KUNKEL, 1966.) 243.
29 Liv. 2, 41, 10.
30 Val. Max. 9, 5, 1.
31 Sen. *clem*. 1, 15, 3.
32 KUNKEL, 1966. 244. sqq.

semble plus juste que le complement *iu<dici>*. Cette lecture du sense au cas où on n'entend pas par les *iudices* les arbitres de la juridiction de l'État, mais au contraire les membres du *consilium,* donc les apparentés et les amis. En même temps, il est également possible que la lecture *iu<…>* soit substituable avec *nec<essariis>* ou avec *pro<pinquis>* mais ce nest pas renforcé. A la lecture du texte des problèmes graves émergent, on ne le doit pas considérer donc comme une preuve qu'elle ne fait point de doute à l'égard de la nécessité absolue du *consilium* necessariorum, mais on peut voir de ce qui précède en termes exprès, que le crime du *filius* devait être prouvé *(iusta causa)* à l' exercice du *ius vitae ac necis,* si le père voulait éviter l'accusation de l'homicide. En même temps les autres sources servent des preuves convaincantes à ce qu' il y avait nécessité à la convocation du *consilium necessariorum* et à l' observation du *iudicium domesticum* pour exercer le *ius vitae ac necis*.[33] Séneque parle dans sa lettre qu'il a écrit à Lucilius du fait, que les ancêtres ont permis au *dominus* donc au *pater familias* qu'il pourvoie des postes et qu'il exerce la *iurisdictio* aux habitants d'une maison, donc on a pensé que la maison ou plutôt les habitants d'une maison sont la forme miniaturisée de l'État. Lorsque le *dominus* exerce l'autorité judiciaire, il agit convenablement selon Tacite à l' *exemlum maiorum*[34] et au *priscum institutum;*[35] selon Suétone au *mos maiorum;*[36] selon Cicéron à la *consuetudo.*[37] En générale, le *iudicium* s'est déroulé entre certaines procédures dans l'*atrium* de la maison du *pater familias*.[38]

L' ouvrages spécialisés se sont divisés fortement sur la question, si le *iudicium domesticum* était une juridiction réelle. On peut ramener l'opinion à Mommsen, qui ne reconnaît pas le *iudicium domesticum* pour une juridiction réelle.[39] Mommsen refuse l'expression du *iudicium domesticum* comme un *oxymoron*. Il parle seulement de *Hauszucht* qui peut être nommé également *coercitio* ou *disciplina*, donc le *iudicium domesticum* ou selon lui *Hauszucht* n' est pas d' autre chose comme *Gewissensgericht*.[40] En suivant Mommsen, Volterra déclare que le jugement du *iudicium domesticum* n' a pas justifié la personne qui est sous la dépendance, de la poursuite judiciaire d'État et de la sanction prononcée par elle,[41] et que l'existence de la justice d' État, qui était fondée à l'appréciation du crime, exclure l'existance du *iudicium domesticum* comme une institution judiciaire.[42] En continuant le même fil de pensée, Mommsen regrette également l'absence de la définition précise du milieu des crimes, qui doivent être évalués par le *iudicium domesticum*.[43] Selon Kunkel, cette façon de penser n'était pas caractéristique de Romains, puisq'il y avaient des imbrications de compétences également dans l'ordre de la juridiction d'État, ce qui a prouvé que l' attribution des tribunals destinés à l'évaluation des crimes définis n'est jamais dévenue exclusive entre la

33 Sen. *epist*. 47, 14. *Maiores nostri dominum patrem familias appellaverunt, honores in domo gerere, ius dicere permiserunt et domum pusillam rem publicam esse iudicaverunt.*

34 Tac. *ann*. 2, 50. *Adulterii graviorem poenam deprecatus, ut exemplo maiorum propinquis suis ultra ducentesimum lapidem removeretur suasit.*

35 Tac. *ann.* 13, 32. *Isque prisco instituto propinquis coram de capite famaqua coniugis cognovit et insontem nuntiavit.*

36 Suet. *Tib*. 35. *ut propinqui more maiorum de communi sententia coercerent*

37 Cic. *Rosc. Am.* 44. *Quod consuetudine patres faciunt,id quasi novum reprehendis…*

38 Val. Max. 5, 8, 3. *Succurebant effigies maiorum cum titulis suis ut eorum virtutes posteri non solum legerent, sed etiam immittarentur.*

39 MOMMSEN, 1899. 16–26.

40 MOMMSEN, 1899. 17.

41 E. VOLTERRA: *Il preseto tribunale domestico in diritto romano.* RISG 2 (1948) (par la suite: VOLTERRA) 117.

42 VOLTERRA 135. sqq.

43 MOMMSEN, 1899. 20.

juridiction domestique et la juridiction d'État, et jusqu'à ce qu'elles aient existé à côté de l'une à l'autre, une concurence de compétence mutuelle existait entre elles.[44] (Il y avait la même situation entre les *tresviri capitales* et les *quaestiones perpetuae,*[45] et on pouvait accuser à cause de certains crimes devant la *quaestio repetundarum*, la *quaestio maiestatis* ou la *quaestio de vi* aussi.)[46] Kaser, bien qu'il ne nie pas si décisivement toute importance du *iudicium domesticum* que Mommsen et Volterra, affirme qu'il n'appartenait pas a au milieu du *ius.*[47] Ceux qui ont embrassé plus au moins l'opinion de Geib, voient une juridiction réelle au *iudicium domesticum,* selon laquelle le droit de la juridiction criminelle sur les membres de la famille a appartenu au *pater familias*.[48] Les Romains ont vu la copie miniaturisée de l' État dans la famille, où le *pater familias* correspond au *magistratus* qui possède l'*imperium* et on peut même mettre en parallèle leur *iurisdictio,*[49] comme Bonfante a déjà attiré l'attention sur ce fait.[50] Düll s' est rallié à cette opinion, mais à son avis, l'opinion du *consilium* n' a pas attaché nécessairement le *pater familias* dans le *iudicium domesticum*.[51] Kunkel lie au *consilium* la sanction capitale des enfants et de la femme sans condition, et il pense que le *pater familias* ne pouvait pas s'affranchir du jugement majoritaire du *consilium*, quant à la culpabilité ou l'innocence de l'accusé.[52] Voilà quelques exemples dont on peut voir, lorsque le père voulait exercer le *ius vitae ac necis* appartenant à lui, et il voulait être exonéré de l' accusation de l'assassinat, il fallait juger l'affaire dans le *consilium necessariorum*.

Tite-Live annonce deux traditions du jugement et de la mort de Cassius. Selon l'une, son père a exécuté la peine capitale; après avoit tenu l'audience nécessaire dans sa maison, il a fait fouetter et exécuter son fils. Il a offert les biens du fils à Ceres, il a fait préparer une sculpture de ces biens, et il a mis sur celle-ci, qu'elle a été préparé par la famille de Cassius.[53] Selon l'autre tradition, Caeso Fabius et L. Valerius, des *quaestores* portaient plainte contre Cassius à

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44 KUNKEL 1966. 222.

45 W. KUNKEL: *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit.* München 1962. 76.

46 KUNKEL, 1966. 223.

47 KASER, 1971. 69. *Die Eindordnung der häuslichen Gerichtsbarkeit in den Bezirk der mores lässt vielmehr deutlich erkennen, dass sie bei der Scheidung von Recht und Sitte aus der Rechtsordnung ausgeschlossen worden ist.*

48 E. GEIB: *Die Geschichte des römischen Criminalprozesses.* Leipzig 1842. 82.

49 Sen. *contr*. 10, 2, 8. *Cetera iura puto, paterno imperio subiecta esse;* Gell. 10, 23, 4. *Vir… mulieri iudex pro censore est, imperium quod videtur habet.;* Sen. *epist.* 47, 14. *Maiores nostri dominum patrem familias appellaverunt, honores illi sin domo gerere, ius dicere permiserunt et domum pusillam rem publicam esse iudicaverunt.*

50 P. BONFANTE: *Corso di diritto romano.* Roma 1925. (par la suite: BONFANTE) I. 98. *Tutto quanto il diritto punitivo del paterfamilias non e poi altrimenti spiegabile che come l'esercizio di un imperio giurisdizionale. Le forme sono quelle di un giudizio pubblico; come il magistrato ha un consilium di sua libera scelta, cosi il paterfamilias convoca all'uopo un consilium necessariorum o propinquorum o anche di amici e di persone autorevoli – in un caso, sin arra, un paterfamilias chiamo a consiglio quasi tutto il senato – ed ha luogo un vero giudizio, iudicium domesticum.*

51 R. DÜLL: *Iudicium domesticum, abdicatio und apoceryxis.* ZSS 63 (1946) 60.

52 KUNKEL, 1966. 249.

53 Liv. 2, 41, 10–12. *Quem ubi primum magistratu abiit damnatum necatumque constat. Sunt qui patrem auctorem eius supplicii ferant: eum cognita domi causa verberasse ac necasse peculiumque filii Cereri consecravisse ; signum inde factum esse et inscriptum: 'Ex Cassia familia datum.' Invenio apud quosdam, idque propius fidem est, a quaestoribus Caesone Fabio et L. Valerio diem dictam perduellionis, damnatumque populi iudicio, dirutas publice aedes. Ea est area ante Telluris aedem. Ceterum sive illud domesticum sive publicum fuit iudicium, damnatur Servio Cornelio Q. Fabio consulibus.*

cause de la *perduellio*, et il était jugé par la procédure qui s'est déroulée en 486/5 av. J.C. devant le *comicium*. Tite-Live penche à donner crédit à la deuxième tradition, mais Mommsen a déjà montré l'impossibilité de cette version.[54] Ainsi on voit l'exemple du *iudicium domesticum* dans la tradition qui est évaluable authentique. L'assassinat, qui était effectué a l'ordre du père, n'est pas despotique puisqu l'on a observé et discuté l'affaire. Tite-Live ne mentionne pas expréssement le *consilium necessariorum*, mais ainsi qu'il apparaît de cas annoncés par lui, c'était naturel pour un écrivain de l'époque d'Auguste et son intention avec ce message était tout d'abord la mise en valeur de la *gravitas* et de la *severitas* de chef de famille des temps ancestrals.[55] Selon Voci, l'écriture qui est sur la sculpture préparée à Ceres renvoie à *giudizio commune*, donc ici on peut lire le mot *familia* et non pas le mot *pater*.[56] Dans ce cas-là, par le mot *familia* il faut entendre la famille et non pas les biens, parceque Tite-Live ne mentionne que la *consecratio* du *peculium* du *filius*, or on n'a pas utilisé le mot *familia (pecuniaque)*[57] au synonyme du mot *peculium*. L'expression *damnatus* ne démontre pas justement ce que le père aurait jugé en toute indépendance, parce que les mots *condemnare* et *damnare* marquent également l'activité de l'accusateur dans le procès classique de *quaestio*.[58]

L. Gellius (consul en 72 av.J.C.; censeur en 70 av.J.C.) a accusé son fils del l'avoir voulu tuer, et de avoir commis un adultère avec sa belle-mère, et il a invité presque le plein *senatus* à juger du crime de son fils. Il a montré sa prévention à l'accusé et il lui a donné la possibilité de la défense, ensuite, après l'appréciation soigneuse de l'affaire il l'a déchargé à la base de son propre jugement et celui du *consilium*.[59] Le jugement est né *de consilii sententia*, donc il s'est basé sur les votes du *consilium*, la *sua sententia* ne portait qu'à croire que le père n'a pas trouvé son fils coupable.[60] Selon Volterra, le père dès l'origine était sûr que son fils était innocent, et il a convoqué le *consilium* seulement pour qu'il blanchît son propre honneur, et pour qu'il sauvât son fils de la poursuite d'action publique du *parricidium*.[61]

L. Tarius Rufus (consul suff. en 16 av. J.C.) n'a puni son fils que par l'exil; son fils voulait le tuer. Il a aussi continué à payer la pension annuelle qui était crée précédemment. Si Sénèque ne louait que le *bonus pater familias*, ainsi la description du cas servirait comme la preuve du pouvoir judiciaire absolu du *pater familias*. Mais le philosophe évoque également le souvenir d'Auguste comme un *bonus princeps*. Le *consilium* a jugé le crime du *filius* qui se dégage de la louange de l'empereur et de la description de sa conduite. Auguste était le plus honorable membre du *consilium*, mais il était seulement un membre, puisqu'en veillant à ce que le père dirige la *cognitio*, il n'a pas fait apel à la *consilium* ou plutôt ses membres, mais il les a cherchés dans la maison du chef de famille. Après la poursuite de la *cognitio*, où le fils pouvait se défendre, selon l'ordre de procédure habituel, les assistants auraient donné oralement leurs votes à la question de la culpabilité du fils, mais Auguste a proposé un suffrage en écrit, pour qu'il empêche que les autres soient influés par son vote qu'il

54 Th. MOMMSEN: *Römisches Staatrecht I–III.* Berlin 1887 –1888. II. 541.

55 KUNKEL, 1966. 225.

56 P. VOCI: *Storia della patria potestas da Augusto a Diocleziano.* IURA 31 (1980) 53.

57 Au l'objet de la *familia pecuniaque* voir J. ZLINSZKY: *Familia pecuniaque.* JT 6. (1986) 395–406.

58 ThLL IV. 125 *condemno* B *de accusatore: efficere ut is quocum agitur condemnetur;* V. 17 *damno* B *de accusatore, efficere ut is quocum agitur damnetur.*

59 Val. Max. 5, 9, 1. *L. Gellius omnibus honoribus ad censuram defunctus, cum gravissima crimina de filio, in novercam conmissum stuprum et parricidium cogitatum, propemodum explorata haberet, non tamen ad vindictam continuo procucurrit, sed paene universo senatu adhibito in consilium expositis suspicionibus defendendi se adulescenti potestatem fecit inspectaque diligentissime causa absolvit eum cum sonsilii tum etiam sua sententia. Quod si impetu irae abstractus saevire festinasset, admisisset magis scelus quam vindicasset.*

60 KUNKEL, 1966. 224.

61 VOLTERRA 133.

aurait fallu donner avant ceux-ci, parce qu'il était la personne du rang plus haut. Après que l'on a recueilli les tablettes où on a écrit les *sententia,* mais avant de les ouvrir, il a juré qu'il n'acceptera pas l'héritage de Tarius. Donc dans ce cas là, on a décidé de la question de la culpabilité en écriture, et il ne les voulait pas influir. Tarius a dû décider par la base de la majorité des voix, puisque s'il avait considéré les *sententiae* seulement comme un conseil, ainsi les efforts d'Auguste, qu'il n'influe personne par son vote, c'est-a-dire son vote soit de rang égal aux autres, auraient été inutiles.[62]

Hadrien a envoyé en exile un père, qui a tué son fils à l'occassion d'une chasse, car il entretenait un lien adultère avec sa belle-mère. Selon l'empereur, le crime crapuleux est un acte qui ne convient pas à un père, mais plutôt il convient à une canaille, car l'essentiel du *patria potestas* est dans la *pietas* et non pas dans la brutalité.[63] Le père n'aurait pas du tuer son fils, même s'il l'avait pris sur l'adultère avec sa belle-mère, car la *lex Iulia de adulteriis coercendis* ne l'autorise pas.[64] Mais si cette loi avait autorisé le *pater familias* à tuer son fils et sa femme qu'il a pris sur l'adultère, ici il n'aurait pas pu utiliser ce droit non plus, car dans ce cas là on ne parlait pas du flagrant délit, au contraire du lien adultère durable, (l'expression *adulterabat* est utilisée ici comme *un-durativum*). Dans ce cas là, il aurait fallu convoquer le *consilium* dans le *iudicium domesticum* pour qu'ils jugassent les coupables. Le père ne l'a pas fait, au lieu de cela, il a assassiné son fils. Mais, il est plus probable ici qu' Hadrien punit le chef de famille à cause du manque du *iudicium domesticum* qui est la procédure pénale convénable, et non seulement à cause de la *schimpliche Gesinnung*, comme Kaser le suppose.[65]

Il faut faire attention à la source suivante, qui écrit que le père ne peut pas tuer son fils sans l'avoir entendu, mais il le doit accuser chez les maires de la *provincia*.[66] La première partie du texte (*inauditum filium pater occidere non potest*) peut-être la seule trace à l'existence du *iudicium domesticum* dans le *Corpus* de Justinien. Mommsen a déjà douté[67] de l'originalité de la deuxième partie du texte *(sed accusare eum apud praefectum praesidemve provinciae debet),* Bonfante pourtant l'a jugé interpolée.[68] Perozzi a pensé qu'il est possible que la description soit originale, parce que selon lui dans les temps de Sévère, les droits appartenants au père encore n'ont pas perdus leur vigueur, seulement ils relevaient de l'obligation de déclaration vers le *magistratus*.[69] Dans les bibliographies spéciales plus nouvelles, Kunkel donne la suivante explication à cette partie du texte. La première partie interdit au père de tuer son fils sans l'entendre, mais la deuxième partie conteste à lui le droit de tuer unanimement et avec cela elle l'ordonne l'accusation devant le tribunal d'État.

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62 Sen. *clem.* 1, 15, 2–6. *Cogniturus de filio Tarius advocavit in consilium Carsarem Augustum ; venit in privatos penates, adsedit pars alieni consilii fuit, non dixit: 'Immo in domum meam veniat', quod si factum esset, Caesaris futura erat cognito, non patris. Audita causa excussisque omnibus ex his quae adulescens pro se dixerat, et his, quibus arguebatur, petit, ut sententiam suam auisque scriberet, ne ea omnium fieret, quae Caesaris fuisset. Deinde priusquam aperientur codicilli, iuravit se Tarii, hominis locupletis, hereditatem non aditurum. Tarius quidem eodem die et alterum heredem perdidit, sed Caesar libertatem sententiae suae redemit; et postquam adprobavit gratuitam esse severitatem suam, quod principi semper curandum est, dixit relegandum, quo patri videretur.*

63 Marc. D. 48, 9, 5. *Divius Hadrianus fertur, cum in venatione filium suum quidam necaverat, qui novercam adulterabat, in insulam eum deportasse, quod latronis magis quam patris iure eum interfecit: nam patria potestas in pietate debet, non atrocitate consistere.*

64 D. 48, 5.

65 KASER, 1971. 69.

66 Ulp. D. 48, 8, 2. *Inauditum filium pater occidere non potest sed accusare eum apud praefectum praesidemve provinciae debet.*

67 MOMMSEN, 1899. 618.

68 BONFANTE 111.

69 S. PEROZZI: *Instituzioni di diritto romano.* Roma 1928. (par la suite: PEROZZI) I. 424. Kunkel trouve cela vraiment improbable. (KUNKEL, 1966. 248.)

Il est presque sûr que le texte original se rapporte au cas du *iudicium domesticum*, et si dans ces cadres, le *filius* avait la possibilité de se défendre, la loi a permis l'assassinat du fils. D'ailleurs, selon lui, la partie qui parle du *praeses* et du *praefectus* n'est même pas absolument interpolée, puisque le père pouvait également abdiquer l'exercice de son pouvoir judiciaire, il pouvait apporter également le crime du fils devant un tribunal public, ainsi les compilateurs peut-être n'ont supprimé que le renvoi concernant le *iudicium domesticum*, qui devait être le suivant: «*sed cognoscere de eo cum amicis vel accusare eum apud praefectum praesidemve provinciae debet*.»[70]

Dans le Digeste en dehors des cas indiqués, les compilateurs ont effacé soigneusement tout les traces, qui se rapportent au *iudicium domesticum* et au *consilium necessariorum*, car la *patria potestas* a devenu un pouvoir éducatif et disciplinaire déjà avant Justinien, ainsi le *ius vitae ac necis*, qui était exercé dans le *iudicium domesticum*, a perdu entièrement son importance. Donc le manque du *iudicium domesticum* et du *consilium* n'est pas démontrable avec l'*argumentum e silentio*, aux quels ne peut pas trouver de renvoi dans les codifications de Justinien.[71]

Le fait que le *iudicium domesticum* était nécessaire pour l'exercice du *ius vitae ac necis* se voit des précédents. Dans certains cas exceptionnels, le droit a donné la possibilité *sine iudicio* aussi à l'assassinat. Parmi ces cas, la réglementation de la *lex Iulia de adulteriis coercendis* était vraiment importante. Cette loi assure au père le droit de tuer sans sanction sa fille prise sur l'adultère avec l'homme adultère mais ce droit était réduit à des limites étroites et aux certaines conditions.[72] La fille devait être[73] sous la *potestas* de son père,[74] ils ont dû commetre l'adulterium dans la maison du père ou dans la maison de son gendre,[75] et le père devait tuer l'homme et sa fille ensemble. S'il a tué seulement le *correus*, cet acte a constitué un *homicidium*, et son acte était jugé d'après la *lex Cornelia de sicariis*.[76] Le père qui n'a tué que le *correus* n'était pas punissable et dans le cas, où sa fille n'était pas tuée parce qu'elle s'est enfuiet, donc non parce que le père a ménagé sa vie.[77] Le *rescriptum* des empereurs Marc Aurèle et de Commode assurent le père qui a tué le *correus* mais non pas sa fille, de la dispense de l'accusation du *homicidium*, au cas ou le père a blessé sa fille sérieusement, donc on peut voir qu'il voulait la tuer, mais la fille a guéri par un heureux hasard.[78] Le père les a dû prendre

70 KUNKEL, 1966. 249.

71 KUNKEL, 1966. 247.

72 E. CANTARELLA: *Adulterio, omicidio legittimo e causa d'onore in diritto romano. Studi in onore di* G. Scherillo. Milano 1972. 244. sqq.

73 Pap. D. 48, 5, 23 (22). *Nec in ea lege naturalis ab adoptivo pater separatur.*

74 Pap. D. 48, 5, 21 (20). *Patri datur ius occidendi adulterum cum filia quam in potestate habet: itaque nemo alius ex patribus idem iure faciet: sed nec filius familias pater;* Ulp. D. 48, 5, 24 (23), 2. *Quare non, ubicumque deprehenderit pater, permittitur ei occidere, sed domi suae generive sui tantum, illa ratio redditur, quod maiorem iniuriam putavit legislator, quod in domum patris aut mariti ausa fuerit filia adulterum inducere.*

75 Paul. Coll. 4, 12, 1. *Permittitur patri tam adoptivo quam naturali, adulterum cum filia cuiusque dignitatis domi suae vel generi sui deprehensum sua manu occidere.*

76 Paul. Coll. 4, 2, 6. *Sed si filiam non interfecerit sed solum adulterum, homicidii reus est;* Pap. Coll. 4, 9, 1. *Si pater quis adulterum occidit et filiae suae pepercit, quaero quid adversus eum sit statuendum? Respondit: sine dubio iste pater homicida est: igitur tenebitur lege Cornelia se sicariis.*

77 Pap. Coll. 4, 9, 2. *Plane si filia non voluntate patris, sed casu servata est, non minimam habeit defensionem pater, quod forte fugit filia. Nam lex ita punit homicidam, si dolo malo homicidium factum fuerit, hic autem pater non ideo servavit filiam, quia voluit, sed quia occidere eam non potuit.*

78 Mac. D 48, 5, 33 (32). *Nihil interest, adulteram filiam prius pater occiderit an non, dum utumque occidat: nam si alterum occidit, lege Cornelia reus erit. Quod si altero occiso alter vulneratus fuerit, verbis quidem legis non liberatur: sed divus Marcus it Commodus rescripserunt impunitatem ei concedi, quia licet intermpto adultero mulier supervixerit post tam gravia vulnera, quae ei pater infixerat, magis fato quam voluntate eius servata est.*

in ipsis rebus Veneris.[79] Il a dû tuer les deux coupables en même temps sans retard *(uno ictu et uno impetu et aequali ira)*.[80] Si le père n'a tué sa fille qu'après un bout de temps, il a commis un *homicidium*, mais si la fille s'était l'avait enfuie et le père l'a attrapée puis il l'a tuée, il a été dispensé de l'accusation du *homicidium* agissant *continuatione animi*.[81] Qu'est-ce que c'est la liaison ou plutôt la relation entre le *ius vitae ac necis* qui a comme origine la *patria potestas* et le *ius occidendi* qui est assuré par la *lex Iulia de adulteriis coercendis*?[82] Papinien nous donne la réponse à la question suivante.[83] Pourquoi était-il nécessaire à codifier que le père avait le droit de tuer sa fille, si déjà la *lex regia* lui a donné la *vitae necisque potestas* sur ses enfants? Papinien dit que la loi ne transmet pas un nouveau pouvoir au père, mais plutôt elle impose à lui l'obligation qu'il tue sa fille aussi avec l'homme adultère, parce que ainsi, ne graciant même pas à sa fille, il agit avec une équité plus grande. Se peut poser la question, pourquoi a-t-on besoin de la négociation tellement détaillé de cette institution judiciaire dans le Digeste et dans la *Collatio*. Comme on voit des précédents, le *ius vitae ac necis* paternel était supprimé au IV[e] siècle, et les compilateurs ont soigneusement effacé presque toutes les références qui ont rapport au *iudicium domesticum*, et qui s'ajoutent nécessairement au *ius vitae ac necis*. Ainsi, il est devenu nécessaire la réservation de la *lex Iulia de adulteriis coercendis* qui a survécu sans le *ius vitae ac necis* qui a lui son origine de la *patria potestas*.[84]

Le *ius occidendi*, que l'on exerce sur la fille prise sur l'adultère, est la partie importante de la *patria potestas*. Il est presque sûr que l'on applique le principe de droit pénal selon lequel la punition des coupables pris sur le fait *(manifesti)*, – dans ce cas là leur assassinat –, est permise également sans poursuite.[85] Ce droit reste chez le père contre la fille mariée aussi, même si le père l'a donnée *in mariti manum*,[86] qui doit être en rapport avec les dispositions de la *lex Iulia de adulteriis coercendis* qui limitent la *manus*.[87] Selon les *leges regiae* le mari pouvait jugé avec les apparentés dans le *consilium domesticum* sur les actes de sa femme qui étaient punis de la peine de mort, comme l'adultère et la consommation du vin.[88] Mais s'il a pris sa femme sur l'adultère (*in adulterio uxorem tuam si prehendisses*), selon Caton, il l'a pu tuée impunément

79 Ulp. D. 48, 5, 24 (23). *Quod ait lex 'in filia adulterum deprehenderit', non otiosum videtur: voluit enim ita demum hanc potestatem patri competere, si in ipsa turpitudine filiam de adulterio deprehendat. Labeo quoque ita probat, et Pomponius scripsit in ipsis rebus Veneris deprehensum occidi: et hoc est quod Solo it Draco dicunt en erga.*

80 Ulp. D. 48, 5, 24 (23), 4. *Quod ait lex 'in continenti filiam occidat', sic erit accipiendum, ne occisio hodie adultero reservet et post dies filiam occidat, vel contra: debet enim prope uno ictu et uno impetu utrumque occidere, aequali ira adversus utrumque sumpta. Quod si non affectavit, sed, dum adulterum occidit, profugit filia et interpositis horis adprehensa est a patre qui persequebatur, in continenti, videbitur occidisse.*

81 Paul. Coll. 4, 2, 6–7. *Sed si filiam non interfecerit, sed solum adulterum, homicidii reus est. Et si intervallo filiam interfecerit, tandundem est, nisi persecutus illam interfecerit: continuatione enim animi videtur legis autoritate fecisse.*

82 Pap. Coll. 4, 8, 1. *Cum patri lex regia dederit in filium vitae necisque potestatem, quod bonum fuit lege comprehendi, ut potestas fieret etiam filiam occidendi, velis mihi rescribere; nam scire cupio. Respondit numquid ex contrario praestat nobis argumentum haec adiectio, ut non videatur lex non habenti dedisse, sed occidi eam adultero iussisse, ut videantur maiore aequitate ductus adulterum occidisse, cum nec filiae pepercerit?*

83 Quant à l'originalité du texte, voir RABELLO 216.

84 RABELLO 223; B. 60, 37, 22, 1.

85 KUNKEL, 1966. 240.

86 La *Collatio* (4, 2, 4.), qui assure au père le droit de l'assassinat de la fille majeure prise sur l'adultère, qui dépasse les limites fixées par la *lex Iulia de adulteriis coercendis*. MOMMSEN, 1899. 624.

87 KUNKEL, 1966. 237.

88 Dion. Hal. 2, 25.

(impune), et sans poursuite particulière *(sine iudicio)*.[89] Mais la *lex Iulia de adulteriis coercendis* a levé ce droit du mari, aussi au cas ou sa femme était placée sous la *manus*; Auguste a affabli la *manus* par cela, et il l'a appliquée aux conditions de l'époque.[90] Selon les attendus d'Auguste, l'amour paternel encourage plutôt à la grace, mais la fureur de mari encourage plutôt à la vengeance précipitée.[91] Si le mari a tué quand même sa femme prise sur l'adultère, il a répondu à la base de la *lex Cornelia de sicariis*.[92]

Jusqu'au IV[e] siècle av. J.C. le *ius vitae ac necis* paternel a resté intact malgré les petites et plus grandes restrictions de droit et hors de droit. Constance parle du *ius vitae ac necis* encore comme une institution judiciaire vivante[93] En 365 ce droit du *pater familias* a faibli au pouvoir pénal, et selon l'édit de l'empereur, le père devait réprimander les jeunes à cause de leurs égarements et il les devait retenir des fautes similaires.[94] Justinien a pris le texte de du *Codex Theodosianus* avec peu de changement. Pourtant, il a effectué ces changements par rapport au *ius vitae ac necis*, car il a parlé de ce-ci seulement comme un pouvoir qui jadis a appartenu au *pater familias*: *«Libertati a maioribus tantum impensum est, ut patribus, quibus ius vitae in liberos necisque potestas olim erat permissa, eripere libertatem non liceret.»*[95] On peut clairement voir de cela, que le *ius vitae ac necis* comme institution judiciaire a déjà disparu depuis longtemps à l'époque de Justinien, et les règles qu'il a contenues sont appliquées par le droit pénale.

II. Dès l'origine, la *patria potestas* contenait le *ius vitae ac necis* et le *ius exponendi* que le *pater familias* pouvait exercé sur le nouveau-né. L'une *lex regia* transmise sous le nom de Romulus a obligé le *pater familias* à l'éducation de tous les fils et de la fille première-née, et elle a interdit qu'il tuât l'enfant qui avait moins que trois ans, mais le monstrueux était une exception; il le devait tuer après sa naissance. Elle n' a pas interdit l'exposition de ce dernier, mais il y avait une condition selon laquelle, on l'a dû montré aux cinq voisins. Ceux qui n'obéissaient pas à cette loi, il les fallait punir par la confiscation de la moitié de leurs biens.[96] Cette norme qui a appartenu au système du droit sacré, jadis elle a réellement limité la *patria potestas*, mais concernant son emploi, en premier lieu la confiscation générale que l' on a utilisé dans ces cas là comme une sanction, on ne trouve pas de renvoi dans les postérieurs.

89 Gell. 10, 23, 4. *Verba Marci Catonis adscripsi ex oratione quae inscribitur De dote, in qua id quoque scriptum est, in adulterio uxores deprehensas ius fuisse maritis necare: 'Vir' inquit' cum divotium fecit, mulieri iudex pro censore est, imperium quod videtur habet, si quid perverse taetreque factum est a muliere; multiatur si vinum bibit; si cum alieno viro probri quid fecit, condemnatur.' De iure autem occidenti ita scriptum est: 'In adulterio uxorem tuam si prehendisses, sine iudicio impune necares; illa re, si adulterares sive tu adulterare, digito non audetur contingere, neque ius est.'*

90 KUNKEL, 1966. 237.

91 Pap. D. 48, 5, 23 (22), 4. *Ideo autem patri, non marito mulierem et omnem adulterum remissum est occidere, quod plerumque pietas paterni nominis consilium pro liberis capit: ceterum mariti calor et impetus facile decernentis fuit refrenandus.*

92 Pap. Coll. 4, 10, 1. *Si maritus uxorem suam in adulterio deprehensam occidit, an in legem de sicariis incidat, quaero. Respondit: nulla parte legis marito uxorem occidere conceditur: quare aperte contra legem fecisse eum non ambigitur.*

93 C. Th. 4, 8, 6. *Libertati a maioribus tantum impensum est, ut patribus, quibus ius vitae in liberos necisque potestas permissa est, eripere libertatem non liceret.*

94 C. 9, 15, 1. *In corrigendis minoribus pro qualitate delicti senioribus propinquis tribuimus potestatem, ut quos ad vitae decora domesticae laudis exempla non provocant, saltem correctionis medicina compellat. Neque nos in puniendis morum vitiis potestatem in immensum extendi volumus, sed iure patrio auctoritas corrigat propinqui iuvenis erratum et privata animadversione compescat.*

95 C. 8, 46, 10.

96 Dion. Hal. 2, 15.

Plus tard, on est informé par Cicéron d'une prescription des XII Tables, qui a non seulement permis mais également ordonné l'*expositio* du monstrueux.[97] Comme la *lex regia* de Romulus n'interdit même pas l'exposition du monstrueux, cette norme, qui prend son origine des XII Tables et était conservée dans *De legibus* de Cicéron, l'autorise, de plus, ordonne la destruction de ses enfants. On parle de l'exposition d'enfant dans les *leges regiae*; les XII Tables parlent de l'assassinat d'enfant. Il est à présumer, que dans ces sources les deux expressions ne figurent pas comme synonymes, pourtant, elles marquent la même acte en regardant le destin de l'enfant. Car au cas du monstrueux, personne n'a pensé à l'adopter et l'élever, qui peut être ramené aux causes religieuses et pratiques. Le monstrueux était un *prodigium* dans la pensée des Romains duquel le communauté a dû se débarasser par la *procuratio prodigii*. L'ordre d'habitude et l'état calme étaient le *pax deum,* qui voulait dire le rapport paisable entre les dieux et l'homme,[98] et si cet ordre s'est relâché, alors cela était en rapport avec la sortie des dieux de cet état calme.[99] Le relâchement de l'ordre cosmique, donc tous les événements particuliers étaient un *prodigium*.[100] L'étymologie du mot est douteuse, le *prodigium* prend son origine de *prod-aio* dans l'interprétation de Walde–Hofmann,[101] selon laquelle le *prodigium* veut dire prépropos et présaction. Cette concéption ne semble pas suffisante, car «*le prodigium* soi même ne déclare rien»,[102] on le doit interpréter c'est pourquoi on a fait appel à l'aide des *haruspices* et des *livres de Sibylla* et des *pontifices*.[103] Donc il semble plus juste l'interprétation, selon laquelle le mot prend son origine de la composition *prod agere*, ainsi le *prodigium* n'est pas d'autre chose que: «*les forces surnaturelles qui se cachent derrière la surface, et ils avancent et deviennent évidentes en cassant cette enveloppe.*»[104] À l'apparition du *prodigium*, qui peut avoir un caractère privé ou d'État, après que l'on avait révélé sa signification, donc on l'avait interprété,il a fallu exécuter la *procuratio*, dont la manière les commentateurs ont également proposée, et si le même *prodigium* s'est répété, les *pontifex* ont ordonné toujours la même réconciliation.[105] (Comme p.ex. s'il y avait une pluie de pierre,on a dû faire un *novemdiale sacrum*.)[106] On devait détruire le monstrueux,[107] et également l'enfant qui était né un jour de malheur.[108] D'après Suétone, on sait que au jour de mort de Britannicus, on a jeté des pierres aux églises, on a bouleversé les autels, on a lancé les Lares dans la rue et on a exposé les enfants. La *procuratio* du monstrueux, qui a compté pour un *prodigium*, s'est passé avec l'assassinat ou plutôt avec l'exposition, mais il faut remarquer que dans ce cas là, l'exposition voulait dire toujours que l'on voulait tuer l'enfant, donc en fin de compte le resultat des deux actes était pareil. Dans tous les cas, la *procuratio* devait être sans perte de sang, par conséquence on l'a souvent effectué par noyade.[109]

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97 XII tab. IV. 1. (Cic. *leg.* 3, 8, 19.) *Cito necatus tamquam ex XII tabulis insignis ad deformitatem puer.*

98 Ici il faut comprendre l'expression *pax deorum* comme un *genitivus subiectius.*

99 Th. KÖVES-ZULAUF: *Bevezetés a római vallás és monda történetébe. (Introduction dans l'histoire de la réligion et du mythe romaine.)* Budapest 1995. (par la suite: KÖVES-ZULAUF) 61.

100 C. ZINTZEN: *Prodigium.* Der Kleine Pauly I. München 1979. (par la suite: ZINTZEN) IV. 1151.

101 A. WALDE–J. B. HOFMANN: *Lateinisches etymologisches Wörterbuch I–II.* Heidelberg 1954. II. 368.

102 KÖVES-ZULAUF 62.

103 ZINTZEN 1153.

104 KÖVES-ZULAUF 62.

105 K. LATTE: *Römische Religionsgeschichte.* München 1967. 204.

106 Liv. 1, 33, 4; 30, 38, 9. *In Palatio lapidibus pluit, id prodigium more novemdiali sacro, cetera hostiis maioribus expiata.*

107 Liv. 27, 37, 6; 31, 12, 7; 39, 22, 5.

108 Suet. *Cal*. 5. *Quo defunctus est die, lapidata sunt templa, subversae deum areae, Lares quibusdam familiares in publicum abiecti, partus expositi.*

109 Sen. *ira* 1, 15. *Portentosos fetus extinguimus, liberos quoque, si debiles monstrosique editi sunt, mergimus;* Tib. 2, 5, 79. *Prodigia indomitis merge sub aequoribus.*

On a de l'information sur la législation plus nouvelle du *ius exponendi* seulement de plus tard, du IV[e] siècle ap. J.C., ainsi on peut présumer que cet élément de la *patria potestas* n'était pas particulièrement restreint jusque-là. Bien sûr, l'exposition d'enfant déjà dans cette époque là n'était rapportable qu'aux causes religieuses. Le père pouvait exposer également l'enfant qu'il ne voulait pas avouer pour le sien, p.ex. à cause de l'infidélité putative ou réelle de la mère, ou qu'il ne voulait pas élever à cause de sa pauvreté ou plutôt à cause de certains problèmes économiques. Dans ce cas là, on n'a pas vouer l'enfant à la mort, mais on l'a exposé au lieu ou les autres le pouvait trouver facilement.[110] Bien sûr, on connaît également des cas lorsqu'on a adopté l'enfant pour qu'il devienne un gladiateur ou un prostitué par son éducation, *(ad servitutem aut ad lupanar)*.[111] Il est arrivé que le père a rencontré sa fille exposée comme une prostituée et il ne l'a pas reconnue.[112] On les a souvent estropié et les a obligé à mendier ces enfants la.[113]

Les sources de l' origine de l'époque préconstantinienne, ne donnent pas d'image homogène du statut juridique de l'enfant exposé. Selon les pièces de Plaute et de Térence; l'enfant exposé puis adopté garde son *status* libre.[114] Selon une comédie de Plaute du titre *Casina*, Cleostrata, qui était une *libertina*, a adopté une fille exposée, et elle l'a nommée Casina. Quand Casina a atteint l'âge adulte, elle s'est mariée avec Eutyrichus qui avait également un *status* libre. Dans la pièce du titre *Cistellaria* qui était ausi écrit par Plaute, Melaenis, une proxénète a adopté et a élevé Selenium, qui est née libre mais on l'a exposée et qui plus tard s'est mariée avec Alcesimarchus, également libre. Dans l'*Heautontimoroumenos* de Térence, Antiphila, que sa mère Sostrata a exposé, a gardé son status libre et elle s'est mariée avec Clinia, également libre.[115] En même temps personne ne doute que l'on n'a contraint beaucoup d'enfants exposés en esclavage.[116] Suétone premièrement donne des informations de Gnipho, selon lesquelles il est né libre (*ingenuus*) en Gaule, mais on l'a exposé dans son enfance, ensuite celui qui l'a élevé, l'a libéré et la fait enseigné. Plus tard il mentionne que Gnipho était doué de brillantes qualités et de la mémoire excellente et qu'il était procuré de la compétence dans la langue latine et greque.[117] La deuxième source parle de C. Melissus

110 Une pareille place était p.ex. à Rome sur le marché aux légumes, qui s'est appellé *columna lactaria.* Voir Fest. *Lactaria columna in foro oltorio dicta, quod ibi infantes lacte alendos deferebant.*

111 Lact. *inst.* 6, 20, 18; M. MEMMER: *Ad servitutem aut ad lupanar…* ZSS 108 (1991) (par la suite: MEMMER) 21. sqq.

112 Min. Fel. 31, 4; Iust. *apol.* 1, 27; BOSWELL: *Expositio and Oblatio. The Abandonment of Children in the Ancient and Medieval Family.* AHR 89 (1984) 28. *Incest comprised the single most common objection of Christian moralists to expositio, and no solution to this problem presented itself. Few, if any fathers of the church objected to abandonment as a dereliction of parental duty. In the relatively few places where early Christian literature touched on the practice, which it describes as common, authors complained of the possibility that parents might unknowingly use as prostitutes children they once abandoned.* (Je n'ai pas pu me procurer cette étude, ainsi je la cite seulement à la base de MEMMER 22.)

113 Sen. *contr.* 10, 4. *Quidam expositios debilitabat et debilitatos mendicare cogebat ac mercedem exigebat ab eis*.

114 MEMMER 26.

115 En question, si on peut considérer les pensées, qui sont dans les oeuvres de Plaute et de Térence, au miroir fidèle des conditions romains. Il est presque sûr que, ces auteurs devaient employer les conditions de vie et la manière de penser représentées au l'esprit romain, bien qu'ils aient travaillé en générale à la base des modèles greques, puisque ils pouvaient espérer seulement comme ça un succès.

116 Sen. *contr.* 10, 4, 13. *Deinde, an hoc non licuerit illi facere. Licuit, inquit, expositi innullo numero sunt, servi sunt.*

117 Suet. *gramm*. 7. *M. Antonius Gnipho, ingenuus in Gallia natus sed expositus, a nutritore suo manumissus institutusque fuisse dicitur ingenii magni, memoriae singularis, nec minus Graece quam Latine doctus.*

qui est également né libre *(ingenuus)* à Spoletium; on l'a exposé dans son enfance à cause des diputes qui étaient entre les parents.[118] Grâce à son gouverneur et à son père adoptif, il a gagné une formation dans les sciènces plus élevées, et on l'a recommandé à Mécène comme un grammairien. Il a devenu ami de Mécène au cours du temps, et bien que la mère de Melissus ait soutenu également la liberté de son fils, saissant l'action nommé *adsertio libertatis*, il est resté *in statu servitutis*, car il l'a mis devant sa descendance originelle. Weiss a attaché du sens opposé aux termes *ingenuus natus* et *manumissus*, et de cela il a induit que Gnipho avait un *status* d'esclave.[119] Selon Cornil dans ce texte, l'expression «*in servitute*» désigne seulement un état *de facto* et non pas cela que l'on aurait fait de l'enfant un servus également *de iure*.[120] Watson pense que chez Suétone ni le terme *status servitutis* et ni le terme *manumissus* ne figure comme un *terminus technicus*, ainsi il serait superflu de prêter attention plus particulière aux eux.[121] Le *manumissus* ne renvoie absolument pas au *status servitutis* puisqu'on a appliqué la *remancipatio* ou plutôt la *manumissio* également dans le cas du *filius* qui était en *mancipium*.[122] Le père pouvait révendiquer son enfant exposé du *nutritor* après avoir payé des dépenses de l'*alimentatio*.[123]

L' empereur Trajane et Pline fils, gouverneur de Bithynia ont échangé des lettres du statut juridique de l'enfant né libre puis exposé. Comme il est à présumer, les lettres étaient datées dans la deuxième année que Pline était à l'office, donc en 111. Pline présente à l'empereur Trajane la question de l'*alimentatio* et du *status* des enfants nés libres puis exposés, des *threptous*, comme un problème qui touche toute la province, puisqu'il n'a pas trouvé de règle qui serait applicable à Bithynia ou au tout empire, et il a pensé qu'il ne pouvait pas être satisfait d'autres exemples dans une affaire, qui n'est jugeable qu'avec une considération impériale. Bien qu'il connaisse certaines *epistulae* et *edicta*, comme p.ex. ceux qui étaient édictés par les empereurs Auguste, Vespasien et Tite pour l'Andania, la Sparte et l'Achaia, mais ceux-ci ne contiennent que des règles particulières, et c'est pourquoi ils ne sont pas appliciables à la province de Pline. Il n'envoie pas à Trajane la copie des documents mentionnés, car probablement ils sont dans les archives de l'empereur avec une rédaction beaucoup plus précise.[124] Trajane rédige la question agité par Pline dans sa lettre de réponse précisement: donc on parle des enfants nés libres que leurs parents ont exposés, puis ont été adoptés et ont été élevés comme esclave. Trajane mentionne que ses ancêtres n'ont pas vraiment réglé cette question avec une vigueur générale, et il a allégué les deux *epistulae* de Domitien qui étaient

118 Suet. *gramm.* 21. *C. Melissus, Spoleti natus ingenuus, se dob discordium parentum expositus, cura et industria educatoris sui altiora studia percepit, ac Maecenati pro grammatico muneri datus est. Cui cum se gratum et acceptum in modum amici videret, quamquam asserente matre, permansit tamen is statu servitutis praesentemque condicionem verae origini anteposuit.*

119 E. WEISS: *Peregrinische Manzipationsakte.* ZSS 37 (1920) 469.

120 G. CORNIL: *Contribution à l'étude de la patria potestas.* Paris 1897. (par la suite: CORNIL) 428.

121 WATSON 171.

122 M. KASER: *Das römische Privatrecht I–II.* München 1971–1975. I. 65.

123 Sen. *contr.* 9, 3. *Expositum qui agnoverit, solutis alimentis recipiat.*

124 Plin. *epist.* 10, 65. *C. Plinius Traiano Imperatori. Magna, domine, et ad totam provinciam pertinens quaestio est de condicione et alimentis eorum, quos vocant threptous in qua ego auditis constitutionibus principium quia nihil inveniebam aut proprium, aut universale, quod ad Bithynos ferretur, consulendum te existimavi, quid observari velles; neque enim putavi posse me in eo, quod auctoritatem tuam posceret, exemplis esse contentum. Recitabatur autem apud me edictum, quod dicebatur divi Augusti, ad Andaniam pertinens; recitatae epistulae et divi Vespasiani ad Lacedaemonios et divi Titi ad eosdem et Achaeos, et Domitiani ad Avidium Nigrinum et Armenium Brocchum proconsules, idem ad Lacedaemonios, quae ideo tibi non misi, quia et parum emendata et quaedam non certae fidei videbantur, et quia verta et emendata in scriniis tuis esse credebam.*

écrites pour Avidius Negrinus *(proconsul)* et pour Armenius Brocchus *proconsul* et qui ne sont absolument pas négligeables, mais comme elles ne possèdent pas de vigueur générale, elles ne sont pas applicables à Bithynia. Trajane donne la possibilité de l'*adsertio in libertatem*, et il réfuse du *nutritor* le droit d'exigence du paiement des dépenses d'*alimentatio*, et le *ius retentionis* qui a servi l'assurance de ce droit dernier. On peut poser la question qui c'est qui peut poursuivre l'exigence à la liberté.[125] Car Trajane a autorisé la *vindicatio in libertatem* et non pas la *vindicatio in patriam potestatem*, selon Cornil le droit de la *vindicatio* a appartenu à l'enfant et non pas aux parents.[126] Mais l'enfant, étant esclave, ne pouvait pas prendre l'initiative du procès lui-même, alors il y avait besoin d'une intervention de l'*adsertor* pour qu'il s'occupât de l'enfant dans le procès.[127] Donc Trajane regarde le *status libertatis* de l'enfant comme un fait que ne peut pas être perdu d'une telle manière.[128] Il ne faut pas rembourser de dépenses de l'*alimentatio*, car dans ce cas là le recouvrement de la liberté n'est pas de rachat du *status servitutis*, mais c'est la manumission de l'esclavage.[129]

Selon le cas de Scaevola qui a également une haute importance en cequi conte la définition du statut juridique de l'enfant exposé, un citoyen romain s'est divorcé de sa femme enceinte et il s'est remarié. La femme répudiée a exposé l'enfant qui était élevé par une troisième personne. Le père, dans son testament, comme il ne savait pas si son fils vit ou pas, il ne l'a ni désigné comme son héritier et l'a ni exhérédé. Le fils, après la mort de son père, et que sa mère et sa grande-mère paternelle l'avaient reconnu, a saisi l'héritage comme un *legitimus heres*.[130] Selon Scaevola le testament est invalide, car le fils était placé sous une *patria potestas*, même si son père n'en savait pas.[131] Selon Paulus l'enfant exposé garde son *status libertatis*, même s'il n'en sait pas et il se considèret comme un esclave.[132] On peut lire le suivant dans le *rescriptum* des empereurs Dioclétien et Maximien, qu'ils ont adressé à Rhodonus, daté en 295.[133] Rhodonus

125 Plin. *epist.* 10, 66. *Traianus Plinio. Quaestio ista, quae pertinet ad eos, qui liberi nati expositi, deinde sublati a quibusdam et in servitute educati sunt, saepe tractata est, nec quicquam invenitur in commentariis eorum, qui ante me fuerunt, quod ad omnes provincias sit constitutum. Epistulae sane sunt Domitiani ad Avidium Negrinum et Armenium Brocchum, quae fortasse debeant observari: sed inter eas provincias, de quibus rescripsit, non est Binthya. Et ideo nec adsertationem denegandam iis, qui ex eius modi causa in libertatem vindicabuntur, puto, neque ipsam libertatem redimendam pretio alimentorum.*

126 CORNIL 430.

127 MEMMER 33.

128 W. BANG: *Die Herkunft der römisches Sklaven II. Die Rechtsgründe der Unfreiheit*. Mitteilungen des kaiserlich deutschen archäologischen Instituts. Röm. Abt. 27 (1912) (par la suite: WEISS) 202.

129 MEMMER 34.

130 Scaev. D. 40, 4, 29. *Uxorem praegnantem repudiaverat et aliam duxerat: prior enixa filium exposuit. Hic sublatus ab alio educatus est nomine patris vocitatus usque ad vitae tempus patris tam ab eo quam a matre, an vivorum numero esset, ignorabatur; mortuo patre tetamentoque eius, quo filius neque exheredatus neque heres institutus sit, recitato filius et a matre et ab avia paterna adgnitus hereditatem patris ab intestato quasi legitimus possidet. Quaesitum est hi qui testamento libertatem acceperunt utrum liberi an servi sint. Respondit filium quidem nihil praeiudicii passum fuisse, si pater eum ignoravit, et ideo, cum in potestate et ignorantis patris esset, testamentum non valere. Servi autem manumissi si per quinquennium in libertate morati sunt, semel datam libertatem infirmari contrarium studium favore libertatis est.*

131 Gai. *inst*. 2, 123.

132 Paul. D. 22, 6, 1, 2. *Si quis nesciat se cognatum esse, interdum in iure, interdum in facto errat. Nam si liberum se esse et ex quibus natus sit sciat,iura autem cognationes habere se nesciat, iniure errat: at si quis (forte expositus) quorum parentium esset ignoret, fortasse et serviat alicui putans se servum esse, in facto magis, quam in iure errat.*

133 C. 5, 4, 16. *Patrem, qui filiam exposuit, at nunc adultam sumptibus et labore tuo factam matrimonio coniungi filio desiderantis favere voto convenit. Qui si renitatur, alimentorum solutioni in hoc solummodo casu parere debet.*

a adopté et a élevé une fille née libre et exposée, et lorsqu'elle a atteint l'âge adulte, il la voulait faire marier son fils. Avant le mariage, le père naturel s'est opposé et il a exigé la remise de sa fille. La *potestas* sur l'enfant est restée chez lui, et il l'aurait pu exercée également à l'aide de *praeiudicium de patria potestate*.[134] Mais la question n'était que si le père doit rembourser les dépenses de l'*alimentatio*. Les empereurs ont décidé dans le *rescriptum,* que si le père naturel s'opposait au mariage entre sa fille et le fils du père adoptif, dans ce cas là il devrait rembourser les dépenses d'*alimentatio*, mais s'il y souscrivait ainsi il serait déchargé du remboursement des dépenses.

L'enfant d'esclave exposé garde aussi le *status servitutis* inné. L'empereur Alexandre Sévère a réglé la question de sa propriété dans son *rescriptum* qui était écrit en 224 à A. Claudius.[135] Si on a exposé l'enfant à l'insu et contre la volonté du *dominus*, alors le droit de la *vindicatio* appartenait au maître, mais il devait rembourser les dépenses du *nutritor*. Mais si le *dominus* a fait exposer l'enfant de la serve lui même, alors le droit de la *repetitio* n'appartenait pas à lui. En conséquence du principe de la *derelictio*, l'enfant d'esclave exposé garde son *status*, mais il devient sans maître, et le *collector* devient son propriétaire par l'*occupatio*.[136]

On trouve une allusion au *status* d'esclave de l'enfant exposé parmi les contrats des tablettes cirées daciques.[137] Le 17 mars 139 à Kartum, un achat d'esclave est intervenu entre Maximus Batonis et Dasius Versonis dont l'objet était une fille d'esclave nommée Passia qui avait environ six ans. Le vendeur était obligé de désigner la descendance de l'esclave à l'achat-vente,[138] car celle-ci a influé en gros le travail dont elle était capable; ce pourquoi l'*edictum* d'*aedilis* a obligé les gens qui vendaient un esclave au marché qu'ils désignent sa *natio*.[139] Selon Mommsen, l'expression *empta sportellaria* porte à croire que le propriétaire a acheté la mère de la fille, et il a reçu Passia, la fille d'esclave comme un cadeau, car la *sportella* veut dire un cadeau.[140] L'opinion de Weiss semble plus sûr, selon lequel le vendeur a acheté lui-même la fille comme un enfant exposé, et il le prouve par le suivant:[141] au témoignage des papyrus, l'expression *sportellarius* est identiqué par l'expression *koptriaireios,*[142] qui désigne toujours l'enfant exposé. Sans doute, la *sportella* veut dire un cabas, comme on peut lire dans la Vulgate d'Hiéronyme en liaison avec l'exposition de Moïse.[143] La *fiscella* est le *deminutivum* du *fiscus* qui veut dire un panier à l'origine, elle est le synonyme de la *sportella*, et elle allégue la tradition selon laquelle on a utilisé souvent un cabas à l'exposition de l'enfant. Donc la *sportellaria* veut dire une fille exposée dans un cabas, certaines sources greques nous peuvent rapprocher a cette acception selon lesquelles on a exposé l'enfant également seulement dans une certain poterie *(ostrakon, enkhystria).*

La loi datée le 17 avril 331 de Constantin a porté un changement significatif au status juridique de l'enfant exposé, puisque il a étendu également aux enfants libres la

134 MEMMER 38.

135 C. 8, 51 (52), 1. *Si invito vel ignorante te partus anciallae vel adscripticiae expositus est, repetere eum non prohiberis. Sed restitutio eius, non a iure vindicaveris, ita fiet, ut, si qua in alindo vel forte ad discendum artificium iuste consumpta fuerint, restitueris.*

136 MEMMER 40.

137 FIRA III. 284.=CIL III. 937. *Maximus Batonis puellam nomine Passiam, sive ea quo alio nomine est, annorum circiter sex plus minus, empta sprotellaria emit mancipioque accepit de Dasio Verzonis Pirusta ex Kavieretio v/v ducentis quinque…*

138 O. LENEL: *Das «Edictum Perpetuum».* Leipzig 1927. 554. 563. *Clausula de natione pronuntianda.*

139 E. PÓLAY: *A dáciai viaszostáblák szerződései.* Budapest 1972. (par la suite: PÓLAY 1972.) 146; Ulp. D. 21, 1, 31, 21. *Nationem cuiusque in venditione pronuntiare debent.*

140 PÓLAY 1972. 146.

141 WEISS 160. sqq.

142 Aristoph. *ran.* 1190.

143 Exod. 2, 3. *Sumpsit fiscellam scripeam… posuitque intus infantulum et exposuit eum.*

réglementation concernant le destin de l'enfant de la femme d'esclave.[144] Donc le père qui a exposé son enfant perd son *potestas* sur lui, et avec cela également le droit de la révendication de l'enfant. Le *nutritor* décide du *status* de l'enfant adopté librement, indépendamment du fait s'il est né libre ou esclave. L'expression *retineat sub eodem statu*, *quem apud se collectum voluerit agitare* montre, que la possibilité de la *vindicatio in libertatem* et de *l'adsertio libertatis* n'était pas le droit du père.[145] On peut voir nettement que cette loi accorde une protection efficace au père adoptif de l'enfant exposé.

La restriction ou plutôt l'interdiction du *ius exponendi* s'est passée assez tard au niveau du droit. En février 374, les empereurs Valentinien, Valens et Gratien ont décidé que l'assassinat de l'enfant était punible de la peine capitale.[146] Après un mois, Valentinien a déclaré punissable l'exposition de l'enfant[147] Car Valentinien se reporte à une sanction précédente, ainsi il n'est pas exclu qu'il ne fait que renouveller une interdiction qui existait déjà depuis longtemps. Il est aussi imaginable à l'encontre de cela que – si on comprend l'*expositio* comme une forme de la *necatio*, qui n'est pas étrangère du tout de la pensée postclassique, – Valentinien allégue l'interdiction de l'assassinat de l'enfant datée en février de cette même année, ou plutôt son lot de sanction.[148] On peut apporter un argument à l'appui de ce dernier point de vue, que le destinataire de toutes les deux *constitutiones* était le même *praefectus praetorio*, appellé Probus. On ne connaît pas le lot de sanction de cette dernière *constitutio*. Selon Memmer, en 442, on n'a encore sûrement pas puni ce qui exposait son enfant par mort. Cela est démontré par le dixième canon du *Concilium Vasense* tenu dans cette même année, qui s'est occuppé de la sanction ecclésiastique des personnes qui exposaient leur enfant.[149] Si un tel règlement avait existé, qui frappait l'exposition d'une peine de mort, ainsi la négociation de la sanction ecclésiastique serait devenue complètement superflue.[150] Comme il est à présumer, l'interdiction d'exposition d'enfant de l'anné 374 s'est rapportée seulement aux enfants du *pater familias*, puisque cette loi règlait également les droits du *dominus* sur l'enfant d'esclave et du *colonus* exposé.[151] Selon cela, le droit de la revendication n'a pas appartenu au *dominus* ou plutôt au *patronus,* qui a voué la mort les enfants et ce pourquoi il les a exposés. En 412 les empereurs Honorius et Théodose ont mis en vigueur un règlement pareil.[152]

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144 C. Th. 5, 9, 1. *Quicumque puerum vel puellam, proiectam de domo patris vel domini voluntate scientiaque, collegerit ac suis alimentis ad robur provexerit, eundem retineat sub eodem statu, quem apud se collectum voluerit agitare, hoc est sive filium sive servum eum esse maluerit: omni repetitonis inquietudine penitus submovenda eorum qui servos aut liberos scientes propria voluntate domo recens natos abiecerint.*

145 MEMMER 65.

146 C. Th. 9, 14, 1. *Si quis necandi infantis piaculum adgressus adgressave sit, erit capitali estud malum.*; C. 9, 16, 8. *Si quis necandi infantis piaculum adgressus adgressave sit, sciat se capitali supplicio esse puniendum.*

147 C. 8, 51 (52), 2 pr. *Unusque subolem suam nutriat. Quid si exponendam putaveri, animadversioni quae costituta est subiacebit.*

148 BONFANTE 112.

149 *Sacrorum conciliorum nova et amplissima collectio.* Ed. Mansi. Graz 1960. VI. 455. *Sane si quies post hac diligentissimam sanctionem expositorum hoc ordine collectorum repetitor vel calumniator extiterit, ut homicida ecclesiastica distinctione feriatur.*

150 MEMMER 70.

151 C. 8, 51 (52) 2, 1. *Sed nec dominis vel patronis repetendi aditum relinqiumus, si ab ipsis expositos quodammodo ad mortem voluntas misericordiae amica collegerit: nec enim dicere suum poterit, quem pereuntem contempsit.*

152 C. Th. 5, 9, 2. *Nullum dominis vel patronis repetendi aditum relinqiumus, si expositos quodammodo ad mortem voluntas misericordiae amica collegerit: nec enim dicere suum poterit, quem pereuntem contempsit; si modo testis episcopalis subscriptio fuerit subsecuta, de qua nulla penitus ad securitatem possit esse cunctatio.*

Dedans, il apparaît comme une nouveauté en comparaison du règlement précédent le fait que les dispositions lient l'adoption de l'enfant exposé aux deux conditions: elle doit se passer devant l'évêque et il faut dresser un acte. Selon Memmer, cela rend probable que le *collector* était en droit de décider du *status* de l'enfant aux termes de la norme datée en 331.[153]

Selon les dispositions de Justinien s'étendant sur tout l'empire daté en 529, l'enfant exposé, indépendamment de son origine, ne peut pas être rejeté ni dans au *colonus* et ni a l' esclave.[154] Ainsi il assure la liberté aux tous les enfants exposés et encore aux enfants d'esclaves, que le *dominus* a fait exposés. Il interdit au *collector* qu'il acquière des avantages par l'éducation de l'enfant, son acte constitue un *officium pietatis*.[155] Il a consolidé ces dispositions encore dans la même année.[156] En 541, il a garanti également *expressis verbis* la liberté de l'enfant d'esclave exposé,[157] et il a permis de prouver le droit de propriété sur l'enfant au *dominus* mais seulement dans le cas où l'enfant était exposé à l'insu de lui ou plutôt contre sa volonté.

En arrivant à la fin de notre examen, on présent quelques remarques de synthèse des deux institutions judiciaires de la *patria potestas,* qui étaient analysées dans cette étude. Le *ius vitae ac necis*, donc le pouvoir autorité du *pater familias* contre l'enfant adulte, voulait dire un droit effectif en vigueur jusqu'au IV^{e} siècle ap.J.C., par conséquent si le père voulait, il pouvait même tuer son enfant. Mais l'exercise de ce droit était reglé dans certains cadres. Ainsi, on devait ternir l'enquête dans le cadre du *iudicium domesticum*, pendant lequel le *consilium necessariorum* a observé l'accusation et il a écouté les moyens de défense de l'accusé, puis dans le cas au le crime semblait vraiment digne de la peine de mort, il a prononcé à la majorité de voix la culpabilité, et cette décision possédait une force obligatoire et sans condition pour le *pater familias.* Auguste a restreint plus le cercle d'emploi du *ius vitae ac necis* avec la *lex Iulia*

153 MEMMER 70.

154 C. 8, 51 (52), 3 pr. 1. *Sancimus nemini licere, sive ab ingenuis genitoribus puer parvulus procreatus sive a libertina progenie sive servili condicione maculatus expositus sit, eum puerum in suum dominium vindicare sive nomine dominii sive adscripticiae cive colonariae condicionis: sed neque his, qui eos nutriendos sustulerunt, licentiam concedi penitus (cum quadam distintione) eos tollere et educationem eorum procurare, sive masculi sint sive feminae, ut eos vel loco servorum aut colonorum aut adscripticiorum habeant. Sed nullo discrimine habito hi, qui ab huiusmodi hominibus educati sunt, liberi et ingenui appareant et sibi adquirant et in posteritatem suam vel extranensos heredes omnia quae habuerint, quomodo voluerint, transmittant, nulla macula vel servitutis vel adscripticiae aut colonariae condicionis imbuti: nec quasi patronatus iura in rebus eorum concedi, sed in omnem terram, quae Romanae dicioni supposita est, haec obtinere.*

155 C. 8, 51 (52), 3, 2. *Neque enim oportet eos, qui ab initio infantes abegerunt et mortis forte spem circa eos habuerunt, incertos constitutos, si qui eos susceperunt, hos iterum ad se revocare conari et servili necessitati subiugare: neque hi, qui eos pietatis ratione suadente sustulerunt, ferendi sunt denuo suam mutatnes sententiam et in servitutem eos retrahentes, licet ab inito huiumodi cogitationem habentes ad hoc prosiluerint, ne videantur quasi mercimonio contracto ita pietatis officium gerere.*

156 C. 1, 4, 24.

157 N. 153, 1. *Quicunque igitur in ecclesiis, vel vicis, vel aliis locis expositi probantur, eos omnibus modis liberos esse iubemus, licet actori manifesta probatio suppetat, qua personam illam ad suum dominium pertinere ostendat. Se enim legibus nostris praeceptum est, ut servi aegrotantes, qui a dominis neglecti, quum de valetudine eorum desperarent, tamquam cura a dominis digni non habiti omnino in libertatem rapiantur, quanto magis eos, qui in ipso vitae initio aliorum hominum pietati relicti, et ab ipses enutriti sunt, in iniustam servitutem trahi non patiemur? His igitur et sanctissimum Thessalonicensium archiepiscopum et sanctam dei ecclesiam, quae sub illo constituta est, et gloriam tuam opem ferre, libertatemque illis adiudicare sancimus. Neque illi, qui haec faciunt, legum nostrarum poenas effugient, ut qui omni inhumanitate et crudelitaterepleti sunt, domnique homicido tanto deteriore, quanto miserioribus id afferunt.*

de adulteriis coercendis. Le *ius exponendi,* donc le droit sur le nouveau-né du *pater familias* était une institution judiciaire vivante dans la pratique jusqu'en 374 ap. J.C. On distingue deux côtés de son exercise. L'un est religieux, dans ce cas là l'exposition d'enfant comme une *procuratio prodigii* s'est portée sur la mort de l'enfant,et elle ne s'est pas séparée de l'assassinat du nouveau-né. Dans d'autres cas, la cause était seulement que la famille ou plutôt le *pater familias* ne voulait pas élever l'enfant, mais il pouvait espérer que quelqu'un le trouvait et adoptait. Si cette dernière possibilité est arrivée, ainsi la question du *status* de l'enfant élevée s'est posée. Celle ci montre un image vraiment varié pendant les siècles, jusqu'à ce que le droit de l'époque de Justinien soit arrivé à garantir la *libertas* à presque tous les enfants exposés et élevés.

Summary

Remarks on the ius vitae necisque and the ius exponendi

Ius vitae ac necis, the penal authority of the *pater familias* over his (adult) children *in potestate,* was valid up to the 4th century A.D. It gave the father the right to kill even his own child, but the exercise of this right was restricted and kept within bounds. So the *pater familias* had to conduct proceedings – *iudicium domesticum* – when the *consilium necessariorum* exemined the case and gave the defendant any oportunity to answer the charge *(cognita et audita causa)*. If the crime seemed to deserve capital punishment *(iusta causa)*, the *consilium* decided aubout the guiltiness of the defendant by mayority. The verdict was binding for the pater familias. The exercise of the *ius occidendi* was further restricted by Augustus in his *lex Iulia de adulteriis coercendis*.

Ius exponendi, the power of the *pater familias* to expose a child, was valid until 374 A.D. There were two reasons why a new-born child could be exposed. One of these reasons has a religious motivation – the *procuratio prodigii* – and it could not be strictly distinguished from killing a new-born child. In the other case the *pater familias* exposed the child, because he did not want to bring it up, but he did not intend to kill it. He counted on somebody to find the child, and adopt it. If the latter case came true, there was a legal question about the *status libertatis* of the child. The regulation of the status was quite different during the centuries, till emperor Iustinian guaranteed almost every exposed and adopted child the freedom.

Zusammenfassung

Bemerkungen zum ius vitae necisque und zum ius exponendi

Das *ius vitae ac necis*, die Strafgewalt des *pater familias* über seinen (erwachsenen) Kinder was bis ins 4. Jh. n. Chr. geltendes Recht, aufgrund dessen der Hausvater sein Kind sogar töten konnte und durfte. Die Ausübung des *ius vitae ac necis* waren jedoch Grenzen gesetzt. Der angeklagte Haussohn wurde im *iudicium domesticum* belangt, wo das *consilium necessariorum* den Fall untersuchte, und die Verteidigung des Angeklagten anhörte *(cognita et*

audita causa). Erschien dem *consilium* die Tat der Todesstrafe würdig *(iusta causa)*, entschied es über die Schuldfrage mit Stimmenmehrheit. Diese Entscheidung war für den Hausvater von bindender Kraft. Kaiser Augustus schränkte die Ausübung des *ius occidendi* über die ehebrüchige Tochter in seiner *lex Iulia de adulteriis coercendis* weiter ein.

Das *ius exponendi*, die Gewalt des *pater familias* über sein neugeborenes Kind war bis 374 n. Chr. geltendes Recht. Es lassen sich zwei Gründe für die Aussetzung unterscheiden. Der eine ist hauptsächlich sakraler Natur: in diesem Fall zielte die Aussetzung des Mißgeburtes, die *procuratio prodigii* auf dessen Tod ab. In jenem Fall, wo der *expositio* nur die Tatsache zugrunde lag, daß der *pater familias* das Kind nicht hatte aufziehen wollen, und es deswegen aussetzte, konnter er sogar gut damit rechnen, daß jemad das Kind finden und es aufziehen würde. Traf dies ein, so erhieb sich die Frage nach dem rechtlichen Status des Findelkindes. Die Regelung des *status libertatis* zeigt ein ziemlich buntes Bild durch die Jahrhunderte, bis endlich Kaiser Justinian fast für jedes ausgesetzte und aufgezogene Kind die Freiheit gewährte.

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Three institutions of the Finnish gender equality law

In this essay I would like to deal with three fundamental institutions of gender equality law in working life by means of the Finnish Act on Equality between Women and Men compared with the secondary law concerned of the European Communities. Hereunder I would like to make an attempt to outline the relevant practice of the Court of Justice of the European Communities (hereinafter CJEC) and the Finnish national courts.

Indirect discrimination

Due to the elaboration of the rules of indirect discrimination it has become possible to judge an apparently neutral action by an employer as discrimination.

According to the Finnish Act on Equality between Women and Men (hereinafter Act) direct or indirect discrimination on the basis of sex is prohibited. Act – in contrast to the solution of other nordic countries as Sweden or Norway – does not contain a separate definition of indirect discrimination, so the Finnish courts have to subsume the cases under the definition which has been evolved in the practice of the CJEC afterwards added to the Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex. Article 2(2) of this directive states that indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

In the practice of the CJEC there were many cases in which it had to be decided whether the employer's criterion or practice had constitued the hidden form of discrimination or it was appropriate and necessary and could be justified by objective factors unrelated to sex.

In the case of J.P. Jenkins v Kingsgate (Clothing Productions) Ltd. the national court was principally concerned to know whether it was of commercial benefit to the employer to encourage the doing of the maximum possible hours of work and consequently to pay a higher rate to workers doing 40 hours per week than to workers doing fewer than 40 hours per week. The CJEC pointed out that the fact that work paid at time rates was remunerated at an hourly rate which varied in accordance with the number of hours worked per week did not offend

against the principle of equal pay laid down in Article 141[1] of the EEC Treaty (hereinafter Article 141) in so far as the difference in pay between part-time work and full-time work was attributable to factors which were objectively justified and are in no way related to any discrimination based on sex – particularly in this case, when by giving hourly rates of pay which were lower for part-time work than those for full-time work the employer was endeavouring, on economic grounds which might be objectively justified, to encourage full-time work irrespective of the sex of the worker.

In the case of Bilka – Kaufhaus GmbH v Karin Weber von Hartz the CJEC stated that Article 141 was infringed by a department store company which excluded part-time employees from its occupational pension scheme, where that exclusion affected a far greater number of women than men, unless the undertaking showed that the exclusion was based on objectively justified factors unrelated to any discrimination on grounds of sex. According to the judgement it is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice which applies independently of a worker's sex but in fact affects more women than men may be regarded as objectively justified economic grounds. The CJEC added that Article 141 did not have the effect of requiring an employer to organize its occupational pension scheme in such a manner as to take into account the particular difficulties faced by persons with family responsibilities in meeting the conditions for entitlement to such a pension.

According to the judgement of the case of Helga Nimz v Freie und Hansestadt Hamburg Article 141 has to be interpreted as precluding a collective agreement,[2] entered into within the national public service, from providing for the period of service of employees working for at least three-quarters of normal working time to be taken fully into account for reclassification in a higher salary grade, where only one-half of such period of service is taken into account in the case of employees whose working hours are between one-half and three-quarters of such normal working time and the latter group of employees comprises a considerably smaller percentage of men than women, unless the employer can prove that such a provision is justified by factors whose objectivity depends in particular on the relationship between the nature of the duties performed and the experience afforded by the performance of those duties after a certain number of working hours have been completed.

In 1999, citing the need to reduce costs, the city of Kajaani implemented lay-offs, which is directed at the basic security sector. Ninety-three percent of the laid-off employees were women. The Ombudsman for Equality[3] (hereinafter Ombudsman) issued an opinion stating that the procedure constituted indirect discrimination in violation of the Act. Altogether 227 employees took the matter to the District Court of Kajaani, which dismissed the case and rejected the employees' claims for compensation pursuant to the Act. According to the District Court, it had been established that the lay-offs in the basic security sector were a necessary

1 (1) Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. (2) For the purpose of this article, „pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

2 It is also added to the judgement that, where there is indirect discrimination in a provision of a collective agreement, the national court is required to set aside that provision, without requesting or awaiting its prior removal by collective bargaining or any other procedure, and to apply to members of the group disadvantaged by that discrimination the same arrangements as are applied to other employees, arrangements which, failing the correct application of article 141 in national law, remain the only valid system of reference.

3 The Ombudsman and the Equality Board shall supervise the observance of the Act in private activities, and in public administration and business, in accordance with the Act and other legislation.

means of balancing the city's finances and the city had shown that the lay-offs were not based on gender but had another, acceptable, reason.

The decision of the District Court was appealed to the Court of Appeal of Eastern Finland, which stated that a municipality has the autonomy to decide how to achieve its savings objectives. However, a municipality must also take into account the provisions of the Act. The Court of Appeal considered that it was unnecessary to direct the lay-offs, which were implemented for financial reasons, at the basic security sector and that the number of lay-offs was unjustified, and also that the city had not shown that there had been another, acceptable, reason for implementing the lay-offs in the basic security sector. Therefore the plaintiffs, who were employed in a female-dominated sector, had been the victims of discrimination. The city was ordered to pay 500 euros to each plaintiff, or a total of 113,500 euros. The city has applied for a leave to appeal from the Supreme Court. (Court of Appeal of Eastern Finland 1509/2002)

Quota provisions

Article 2(4) of Council directive 76/207/EEC of 9 february 1976 (hereinafter Directive) on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions states that this Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1 (1).[4] So by this article member states have been entitled to apply special, positive measures including giving priority to the under-represented sex in order to promote gender equality.

Application of different quotas means a special form of these measures. This is the most drastic mean of giving preference, so inadequate regulation of this institution may directly threaten the principle of equal opportunities.

The CJEC tried to state precisely the limits of measures to promote equality of opportunity between men and women in two apparently contradictory cases which demand a more detailed description.

The ground of the proceedings between Eckhard Kalanke v. Freie Hansastadt Bremen was the Bremen Law on Equal Treatment for Men and Women (hereinafter LGG) in the Public Service which stated that in the case of an appointment (including establishment as a civil servant or judge) which is not made for training purposes, and in the case of an assignment to a position in a higher pay, remuneration and salary bracket women who have the same qualifications as men applying for the same post are to be given priority if they are under-represented. In accordance with LGG "there is under-representation if women do not make up at least half of the staff in the individual pay, remuneration and salary brackets in the relevant personnel group within a department." Refering to LGG the staff committe considered that Mr. Kalanke and another female candidate were equally qualified and that priority should therefore be given to the woman. Before the Arbeitsgericht (Labour Court), Mr Kalanke argued that, by reason of its quota system, the LGG was incompatible with the Bremen Constitution, with the Grundgesetz (German Basic Law) and with Paragraph 611a of the BGB (German Civil Code). His application was dismissed, however, by the Arbeitsgericht and again, on appeal, by the Landesarbeitsgericht (Regional Labour Court).

4 The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security.

The Bundesarbeitsgericht pointed out that the case did not involve a system of strict quotas reserving a certain proportion of posts for women, regardless of their qualifications, but rather a system of quotas dependent on candidates' abilities. Women enjoy no priority unless the candidates of both sexes are equally qualified. The national court considered that the quota system was compatible with the German constitutional and statutory provisions and that such a system was not incompatible with the Directive. The national court pointed out that a quota system such as that in issue might help to overcome in the future the disadvantages which women currently faced and which perpetuated past inequalities, inasmuch as it accustomed people to seeing women also filling certain more senior posts. Considering, however, that doubts remain in that regard, the Bundesarbeitsgericht stayed the proceedings and sought a preliminary ruling from the Court to clarify the scope of the derogation from the principle of equal treatment allowed by Article 2(4) of the Directive. According to CJEC Article 2(4) of the Directive is specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life. It thus permits national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men. Nevertheless, as a derogation from an individual right laid down in the Directive, Article 2(4) must be interpreted strictly, so national rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception. Furthermore, in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity.[5] So CJEC pointed out that national rules such as those in this case were excluded by the Directive.

Considering that grounds of the Marschall-case (Hellmut Marschall v. Land of North Rhine-Westphalia, hereinafter `the Land') and the Kalanke-case examined above do not essentially differ from each other, judgement made in the Marschall-case should be regarded as the refutal or correction at least of the arguments presented in the Kalanke-case. The question raised in proceedings between Hellmut Marschall and Land Nordrhein-Westfalen (Land of North Rhine-Westphalia, hereinafter `the Land') concerning his application for a higher grade post at a comprehensive school. After his application for promotion to an A 13 post the district authority concerned informed him, however, that it intended to appoint a female candidate to the position on the ground that, in view of the priority rule of Law on Civil Servants of the Land, the female candidate must necessarily be promoted to the position since, according to their official performance assessments, both candidates were equally qualified and since at the time when the post was advertised there were fewer women than men in career bracket A 13. Law on Civil Servants provides that `where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post

5 In accordance with the reasons of the advocate general the principle of equal opportunities must be linked with starting-points and not with arrival-points so promotion of gender equality can be realized only by means of changing conditions of education, vocational training, social environment. Referring to the Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women the advocate pointed out that the essence of such measures to promote equal opportunity for men and women was to encourage to remove existing inequalities better than to give automatically priority, furthermore this kind of measures must be limited in time. According to him national rules such those in this case mechanically equalizing the proportions are not suitable to cease the reasons of the inequalities so it cannot be regarded as temporary.

in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to an individual [male] candidate tilt the balance in his favour.' It is obvious that the legislator – by means of this imprecise expression as 'reasons specific to an individual candidate' – in contrast with the quota provision of LGG tried to ensure sufficient flexibility and, in particular, to allow the administration latitude to take into account any reasons in order to ensure objectivity in connection with male candidates.

According to the authority concerned there was not any special reason on Mr. Marschall's side, so his objection lodged was rejected. Mr Marschall then brought legal proceedings before the regional administrative court for an order requiring the Land to promote him to the post in question. Relying on the judgment of Kalanke-case the court considered that the priority which the provision in question accorded in principle to women seemed to constitute discrimination within the meaning of Article 2(1) of the Directive and that such discrimination was not eliminated by the possibility of giving preference, exceptionally, to male candidates. That court also doubted whether the provision in question was covered by the exception provided for in Article 2(4) of the Directive concerning measures to promote equality of opportunity between men and women – the basis for assessing candidates was unduly narrowed since only the numerical proportion of men to women at the level concerned was taken into account. Furthermore, the court pointed out that the provision in question did not improve women's ability to compete on the labour market and to pursue a career on an equal footing with men but prescribed a result, whereas Article 2(4) of the Directive allows only measures for promoting equality of opportunity. The court therefore decided to stay proceedings and to turn to the Court for a preliminary ruling.

The Land, the Spanish, Austrian, Finnish, Swedish and Norwegian Governments and the Commission considered that a national rule such as the provision in question constituted a measure for promoting equality of opportunity between men and women which fell within the scope of Article 2(4) of the Directive. The Finnish Government added that past experience showed in particular that action limited to providing occupational training and guidance for women or to influencing the sharing of occupational and family responsibilities was not sufficient to put an end to the gender partitioning of labour markets.

The French and the United Kingdom Governments, on the other hand, considered that the provision in question was not covered by the derogation provided for in Article 2(4) of the Directive and it went further than promoting equality of opportunity and aimed to bring about equality of representation between men and women. These governments pointed out that the presence of a saving clause did not make the provision in question any less discriminatory, because it applied only exceptionally and therefore had no impact in a `normal' case where there were no reasons specific to the male candidate – moreover imprecise and general clauses such as that in this case were contrary to the principle of legal certainty.

The CJEC stated that unlike the rules at issue in Kalanke, a national rule which, as in the case in point in the main proceedings, contained a saving clause did not exceed limits of the exception laid down in Article 2(4) of the Directive if, in each individual case, it provided for male candidates who were equally as qualified as the female candidates a guarantee that the candidatures would be the subject of an objective assessment which would take account of all criteria specific to the individual candidates and would override the priority accorded to female candidates where one or more of those criteria tilted the balance in favour of the male candidate. In this respect, however, it should be remembered that those criteria must not be such as to discriminate against female candidates.

It should be noted that the CJEC did not even try to only illustrate such reasons with examples.

In accordance with the Act authorities shall promote equality between women and men purposefully and systematically, especially by changing circumstances which prevent the achievement of equality. The minimum percentage of both women and men in government committees, advisory boards and other corresponding bodies, and in municipal bodies, exclusive of municipal councils, shall be 40, unless there are special reasons to the contrary.

Two women and 5 men had been selected as regular members, and 1 woman and 6 men as deputy members to the municipal executive board of Kolari, and 2 women and 7 men had been selected as regular members, and 1 woman and 8 men as deputy members to the social welfare and health board. The municipal executive board justified the selections by referring to its rules and regulations, which stated that only council members and their deputies may be selected to the municipal executive board and the social welfare and health board. The municipal council had 27 members, of whom 6 were women. According to the municipal executive board, the fact that the rules and regulations of the organ highlight the importance of selecting council members and their deputies constitutes a special reason for departing from the quota provision of the Act.

The decisions were appealed to the Administrative Court of Rovaniemi, which annulled the selections and stated that according to the Act municipal organs, with the exception of municipal councils, should be composed of at least 40% women and 40% men, unless otherwise provided for a special reason. As the number of women elected to the council was sufficient to permit compliance with the aforementioned provision of the Act, the rules and regulations of the organ do not affect the matter. The Supreme Administrative Court did not amend the decision of the Administrative Court of Rovaniemi.

The Act states if an agency, an institution or a municipal or State-majority company has an administrative board, board of directors or some other executive or administrative body consisting of elected or appointed representatives, that organ shall comprise an equitable proportion of both women and men, unless there are special reasons to the contrary.

The town council of Harjavalta had appointed three men – the chairmen of the council – to represent it on the advisory committee for regional cooperation of the Economic Region of Pori (Karhukunnat). This decision was appealed to the Administrative Court of Turku on the grounds of the quota provision in the Act. The Administrative Court rejected the appeal and considered that the advisory committee in question was not a municipal organ to which the quota provision should be applied pursuant to the Act. According to the Administrative Court the town council had not either neglected its obligation, as an authority, to promote gender equality when it had selected members to the committee, and the decision did not violate the Act.

The Supreme Administrative Court reversed the decisions of the Administrative Court of Turku and of the town council. Considering its status and its duties as an inter-municipal cooperation organ, the advisory committee is an organ, which, according to the Act, should be composed of at least 40% men and 40% women, unless otherwise provided for special reasons. The fact that the municipalities had wished that the members of the advisory committee be selected from among the key elected officials, for example chairmen of the town council and members of the municipal council, did not authorize the municipalities to depart from the quota provision.

Equality plan

Article 8b of the Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the

principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions states the followings:

"1. Member States shall, in accordance with national traditions and practice, take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.

2. Where consistent with national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to promote equality between women and men and to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 1 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and the relevant national implementing measures.

3. Member States shall, in accordance with national law, collective agreements or practice, encourage employers to promote equal treatment for men and women in the workplace in a planned and systematic way."

Due to the lack of detailed rules in connection with such agreements or plans the nature and content of plans can be expected to vary according to how developed they are. Some plans are pure equality statements, affirming the equal treatment of employees regardless of matters such as gender, religion, sexuality and ethnicity, but not linked to any specific actions. Other, more developed plans might include special actions targeted at defined areas or limited groups of employees. Plans embedded in an employer's general human resources/personnel policy are likely to be even more developed. In such cases, the equality plans concerned are applied to all employees and all sections of the organisations concerned. In some such cases, equality between men and women is made part of the company culture and equality indicators might be communicated to external 'stakeholders'. Plans of this kind might be seen as an implementation at company level of the EU's gender mainstreaming strategy. Gender mainstreaming was defined by the Council of Europe in a 1998 report as 'the (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies, at all levels and at all stages, by the actors normally involved in policy-making'.

In accordance with the former rules of the Act if an employer regularly employs a staff of at least 30, said employer shall include measures to further equality between women and men at the workplace in the annual personnel and training plan or the action programme for labour protection. Gender equality plans were added[6] to the Act ten years ago in 1995. However, according to the amendments of the Act taken effect from the beginning of 2005 workplaces employing 30 or more employees are now obliged to draw up separate equality plans dealing with the division of workplace responsibilities among men and women, mapping pay distribution and ways to tackle gender based inequalities. The carrying out of workplace equality plans is being overseen by the Ombudsman, who is empowered to set deadlines for creating them.

Ombudsman has published broad guidelines on how to draw gender equality plans. According to Ombudsman – as a basis for equality planning – a comprehensive and detailed preliminary charting should be made of the working community's equality status. Preliminary charting is used for locating problematic issues in the workplace by defining the status of men and women in the workplace by taking into consideration for example the issues mentioned below:

– number of men and women employed by the company, nature of employment relationship of each employee;
– duration of employment relationship, fixed-term and permanent employees;

6 In Finland, all legislative changes concerning working life are prepared in tripartite negotiations.

– level of education;
– job advertisements, qualifications for the position, questionnaires used in interviewing applicants, applications for vacancies (applicants/persons selected);
– placement of men and women in various jobs and positions within the organisation, using for example the following classification: blue- and white-collar employees, senior staff members, supervisors, middle management, top management;
– male and female-dominated positions;
– average wages of men and women in general and according to profession and position; share of men and women in different wage groups, relative differences or differences in the wages of men and women employees in these wage groups;
– effect of various bonuses, overtime compensation, payment by results, holiday benefit, and other such compensations in men's and women's earnings;
– participation by men and women in internal and external training;
– differences in occupational advancement;
– men's and women's use of parental leave (maternity and paternity leave), child home care leave and leave for caring for a sick child;
– physical working conditions, equipment and their ergonomics;
– number of and reasons for absences by men and women;
– occurrence of night shifts or solitary work;
– amount of overtime, use of shift work or flexible working hours;
– opportunity for distance working;]
– occurrence of harassment or abuse in the workplace, measures taken in such cases;
– participation opportunities for personnel;
– problems in co-operation, sharing of responsibility, receiving information.

Ombudsman emphasises that it is extremely important that management be committed to developing an equal working community. Management's participation in the launching phase of equality planning ensures that the objectives and measures aimed at promoting equality in the workplace are in line with the working community's concrete objectives. This way, the goals are as realistic as possible from the point of view of the working community, and as such, are easier to realise. Equality requirements can be a positive challenge, providing management with a new perspective. In the launching phase, the most practical solution is to appoint a working group or person/persons responsible for equality planning in the workplace, or to hire an external consultant specialised in equality issues.

The long or short-term goals suggested by the preliminary charting might be the following:

- increasing the number of men or women (i.e., the gender with the lowest representation) in certain tasks, positions, or at certain levels of the organisation (lower, middle and top management);
- increasing the number of men or women in internal and/or external training;
- changing working conditions so that they enable equal representation of men and women in different tasks and positions, providing more equal occupational advancement opportunities for men and women;
- prevention of sexual harassment and abuse in the workplace, creating a set of actions for eventual problem situations;
- increasing the share of men taking family policy leave and leave to care for a sick child;
- providing opportunities for flexible working hours and distance working for men and women wishing to use them;
- maintaining the professional skills of men and women employees and providing information on central workplace issues during family policy leave or during other such leave;
- ironing out differences in wages for the same work or work of equal value;
- creating an equal working atmosphere and working community;

• creating a modern and development-oriented corporate image by means of equality.

Measures for creating an equal working community might be the following:

– changing the external and internal recruitment policies, amending the requirements and the selection criteria so that they are de facto equal for both men and women;
– questionnaires for applicants are formulated so that men and women are treated equally in every respect;
– the under-represented gender is given precedence in selection in cases where the applicants are otherwise equally qualified;
– if the preliminary charting indicates that one of the genders is under-represented in internal training in the workplace, it is given more opportunities to participate in training. (in addition, a decision may be made to favour the under-represented gender in training selection);
– if women are under-represented at the higher levels of hierarchy, decisions on promotions are made in favour of a woman candidate who fulfils the qualification requirements and expresses an interest in occupational advancement – likewise, training for supervisors and management shall be directed especially at women fulfilling the qualification criteria;
– men shall be encouraged to take more actively family policy leaves and to participate in caring for a sick child, use of the said leaves shall be facilitated also in practice by developing the substitute personnel and flexible working hours system; communication of information shall be arranged so that the person in question is kept up-to-date as regards his or her duties and as regards developments in the workplace during his or her absence.
– to eliminate sexual harassment and abuse, management shall state clearly its negative stand on the subject and give clear instructions as regards cases of harassment or abuse;
– if differences in pay between men and women for the same work and work of equal value are detected, the principle of equal pay shall be realised by a specific compensatory sum reserved for such a case, paid either in connection with regular pay rises or as a lump sum annually (alternatively, as a basis for fair pay, a survey on job difficulty shall be initiated);
– training in equality issues and in their significance for both the working atmosphere and the external corporate image shall be arranged in the workplace.

A follow-up of the equality situation shall be carried out by the work group or person/persons selected at the preliminary stage of equality planning. The follow-up provides information on what has been achieved and what still remains to be done. The results of the follow-up shall be reported to the co-operation bodies, personnel and especially to corporate management in a similar vein, as realisation of the company's other objectives.

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Zusammenfassung

Die Arbeit führt die Durchsetzung der Gleichberechtigung der Geschlechter und deren Chancengleichheit in der Arbeitswelt anhand dreier grundlegenden gesetzgeberischen Lösungen vor. Der Autor führt Untersuchungen der im Bereich der Regelung gegen die indirekte Diskrimination, und der positiven Diskrimination angewendeten Quotenregelungen, sowie der für den Plan der Chancengleichheit massgebenden Regelungen unter Betrachtung der einschlägigen Richtlinien der Europäischen Gemeinschaften mit Hilfe des Gesetzes über die Gleichberechtigung von Männern und Frauen durch. Dabei ergibt sich ein Ausblick auf ein Mitgliedsstaat der EU, nämlich Finnland, das hinsichtlich der Rechtsentwicklung eine Spitzenposition einnimmt. Gleichzeitig versucht der Autor, die mit diesem Themenbereich zusammenhängende Praxis des Europäischen Gerichtshofs, bzw. der finnischen nationalen Gerichte vorzuführen.

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Legal aspects of the relationship between the Government and the Civil Society in Hungary

Introduction

In the period of European Union legal harmonization it became obvious that despite the contradictions and childhood ills characterising the era of transition, genuine democratic transition is taking place in Hungary. During my researches I studied legal matters within the nation comparing them to the best practices of foreign legal systems furthermore the EU regulations (if any). While examples of the Law on Public Benefit Organisations or the „One Percent Law" have rightfully become model legislation for other countries in the region, there are „darker sides" of the legal framework that are being challenged only now, after many years of compliance with problematic regulations.

In the new science of politics, Tocqueville added, the art of association is the first law of democracy. Self-governing citizens try to meet their social needs first through creating their own social organizations, and only as a last resort, when everything else fails, through turning to the state. Civil Society is a contested concept. There is little agreement on its precise meaning, though much overlap exists among core conceptual components. In its transnational dimension, the term goes beyond the notion of both nation state and national society, and allows us to examine critical aspects of globalisation and the emergence of a new social, cultural and political sphere. The Government manifests different roles in its relationship to the civil sector. It not only regulates and controls NGOs, but also supports and subsidizes them. Consequently, the relationship between the Government and the civil sector is rather complex and complicated.[1] This study does not undertake to present all facets of this relationship. Instead, it focuses on the structural, legal and contractual relationships of the public and civil sectors, examining the relationship between the central government and the civil sector.

Democracy is composed – as it is visible nowdays in Paris... – of „three key, independent elements – civil society, the state and ethnicity".[2] These three are in a continuous, interactive

1 István CSÓKA: The relationship between the governmental and civil sectors in Hungary. A quarterly publication from The International Center for Not-for-Profit Law. Volume 3, Issue 1 – September 2000., p. 2.

2 George SCHOPFLIN: Civil Society, Ethnicity and the State: a threefold relationship. Centre for the Study of Nationalism, London, 1997., p. 1.

relationship. They have different functions and roles, create different, at times overlapping, at times contradictory attittudes and aspirations and through their continuous interaction, all three are reshaped and reformulated dinamically. „Given the emphasis on the reciprocal relationship of state and civil society, it is the mutual impact of either that is deemed significant. In effect, it is hard to conceive of civil society functioning successfully actually without the state. The citizen, the agent and subject of politics, is simultaneously costrained by the state and protected by it. The state plays an important role in providing the integrative framework within which civil society operates and the latter cannot function properly without that. That framework which must include a solemnised set of rules by which the political contest is played out, must be accepted as valid by all and must be administered in as neutral a fashion as is consistent with the shared culture of the society in question. This would clearly include the rule of law and the ability of the state to create a degree of coherence without wich civil society would rapidly become uncivil and potentially decline into chaos ore anomie. But equally, civil society must be free to challenge the state in order to preclude the bureaucratic rationality of state action from attaining the kind of paramountcy that would generate rigidity".[3]

„In the last decade, the evolution of a network of a transnational associations centred on the European Union have generated new power relationships, new forms and hierarchies of power, of social knowledge and information, of political capital. Importantly, these side-step the traditionally conceived nation-state and establish connections directly among non-state actors and Brussels. The new results of empowerment can be used to reform or to reshape domestic structures".[4]

NGO Policy of the Government

The Government has the task of establishing best practices for contracting-out public services and initiating legislation for a more supportive legal environment. There are some areas where the Government really needs to count on Public Benefit Organizations (PBOs).[5,6] The voluntary organizations play important roles in building civil society and political democracy, in reorganizing the social structure, in providing welfare services, and in restructuring the economy.[7] They are also important as possible owners of the former state property, as „life belts" for some individuals and institutions in precarious positions, and as „tax shelters" for many different kinds of tax evaders.[8]

A Weberian „verstehenden" social science approach is necessary in the analysis of the East European developments. „We must try to understand what is happening, under what circumstances, who are the main actors, what are their aims and motivations, but we should be very cautious about judging the process and the results. Application of theories, comparison

3 George SCHOPFLIN: Civil Society, Ethnicity and the State: a threefold relationship. Centre for the Study of Nationalism, London, 1997., p. 2.

4 George SCHOPFLIN: Civil Society, Ethnicity and the State: a threefold relationship. Centre for the Study of Nationalism, London, 1997., p. 7.

5 One is the pressing reform of the health-care system, and the other is the preservation and revival of cultural heritages.

6 Daniel CSANÁDY: Improving Civil Society in Hungary. INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW. Budapest, July 22, 2004., p. 5.

7 Henry B. HANSMANN: The role of nonprofit enterprise, Yale Law Journal, 1980., p. 89.

8 Éva KUTI: Nonprofit Organizations as Social Players in the period of Transition: Roles and Challenges. In: „Szelényi 60" (1998)., http://hi.rutgers.edu

with developments in other parts of the world or in other periods of history will only be fertile if we are extremely careful with generalization and value judgments".[9]

The government is open to work with NGOs on the reform of the legal framework affecting them. In its newly devised strategy (2002) towards the non-profit sector, the government declares the importance of ensuring long-term sustainability and independent and depoliticised financing of the sector.[10]

This paper is trying to overview the social, political[11] and economic roles played and the challenges to be faced by the nonprofit sector in the process of societal and legal transformation after Hungary's EU accession. In my analysis I examine the pattern of state/society relationship and the development of the voluntary sector in the last decade. In this paper I'm going to examine and discuss seven dominant aspects of the relationship mentioned above.

1. Historical background

Although foundations were banned till 1987, other forms of nonprofit organizations had a limited existence under state socialism, and even this limited existence was enough to keep alive the spirit of democracy and liberal institutions.[12] There were some officially accepted and even supported nonprofits (called social organizations), e.g. trade unions, Red Cross, Adult Education Society, Patriotic Front, Chamber of Commerce, etc., and much more voluntary associations (e.g. fishermen's, hunters' associations, sport clubs, pet fans' societies, voluntary fire brigades, etc.) considered to be harmless and therefore tolerated by public authorities. They also tolerated the existence of some oppositional voluntary organizations (e.g. amateur theatre groups, youth clubs, intellectuals' organizations, folk dance houses, etc.) which they did not trust at all, but did not dare to ban.

This more or less hidden oppositional character of the voluntary sector is probably explained by the oppositional attitude of the Hungarian society itself. Against their better judgment, most of the Hungarian citizens had to cooperate with the authorities after the suppressed 1956 revolution. This discrepancy between opinion and behaviour could have resulted in attitude changes, but it did not because the cognitive dissonance was significantly decreased by two factors.[13] „First, most people, including political leaders felt that they behaved under pressure from a foreign superpower. Second, the „reward" for conformity was quite big (relatively high standard of living, freedom of travelling abroad, opportunities for small entrepreneurship, relatively free press, access to the Western cultural products, etc.)".[14] Under these circumstances both the individual citizens and their voluntary associations could

9 Éva KUTI: Nonprofit Organizations as Social Players in the period of Transition: Roles and Challenges. In: „Szelényi 60" (1998)., http://hi.rutgers.edu

10 Nilda BULLAIN: Hungary's Legal Environment for Endowment Building. SEAL (Social Economy and Law Journal), Winter 2002-2003.; p. 5.

11 James DOUGLAS (1987): The political theories of the nonprofit sector, in Walter POWELL (ed): The nonprofit sector: A research handbook, Yale University Press, New Haven.

12 Éva KUTI: Nonprofit Organizations as Social Players in the period of Transition: Roles and Challenges. In: „Szelényi 60" (1998)., http://hi.rutgers.edu

13 Éva KUTI: Nonprofit Organizations as Social Players in the period of Transition: Roles and Challenges. In: „Szelényi 60" (1998)., http://hi.rutgers.edu

14 Éva KUTI: Nonprofit Organizations as Social Players in the period of Transition: Roles and Challenges. In: „Szelényi 60" (1998)., http://hi.rutgers.edu

preserve some autonomy of thinking and judgment.[15] The genuine democratic aspirations, the distrust between government and citizens, the „second society mentality" and the pre-modern character of the society and economy all played some role in the remarkable growth of the Hungarian nonprofit sector, when the basic conditions for this development were dramatically improved by the political changes.

The government itself is rather ambivalent. It realizes that there is some qualitative and quantitative shortage in the market of welfare services and nonprofit service providers may contribute to the solution of this problem if they receive regular state support. On the other hand, the sources available for government authorities are very limited. The budget deficit and the difficult economic situation are forcing the government into a policy of retrenchment. Under the climate of serious budget cuts the government is reluctant to finance the delivery of new, additional services, it prefers to confine to subsidize nonprofit services which substitute for some public service provision.

The above overview of the roles played and challenges to be faced by the Hungarian nonprofit sector suggests that this sector is one of the crucial actors of the transition process. The emergence of a flourishing nonprofit sector in a declining economy can only be explained by the fact that the patterns of problem solving offered by the nonprofit organizations are equally acceptable and attractive for citizens, government and organizations. The nonprofit institutional form is generally considered to be an appropriate means of facing the social and economic challenges of the transition period. Difficult, as they are, the problems and issues mentioned above are already the challenges of a consolidation period. „To face consolidation problems instead of survival problems is a great achievement in itself for the Hungarian nonprofit sector".[16]

2. Legal background and challenges

Hungary is probably both blessed and cursed by being at the forefront of NGO legislation in the region. On the one hand, this country regularly comes up with innovative pieces of legislation. On the other hand, it constantly faces the consequences of a changing NGO environment as well as less effective implementation practices.[17] In December 2001, two significant amendments were passed in the Parliament as a long overdue response to the challenges presented by the practical difficulties experienced by Hungarian NGOs.[18] One was Act CVI of 2001 on the Amendment of Regulations concerning Registration of Social Organisations and Foundations. This law contains a number of significant changes not only in the procedure for registration but also in the structural/organisational aspects of these non-profit entities. In essence, the new regulations provide for greater transparency and accountability as well as making the everyday life of public benefit organisations much easier.[19] If the court does not

15 Éva KUTI (1996): The nonprofit sector in Hungary, Manchester University Press, Manchester; p. 4.
16 Éva KUTI: Nonprofit Organizations as Social Players in the period of Transition: Roles and Challenges. In: „Szelényi 60" (1998)., http://hi.rutgers.edu
17 Nilda BULLAIN: Hungary: Dilemmas of a Pioneer. First published in SEAL (Social Economy and Law Journal), Summer 2002.; p. 22.
18 Nilda BULLAIN: Hungary: Dilemmas of a Pioneer. First published in SEAL (Social Economy and Law Journal), Summer 2002.; p. 22.
19 Nilda BULLAIN: Hungary: Dilemmas of a Pioneer. First published in SEAL (Social Economy and Law Journal), Summer 2002.; p. 23.

register a non-profit organisation within 60 days of its application, it will be considered to be registered. This provision should end the problem of having to wait many months to be registered due to overburdened or just slow courts. The act allows the founder to name a successor to fulfill its duties. This is important because in the Hungarian model the founder retains all rights to modify the statute and to appoint members of the governing body (even when terms are introduced). Until now, when a founder died or went bankrupt, no one in practice could carry out these tasks. (Officially the court had the responsibility to fill this gap, but it rarely acted in these cases.[20] The second piece of legislation was a modification of the so-called „1% law" (Act CXIV of 2001 amending Act CXXVI of 1996 on the Use of a Specified Portion of Personal Income Tax According to the Designation of the Taxpayer). The amendment had two main substantive points:

– Eased eligibility criteria: Under the previous law, a not-for-profit entity had to be registered for three years in order to be entitled to receive the 1% designations. The amendments reduce this period to two years, and only one year in the case of prominent PBOs (they also need to present a contract with a State provider).
– Broadened base of beneficiaries: The 1% can now be earmarked for a public benefit company (this is implicit in the text as legislators changed the word „institution" to „organisation" when describing a set of beneficiaries) in addition to associations and foundations.

The above amendments cannot be regarded as the result of active advocacy by the NGO community, but rather as the result of demands by more knowledgeable judges and lawyers from the „inside". Nevertheless, a number of important law reform initiatives have taken off in the past half year, signalling a shared concern for the future development of legislation affecting the sector.[21]

„Although nothing prohibits the establishment of an endowment in Hungary, in practice endowments do not exist. We have to take a look at the reasons for the lack of endowment funds in the NGO sector in Hungary, analyse the most important legal aspects of establishing and managing endowments, and list the factors that could encourage the development of these funds. Foundations have not been prepared to administer such funds as the financial and management capacities of most have been limited by both lack of skills and funding. Due to the strong influence of state public foundations on the NGO sector, funding for NGOs has always been expected from government budgetary funds – therefore, there was no clear demand for endowments in the NGO community. A number of legal barriers have also contributed to the fact that there are no endowed grant-giving foundations in Hungary today. These include unfavourable or unclear regulations regarding governance structures, the lack of adequate risk-management concepts, lack of clarity about liability for investment failures, and insufficient incentives with respect to the taxation of investment returns. Interestingly, under Hungarian law the establishment of a foundation in itself involves the possibility of creating an endowment. In the current law, there are two ways to dedicate the property of a foundation, through a so-called „closed foundation", or through an „open foundation". Article 74/B (4) states that if the founder allows others to join the foundation (open foundation), anyone may join (i.e. contribute to) the foundation, under the conditions laid down in the founding statutes. In this case, only „the amount of property that is essential to start its operations" needs to be assigned to the foundation".[22]

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20 Nilda BULLAIN: Hungary: Dilemmas of a Pioneer. First published in SEAL (Social Economy and Law Journal), Summer 2002.; p. 23.

21 Nilda BULLAIN: Hungary: Dilemmas of a Pioneer. First published in SEAL (Social Economy and Law Journal), Summer 2002.; p. 23.

22 Nilda BULLAIN: Hungary's Legal Environment for Endowment Building. SEAL (Social Economy and Law Journal), Winter 2002-2003.; p. 4.

One reason why there may be reluctance to endow foundations is that the governance principles of foundations in Hungary are not entirely clear. Although in principle the founder retains the right to appoint and dismiss board members throughout the life of a foundation (and is also the only person competent to modify the founding statutes), in practice Hungarian court rulings show a tendency to restrict the founder from active involvement in decision-making about the organisation. This is logical and understandable, given the fact that in most cases the founder has made only a minimal financial contribution to the organisation. There is also a legal argument that a foundation is a separate legal entity, so founders should be able to exercise only indirect control over foundations.[23]

Public Interest Volunteer Activities

The Parliament recognizes volunteer activities based on solidarity among members of society that express volunteer action of citizens and are pursued by individuals and communities without remuneration and for the benefit of others. In order to ensure that these significant social resources are more effectively mobilized to help achieve public purposes as well, the Parliament, through the creation of the Act LXXXVIII of 2005 on Public Interest Volunteer Activities,[24] established the basic rules of public interest volunteerism and by way of preferences and guarantees it encourages citizens and their organizations to participate in the achievement of societal tasks and public purposes. Under Art. 2. public interest volunteer activity is work performed at the host organization without remuneration within the scope of activities specified in the present Act. The Act notices that anyone performing work for remuneration on the basis of another legal relationship with the host organization may not perform those tasks on the basis of volunteer legal relationship at the host organization that otherwise fall within his/her scope of activities. Public interest volunteer activity may be performed on the basis of a volunteer legal relationship established in a volunteer contract between the host organization and the volunteer. The volunteer contract shall be concluded in writing. It also states that „a person being in a volunteer legal relationship with more than one organization may receive per diem from only one organization at a time, of which he/she is obliged to notify the other organizations".[25]

Equal Treatment Authority

In June of 2005 the Hungarian Minister of Youth, Family, Social Affairs and Equal Opportunities appointed six NGO members to the newly established Advisory Body assisting the Equal Treatment Authority. The Authority began its operations on 1 February 2005 in accordance with the Act of Non-discrimination (Act CXXV of 2003). The Act is a comprehensive law, aiming to protect all minority groups against discrimination. The members of the Advisory Body were nominated by 63 Hungarian NGOs and appointed by the Prime Minister based on the joint proposal of the Minister of Justice and the Minister of Equal Opportunities.

23 Nilda BULLAIN: Hungary's Legal Environment for Endowment Building. SEAL (Social Economy and Law Journal), Winter 2002-2003., p. 4.
24 Translation: ICNL / ECNL, August 2005
25 Art 3. (4)

3. Public Benefit Organizations

The legal form of a foundation goes back to 1987 as the first sign of change. The Right of Association Act[26] – in accordance with the International Covenant on Civil and Political Rights – was a legal milestone of the change in the regimes in the beginning of 1989. In 1993 with the reform of the Civil Code[27] new legal forms of not-for-profit organizations were introduced: public foundation, public benefit company and public society. The debates about „public benefit" service-providing came into the agenda of the Hungarian politics after 1995.[28] After the 1996 legislation enabling not-for-profit organizations opportunity to receive one percent of the personal income tax was adopted, the Hungarian Parliament passed the Act CLVI of 1997 on Public Benefit Organizations in 1997. „The Act on Public Benefit Organizations may be regarded as a pass over the ridge. This Act is a spectral legislation linking together private and public law regulations. It defines the scope of public benefit organizations and determines the fiscal preferences to which they are entitled".[29] The Acts on personal income tax, corporate taxes and other revenues can be found on the other side of the pass. These public law regulations determine the extent and terms of preferences related to public benefit organizations. „The Act realized its main goal – to provide equal opportunity in receiving direct and indirect state support – by establishing a qualification system.

The Act contains rules on qualification – procedural requirements – on one hand, and rules on operation – substantive requirements – on the other hand. The basis of the qualification is not the difference between the types of organizations, but the delimitation of activities. The outcome of qualification is a new status, namely the public benefit status. This new status gives rise to rights as an opportunity for receiving state support (tax preferences – even on „durable donation"), and to duties, consisting of a system of terms and guarantees. The procedural requirement of public benefit status is registration: Organizations falling under the scope of the Act can be registered, but only if they undertake the public benefit criteria prescribed by the Act. The substantive requirements relate to the provision of public benefit operation. On the one hand, public benefit status is not only connected to the undertaking of a „public purpose" prescribed by the Civil Code, but also to the pursuance of a public benefit activity enumerated in the new Act. On the other hand, it does not only mean the undertaking of duties set forth in the governing documents, but also the compliance with the operational and management order determined in the Act.

Within the classification of PBOs, the Act creates a separate category for PBOs undertaking state responsibility. Organizations, pursuing a public benefit activity, which is qualified as the duty of a state agency or a local government by an act or a government decree authorized by an act, qualify as prominently public benefit. These organizations are entitled additional fiscal benefits, but must meet stricter requirements of public disclosure".[30]

„Consequently, the scope of the Act extends to civil society organizations, foundations, public law foundations, public benefit companies, and in certain cases, public law associations

26 Act II of 1989 on the Right of Association

27 Act IV of 1959 on the Civil Code of the Republic of Hungary

28 Daniel CSANÁDY: Improving Civil Society in Hungary. INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW. Budapest, July 22, 2004., p. 3.

29 Daniel CSANÁDY: Improving Civil Society in Hungary. INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW. Budapest, July 22, 2004., p. 3.

30 Daniel CSANÁDY: Improving Civil Society in Hungary. INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW. Budapest, July 22, 2004., p. 4.

(QUANGOs). From civil society organizations and foundations, the Act excludes those organizations which operate only in the interest of their membership (MBOs). In addition, the Act explicitly excludes those types of organizations, which can be considered as MBOs with regard to their core activity. These are insurance associations, political parties, and interest groups of employers and employees. QUANGOs, which operate on the borderline of non-for-profit and state sector, are given the option to operate as PBOs on the basis of their establishing acts' authorization.

Consequently, the Act differentiates between core and public benefit activities. The scope of public benefit activities is narrower than the scope of core activities. PBOs may also pursue such core activities which serve a „public purpose," but which do not qualify as a public benefit activity. PBOs may also pursue business activity. Every „economic activity which is directed to or resulted in acquisition of income or assets" qualifies as business activity if it does not belong to the sphere of the core activity. The differentiation based on PBOs activities is necessary because tax laws grant different preferences to different kinds of activities".[31]

The significance of the Act is that it ensures the accountability and transparency of NGOs receiving direct or indirect state support. In comparison with the previous practice, the Act orders the mandatory conclusion of support contracts, which serves as a basic guarantee of accountability.

4. Civil Participation in the Public Decision-Making Process

In the field of dialogue between governmental bodies and different civil entities more effective garanties need to be forced because of the fact that all the existing legal regulations on obligatory involvement of civil actors are so called lex imperfectas. It means that the possibility of participation of NGOs in different areas of public life (for example legislative process) exists as mere consequence of momentary political etiquette. There are some newly created institutions and hopefully some others will build up [Economic and Social Council; National Civil Association; civil members in governmental bodies (advisory groups, councils); Second Chamber of Parliament comprised of „representative non-profit organisations", etc.]. The key to improving public participation and indeed public concern for the social tasks is increasing access to information. It's integral to the development of the public participation process. Citizens and their associations cannot hope to influence decisions which they know nothing about.

Since the change of the political regime in 1990, a plan to introduce a bicameral Parliamentary system came up several times. According to this conception, the "members" of the second chamber would be the representatives of interest groups, churches or NGOs etc. Today, with a possible reduction of the number of representatives in the limelight, the introduction of a second camera does not appear very realistic.

The current regulation in force provides civil society organizations the right to express their opinions on legislative proposals that are going to be submitted to the Government.[32] In the case of ministerial decrees, the regulation requires the proposals be sent to civil society organizations

31 Daniel CSANÁDY: Improving Civil Society in Hungary. INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW. Budapest, July 22, 2004., p. 4.

32 § 27 of Act XI of 1987 on Legislation

concerned.[33] According to the current practice, each Ministry has a list of the larger and well-known civic organizations in the fields of their activity. Each Ministry sends the legislative proposals only to those organizations that are on the list. However, in urgent cases this part of the legislative process may be omitted. Because most of the ministerial decrees are urgent, civil society organizations often cannot use this right to express their opinions. Even in cases where their opinions are expressed, there is no guarantee they will be taken into consideration.

The structure and form of interest reconciliation has changed in the last few years, and it means that the importance of civil participation rised up as well:[34]

Since joining the EU, Hungary can delegate members to the European Economic and Social Committee (ESC). As of 1 May, employers' and workers' representatives were delegated by consensus of the relevant organisations within National Interest Reconciliation Council (OÉT), and the Hungarian government appointed representatives to the 'third interest group' within ESC. On 24 August 2004, the Economic and Social Council (Gazdasági Szociális Tanács, GSZT) was set up in Hungary. This is a consultative forum to discuss major national-level strategic plans and programmes designed to shape national development paths for the medium and long term. GSZT comprises the social partners (all employers' associations and trade unions represented in OÉT), as well as various business interest organisations, such as the chambers of commerce and industries, major associations of foreign-owned firms, commercial banks, academic researchers, the Monetary Council of National Bank of Hungary (Magyar Nemzeti Bank) and non-governmental organisations. GSZT functions with the participation of the social partners – all employers' associations and trade unions that are represented in OÉT – and as well as various business interest organisations (such as chambers of commerce and industries, major associations of foreign-owned firms and commercial banks), academic researchers, the Monetary Council of the MNB and non-governmental organisations.

5. Financial support

Following the change of the political regime in 1989-90, not only the amount, but also the types of state support for the civil sector have changed radically. From 1990 through 1997 the total amount of state support increased from 5 billion HUF to 50 billion HUF. In the 90's, the support of different programs, and, in the field of education and social services, „normative"[35] budgetary support have also become widespread. In addition, more governmental institutions – and from 1997 the taxpayers themselves – have become involved in deciding on the "destinations" of public support.

The Government may provide financial support for the civil sector through the following main channels[36]:

1. support for operations from the public (state) budget,
2. „normative" support from the public (state) budget,
3. support from the Ministries and from Public Funds,
4. public foundations,

33 § 29 of Act XI of 1987 on Legislation

34 Trade union membership and workplace presence have diminished continuously in Hungary in recent years. The 2004 Labour Force Survey indicates that union density stood at 16.9%, down from 19.7% in 2001, while 33% of respondents reported a trade union presence at their workplace, compared with 37% in 2001.

35 This term refers to budgetary support given on a per capita basis to organizations maintaining institutions such as hospitals, schools etc.

36 This paper deals only with direct means of public support, and not with indirect support, such as tax benefits.

5. 1% of personal income tax liability as designated by taxpayers, and
6. National Civil Fund

Beginning in 1997, Hungarian taxpayers may designate 1% of their personal income tax paid to a chosen not-for-profit organization and, beginning in 1998, an additional 1% to a church[37] in accordance with Act CXXVI of 1996 on the Use of a Specified Portion of Personal Income Tax According to the Designation of the Taxpayer (hereinafter: 1 % Act).[38] Though the 1% is connected to the tax system, it is a peculiar type of indirect state support, rather than a tax benefit. Its "source" is the tax revenue of the public budget, but its distribution is based on the taxpayers' decisions, and not on a central (governmental) decision.

In comparison with other Western countries, the total public support for the Hungarian not-for-profit sector (including „normative" and other central and local budgetary support, plus the support from Ministries and funds) is substantially lower.[39] NGOs must obtain more income from private donations and from economic activities. The centralized system of state subsidies has changed radically in the 90's: the decision-makers have multiplied and have gotten closer to the organizations in many cases. In addition, more forms of support have developed. Today, a small local NGO probably has better chances when applying for public support than ten years ago.

National Civil Fund

The Hungarian Parliament voted on June 23, 2003 to pass a groundbreaking new law setting up a National Civil Fund. The main purpose of the Fund is to provide institutional support to Hungarian NGOs. To finance the Fund, the Hungarian government will provide matching funds based on the amount of actual taxpayer designations under the 1% tax designation law each year. The 1% Law permits every Hungarian taxpayer to designate 1% of his or her tax liability to a qualified NGO of their choice each year. Under the Civil Fund Law, the government will match the amount of actual tax designations each year, and will in no case contribute less than the 0.5% of personal income taxes collected. Thus, the more money that taxpayers designate, the more money will be contributed by the government to the Fund. At least sixty (60) percent of the Fund's resources each year will have to be dedicated to providing institutional support to NGOs in Hungary.[40] Besides covering the costs of the Fund's administration, the remaining funds may be directed towards the support of various programs related to the development of the NGO sector, including e.g. sector-wide events, festivals, international representation, research, education or publications. The highest governing body of the Fund will be a Council, consisting of 17 members, the majority of which (12) are delegated by nonprofit organizations. The law prescribes a mechanism of delegation called "the civil nomination mechanism". Implementation regulations will detail the procedure for achieving a balanced representation among the Council members according to geographic and professional areas in which civil society organizations in Hungary operate. Actual grant decisions will be made by

37 Instead of churches „atheist taxpayers" may designate „their second 1 %" to a special budgetary objective defined in the Budgetary Act annually. For instance, in 2000, the budgetary objective is the support of programs related to canal-building and reconstructing and dam-building serving the purpose of prevention of flood damages. In 1999, this objective was the support of programs related to the celebration of the Hungarian state's 1000-year existence; in 1998 the objective was the support of families, children and youth in social need.

38 The designation of „the second 1 %" to churches has become possible after the amendment of the 1 % Act by Act CXXIX of 1997.

39 Data is from KUTI, Hívjuk talán nonprofitnak… [LET'S CALL IT NONPROFIT…]; p. 139.

40 Last year (2004) it was more than 72 percent.

regionally delegated Colleges. While questions remain about how exactly the Council and College members will be delegated and how this mechanism will relate to an emerging national NGO representation, and how will "institutional support" be defined, the Civil Fund is yet another milestone in the legislation concerning the not-for-profit sector in Hungary.

The law will provide a new opportunity for NGOs to apply for much needed institutional support, and at the same time it will present an additional incentive for NGOs to increase their efforts at reaching out to citizens for the 1% designations.

6. Corruption

All new EU member states have made impressive progress toward establishing democracy, the rule of law and a market economy.

As accession negotiations have been primarily focused on harmonization and implementation of the acquis communautaire (the EU's set of legislation), this has limited scope for the inclusion of anti-corruption policy.[41] A general problem in new states (EU members) is the lack of political will to tackle corruption. The evidence for this is widespread, including the inability of candidates to achieve cross-party consensus on anti-corruption policy, the unwillingness of executive authorities to give sufficient independence to anti-corruption prosecutors, and tendencies to fulfil the easier components of national anti-corruption policies. Where governments have put in place anti-corruption strategies, these have been oriented towards repression and a criminal law-based approach, directed primarily toward low-level corruption rather than high-level corruption, the report warns.[42]

A more positive chapter is legislation: Hungary has made significant progress toward establishing an integrated system of state financial control, although further progress is necessary in a number of areas. There are no specialized anti-corruption bodies, and although three parliamentary ombudsmen exist, their findings are not always respected.[43]

7. Romas

As one of the most oppressed ethnic groups in Europe, the Roma (Gypsies) in Hungary face many problems. Centuries of discrimination, the Twentieth Century experience, and, from 1945 to the end of the former regime, party policies and programs that have resulted in the isolation of Roma from mainstream Hungary. Areas that still need to be addressed are the Roma's unfair treatment under the law, ineffective governmental representation, social and economic discrimination, and lack of educational opportunities.

In the last few years it became obvious that projects should be for longer than one year periods. More time is ordinarily needed to establish and operate programs.

- Project efforts should be located very close to Roma settlements and markets. Projects need to have independence from state and business sectors to build Roma self reliance.

41 Balázs PÓCS: SHADY Deals. Business Hungary, 2003 February, American Chamber of Commerece in Hungary; p. 6.

42 Balázs PÓCS: SHADY Deals. Business Hungary, 2003 February, American Chamber of Commerece in Hungary; p. 7.

43 Balázs PÓCS: SHADY Deals. Business Hungary, 2003 February, American Chamber of Commerece in Hungary; p. 8.

- The legal situation surrounding the Roma must be addressed.
- Donors should support Roma NGOs with training to make their organizations viable and effective.
- Including Roma participants in groups of Hungarian trainees and conference attendees would support integration and sensitivity.

8. Religious movements as parts of civil society

The impact of global processes is to erode the tradition-driven belief systems by which groups and individuals structure their lives and this loss of the past, in turn, creates an insecurity about the present and the future.[44] The lack of a flourishing civil society in any of these countries makes work on these topics difficult but it also means that the religious communities have a particularly important role to play. Some would like changes in the Hungarian law to restrict religious registration more but there is no consensus for this yet. The question of a 'free market of religions' has problematic implications for setting up a dialogue but it is probably a secondary consideration for the Hungarian religious movements. „After the fall of the evil collectivist regime that insisted on "the scientific study of atheism," and that so dominated world history in the twentieth century, what is to be said about the construction of a normal, decent, human society?"[45] This question is of vital importance for the newly shaped hungarian civil society.

Zusammenfassung

Die rechtlichen Aspekte der Beziehung zwischen der Regierung und der Zivilgesellschaft in Ungarn

Die Studie ist ein kurzer Überblick, die vor allem die untersuchten Institutionen vorstellen möchte, und welche neben das Wachrufen der historisch ausgebildeten Eigenheiten (Korruption, Situation der Romas) auch die Probleme des momentanen rechtlichen Umfeldes des Nonprofit-Sektors skizziert. Neben den aktuellen Fragen der gemeinnützigen, bzw. freiwilligen Tätigkeit beschäftigt sich das Schreiben mit den neuen Foren über die Finanzierung, bzw. das zur Geltung-Bringen der Interessen, wie z.B. mit dem Wirtschafts- und Sozialrat oder dem Volksunterstützungsprogram von Zivilen Organisationen (NCA), sowie mit der Zukunft des sogenannten 1%-Systems. Über das Erwähnte hinaus wird vom Autor auch die Frage der Rückintegration der Kirchen in die zivile Gesellschaft behandelt, und der Bereich der durch den Staat des XXI. Jahrhunderts zu verrichtenden Aufgaben skizziert..

44 George SCHOPFLIN: Civil Society, Ethnicity and the State: a threefold relationship. Centre for the Study of Nationalism, London, 1997., p. 7.

45 Multi-Religious Co-operation for the Common Good: Building Healthy Civil Society' Graz, Austria 5-8 May 2005.

46 Multi-Religious Co-operation for the Common Good: Building Healthy Civil Society' Graz, Austria 5-8 May 2005.

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The regulation of Consumer Protection in Hungary

The recognition of the significance of consumer rights has first appeared in the United States of America in the 1930s, when the first Consumer Union was born, at that time the social movement was named „consumerism".[1] Soon after endeavours have been made for the realization of consumer rights in Western Europe, in this manner the Consumers' Council was formed. In the United States the question of consumer protection – as a result of the initiatives of J. F. Kennedy – came to the forefront beginning from the 1960s, while in Western Europe it was only handled with greater attention since the 1970s. In Hungary the legal regulation has been practically begun with the 1977 novel of the Hungarian Civil Code and the Act 1 of 1978 on Domestic Trade,[2] which were followed by the Act 1 of 1984 on Unfair Economic Activities, and the Act 56 of 1990 on Prohibition of Unfair Market Conduct.

The Europe Agreement was signed in Brussels, 16 December 1991, on which's basis the Republic of Hungary expressed it's intention to join the European Union, thereby undertaking to fulfill the harmonizational obligations to the date of the accession. The accession treaty was promulgated by the Act 1 of 1994, Paragraph 68 stipulating the harmonizational tasks set out for Hungary. Closely connected to this act, the so called White Book was adopted on the 1995 Cannes summit of the European Committee, Chapter 23 defines the harmonization objectives on the field of consumer protection. As a result of which the Act 154 of 1997 on Consumer Protection was born, forming a legal framework in this department.

The aim of this paper was to introduce the forms of regulation of consumer protection, this dynamically developing new field of law playing a salient role in Hungary. Inside these frames, I would like to outline the boundaries and allocation of the domain of law within the Hungarian legal system, especially in the area of civil law.

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1 G. BENACCHIO: *Az Európai Közösség magánjoga. Polgári jog – kereskedelmi jog*. (Private Law of the European Communities. Civil Law – Commercial Law) Osiris Kiadó. Budapest, 2003. 199. pp.

2 In this period, consumer protection was practically defined as quality protection, service safety and legal protection against contracts of unequal services. J. FAZEKAS: *A fogyasztóvédelem múltja, jelene, jövője a fogyasztóvédelmi törvény tükrében*. (The past, present, future of consumer protection in light of the Act on Consumer Protection) In: Fogyasztóvédelmi kódex. Budapest. Közgazdasági és Jogi Kiadó. 1998. 17. pp.

1. The shaping of legal regulation on consumer protection

Regulation on the level of statutes hasn't been without any precedents in Hungary. The Chapter 2 of Act 18 of 1884 on the 2nd Industrial Code in accordance with it's 1890 amendment expressively provides that „the manufacturer, trader or their delegates may collect orders outside the residency of the manufacturer or trader with or without a specimen only from such manufacturers or traders whose business sphere includes the sale or utilization of the offered goods. The Paragraph 58 of the Industrial Code moreover prohibited the use of such signs, data on trade-signs, printed papers and advertisments which are in no correlation with reality or the actual business relations.

Among Hungarian historical legal documents we find some deserving to be mentioned: the Act of 1923 on Competition, the first Cartel Code (Act 20 of 1931) expressively sanctioning agreements blocking free competition and establishing the Cartel Committee; the Act 1 of 1978 on Domestic Trade regulated the management and control of internal trade. At this time consumer interests and rights along with their regulation and protection appeared, and the prohibition of deception and damage of consumers were layed down. There is also the Act 4 of 1984 on Prohibition of Unfair Economic Activities, the Act 84. of 1990 on Unfair Market Conduct, entered into force 1 January 1991, regulating in Chapter 2 certain aspects of consumer protection, moreover it provided the legal basis on which the Office of Economic Competition was established. The Act 57 of 1997 on Prohibition of Unfair Market Conduct and of Restriction of Competition (entered into force 1 January 1997) in it's 2nd Chapter rules appear on deceit of consumers and unfair influence of consumers' decisions.

The Order of Government 149/1994 referred the working outs of the principles of consumer protection to the competence of the Minister of Industry and Trade. The Order of Government 2192/1995. (VII. 6.) ordains the improvement of the efficiency of consumer protection, the Order of Government 1105/1995. (XI. 1.) prescribes the reform of the organization of the Consumer Protection Supervisory Authorities on the level of the counties. The Order of Ministry of Industry and Trade 6/1996. (IKK. 13.) established the Consumer Protection Advisory Body, which was set up at the Ministry of Industry and Trade. (On the history of regulation concerning consumer protection: J. FAZEKAS: The past, present, future of consumer protection in light of the Act on Consumer Protection In: Fogyasztóvédelmi kódex. Budapest. Közgazdasági és Jogi Kiadó. 1998. 16. pp.).

2. Community regulation and Hungarian harmonization in the field of consumer protection

Throughout the history of law related to the purchase and orders of private persons, we can find numerous regulations providing certain protection against the defencelessness in relations with merchants.[3] However it was only in the 20th century when consumer rights came to the fore

3 On legal history sources: J. FAZEKAS: *A fogyasztói jogvédelem nemzetközi tapasztalai*. (Experiences of international consumer legal protection) Európa Fórum 1994/4. 105. pp. and J. FAZEKAS: *Fogyasztóvédelmi jog*. (Consumer law) Novotni Kiadó. Miskolc, 2001. 11. pp., Moreover, in respect of certain antecedents of consumer protection appearing in the ancient roman legal system: A. FÖLDI – G. HAMZA: *A római jog története és institúciói*. (The history and institutes if Roman Law) 7th edition. Nemzeti Tankönyvkiadó. Budapest, 2002. e. g. in relation with the activities of *aedilis curulis 21. pp.*, on the question of *leasio enormis* 513. pp., on warranty of goods (*actio redhibitoria*, *actio quanti minoris*) 518. pp.

through certain evaluation of conventional private law institutions.[4]

The demand for the regulation of consumer protection appeared in the United States of American earlier, thus J. F. Kennedy proclaimed the right of consumers to information, safety, choice and audition.

A great endeavours has been strated in the 1960s in Western Europe with the objective to create a uniformized European private law (Europäisches Einheitsprivatrecht).[5] In this process international agreements have been concluded:

– 1968: Brussels Agreement on Jurisdiction (procedual law)
– 1980: Rome Treaty on determining the governing law of contracts (collision law)
– 1999: Amsterdam Agreement on direct legal uniformation.

The 1957 Treaty of Rome (TEC) has not yet dealt with consumer law.[6] It was the 1972 Paris summit where the general demand for consumers' health, safety and protection of their economical interests closely connected to the improvement of life standards emerged for teh first time[7]. The course of legislation on consumer protection in the European Economic Community began in 1975 with the shaping of the basic rights of consumners, which won recognition in the Common Market Magna Charta on Consumer Rights. This paper pinned down five basic rights of the consumers, thus:

– the protection of health and safety,
– the protection of consumers' economic interests,
– the validation of claims for damages,
– the right to informtaion and education,
– and at last, the right to representation.

This process continued with five and three year consumer programms on the basis of the 100th and 235th paragraph of the Treaty of Rome.[8] The passing of the Single European Act meant a subsequent breakthrough, which ordained that in the process of decision-making consumer

4 Main literature on consumer protection in community law: HARTKAMP – HESSELINK – HONDIUS – JOUSTRA – DU PERRON (ed.): *Towards a European Civil Code*. 2. edition. Nijmegen, 1998., L. VÉKÁS: *Az új Polgári törvénykönyv*. (The new Hungarian Civil Code) HVG-Orac Kft. Budapest, 2001., Á. SÁRINÉ SIMKÓ (ed.): *Szerződési jog – fogyasztóvédelem*. (Contract Law – Consumer Protection) HVG-Orac Kft., Budapest, 2000., L. VÉKÁS (ed.): *Európai Közösségi jogi elemek a magyar magán- és kereskedelmi jogban*. (European community law elements in Hungarian private and commercial law) KJK Kerszöv, Budapest 2001., G. BENACCHIO: *Az Európai Közösség magánjoga*. (Private law of the European Community) Osiris Kiadó, Budapest, 2003., M. KIRÁLY (ed.): *Az Európai Közösség kereskedelmi joga*. (Commmercial law of the European Community) KJK, Budapest, 1998. S. WEATHERILL: *EC Consumer Law and Policy*. Pearson Education. Longman. London, New York, 1997., M. LEDER – P. SHEARS: *Consumer Law*. 4th edition. Financial Timer, Pitman Publishing. London, Hong Kong, Johannesburg, Melbourne, Singapore, Washington DC, 1996., W. T. VUKOWICH: *Consumer Protection in the 21st Century. A Global Perspective*. Transnational Publishers. Ardsley, 2002.

5 On this issue: L. VÉKÁS: *Az Új Polgári Törvénykönyv elméleti előkérdései*. (The antecedent questions of the new Hungarian Civil Code) HVG-Orac. Budapest, 2001. 75. pp.

6 The Treaty of Rome mentions the consumer in four clauses, although not int he purpose of creating consumer rights. J. FAZEKAS: *A fogyasztói jogvédelem nemzetközi tapasztalatai*. (Experiences of international consumer legal protection) Európa Fórum 1994/4. 108. pp.

7 On this issue: A GYARMATI: *A fogyasztóvédelemről*. (On consumer protection) Magyar Jog 1996/6. 321. pp.

8 On community regulation and judical practice of consumer law M. A. DAUSES: *Az Európai Bíróság joggyakorlata a közös piaci fogyasztóvédelem és versenyszabadság kérdéseiben*. (The practice of the Court of Justice of the European Communities on common market consumer protection and competition law) Jogtudományi Közlöny 1996/9. 364. pp., és M. KIRÁLY: *A fogyasztóvédelmi irányelvek értelmezése az Európai Bíróság joggyakorlatában*. (Interpretation of consumer law directives in the practice of Court of Justice of the European Communities) In: Ius privatum. 2001. 135. pp.

protection should be taken into account, by point 3 of Article 100/A the obligation of the European Commission was laid down that a high level protection should be taken as a basis in proposals in accordance with consumer protection.

By way of Article 95 (currently 100a) of the Treaty of Rome an opportunity is given for the creation of the uniformized community private law (Gemeinschaftsprivatrecht).

Also model-statutes should be mentioned, concsequently the European Parliament's two attempts on creating the uniformized regulation: in 1989 and 1994 it invited the European Commission to work out the uniform European Private Code. In addition a private endeavour has been also made in 1982, with the leadership of the Danish professor LANDO. Also the 1994 UNIDROIT draft should be mentioned in the area of contract law.

Since 1985 the following steps were made for the achievement of the uniform regulation of consumer protection within the European Economic Community:

– 85/374/EEC Directive on product liability
– 85/577/EEC Directive on contracts negotiated away from business premises,
– 87/102/EEC Directive on approximation of consumer credit rules,
– 90/496/EEC, 91/72/EEC, 91/238/EEC and 92/11/EEC Directives on labeling of comestibles,
– 90/314/EEC Directive on package travel, package holidays and package tours,
– 92/59/EEC Directive on general product safety,
– 93/13/EEC Directive on unfair terms in consumer contracts,
– 94/47/EC Directive on use of immovable properties on a timeshare basis,
– 97/7/EC Directive on the protection of consumers in respect of distance contracts, etc.

The Maastricht Agreement amending the Treaty of Rome is considered yet an other milestone in community level regulation of consumer protection, since Article 129/A declares self-sufficient and unrestricted consumer policy. The obligation of harmonization raised the possibility that community rules may provide less protection for consumers than those already in force or planned member state regulations. This problem was solved by the principle of minimum harmonization, making it possible that member states may adopt stricter rules on consumer protection than the EEC directives would suggest, although at all times in accordance with the Treaty.

In the area of consumer protection Hungarian harmonization had to consider the provisions of the White Book, which defined two larger fields of consumer policy:

a) Prescriptions concerning product quality and safety, thus the harmonization of rules pertaining to:
   – product safety,
   – toys,
   – textiles,
   – and cosmetics.
b) The economical interests of consumers which includes:
   – deceptive advertisment,
   – consumer credit,
   – unfair terms in consumer contracts,
   – indication of prices,
   – guided tours,
   – contracts negotiated away from business premises,
   – usage of immovable properties on a time-shared basis.

In accordance with the instructions of the White Book Hungarian legislation earmarked the folowing objectives:

   – prescription of basic consumer rights,
   – creating the institutional background,

– ensuring the participation of consumers in decision-making processes,
– enabling the access for information and education,
– establishing quick and efficient methods for validation of claims,
– supporting consumer civil contracts.[9]

Consumer protection policies aimed primarily the uniformization of quality assurance, on which subject numerous directives have been adopted. These directives were implemented into Hungarian legal system by the Order of Government 2281/1996. (X. 25.).

Hungarian harmonization in the area of consumer law was circumscripted by the presriptions of the White Book, and arose to the front by Act 1 of 1994.

There is essentially three regulation models in Western Europe.10

a) The so-called scattered regulation (e.g. Germany, Great Britain), whereas directives are transformed into member state law by separate statutes.
b) By way of an independent consumer protection code (e.g. the Austrian Act of 1979 on Konsumenschutzgesetz, the French Act of 1993 on Code de la consommation), additionally with amendments according to the newly adopted harmonization cirteria.
c) Consumer law is built-in in the private law code (e.g. the Netherlands).

In the course of validation of consumer rights the possiblitiy of transborder contract validation emerges, along with certain peculiar difficulties surfacing. In line with this matter Articles 5/C and 28/A of the Act 13 of 1979 on private international law bears partcular importance aiming to protect the weaker party in international contracts.[11]

The regulation of consumer protection should be treated with an accentuated importance in pursuance of the codification of the new Hungarian Civil Code too, on which's basis differentiating definitions may be uniformized.[12]

3. The area of consumer law

In Hungary, the definition of the consumer appeared in the second half of the 1990s, mainly as a result of the harmonization between European Economic Community law and Hungarian

9 In details: A. GYARMATI: *A fogyasztóvédelemről*. (On consumer protection) Magyar Jog 1996/6. 322. pp.

10 On this issue: Ö. ZOLTÁN: *A fogyasztóvédelemről és gyakorlatáról*. (On consumer protection and it's practice) Magyar Jog 2001/11. 660. pp., I. GARAI – T. RITTER: *Fogyasztóvédelem az Európai Unió tagállamaiban*. (Consumer protection in European Union member states) Collega 1998/7. 16. pp. L. VÉKÁS: *Fogyasztóvédelmi magánjog és az új Polgári Törvénykönyv*. (Consumer private law and the new Hungarian Civil Code) Bérczi Imre Jubileumi Emlékkönyv. 2000. 554. pp. J. FAZEKAS: *A fogyasztói jogvédelem nemzetközi tapasztalatai*. (Experiences of international consumer legal protection) Európa Fórum 1994/4. 114. pp.

11 In details: L. BURIÁN: *Fogyasztóvédelem és nemzetközi magánjog*. (Consumer law and private international law) Jogtudományi Közlöny 1994/7-8. 307. pp., L. BURIÁN: *A fogyasztóvédelem az új nemzetközi magánjogi szerződési szabályok tükrében*. (Consumer protection in light of the new private international contract rules) Magyar Jog. 1999/1. 16. pp. P. MANKOWSKI: *A nemzetközi fogyasztói szerződési jog strukturális kérdései*. (The structural questions of international consumer contract law) Magyar Jog. 1998/10. 618. pp.

12 In details on the contact points of consumer protection and the codification of the new Hungarian Civil Code: L. VÉKÁS: *Fogyasztóvédelmi magánjog és az új Polgári Törvénykönyv*. (Consumer private law and the new Hungarian Civil Code) Bérczi Imre Jubileumi Emlékkönyv. 2000. 553. pp., J. FAZEKAS: *A Ptk. kodifikáció és a fogyasztóvédelmi jogharmonizáció kapcsolódási pontjai*. (Codification of the Hungarian Civil Code and links of consumer law harmonization) Polgári Jogi Kodifikáció 1999. 45. pp.

private law, although consumer protection rules have appeared in the past as well. The consumer, as a special subject of law, is granted with various rights on basis of prescribed findings of facts, rights which point beyond the conventional private law position of the purchaser, or of the orderer's. These rights create special protections for consumers, these emerging in three areas, thus

– in the course of concluding contracts and practicing rights emanating from contracts (e.g. recission, cogency of legal regulations, etc.),
– regulations pertaining to the increased precaution and control on the function of business organizations contracting with consumers (e.g. permission-binding particular activities, prescribing continious data-supply, etc.),
– the diversity of validation of consumer rights and interests (e.g. conciliation bodies, Office of Economic Competition, procedures of the competition Council, misdemeanor procedures, civil procedures, etc.).

In Hungarian regulation of consumer protection – although the Act 149 of 1997 on Consumer Protection earmarks this field of law to be regulated by a single code – we find several other acts, government decrees, ministerial decrees pertaining to consumer law. This situation renders the application of a uniformed definition on consumers.

3.1. The definition of the consumer

The definition of the consumer within the Hungarian Civil Code has been placed on basis of Article 10 point (2) of the Act 149 of 1997.[13] The Hungarian Civil Code includes an authentic interpretation on consumers in Article 685 point d): „consumer: the person contracting outside his business or professional activities".

Article 2 point e) of the Act 155 of 1997 on Consumer Protection defines the consumer similar in content, although somewhat different in wording, thus „consumer: the person who – outside his economic or professional activities – purchases, orders, recieves, utilizes products, the person to whom the service is performed, moreover the reciever of informations or offers in connection with products or services".

Paragraph 8 point (1) of the Act 57 of 1996 on Prohibition of Unfair Market Conduct and Restriction of Competition interprets the definition of the consumer shorter and wider than the previous two: „in accordance with the application of this act, consumer: the orderer, the purchaser and the utilizer". By reason of the previously expounded the definition of the consumer in a material approach could be deciphered from the Hungarian Civil Code, with three conjuctive conditions:

a) The consumer protection aspect of the definition of the consumer cannot be merged with the definition set out by public utility contracts („By strength of the public utility contract the service provider is obliged to provide continious and safe public service – such as gas, electricity and water in particular – defined by the demands of the consumer from a certain date, as well as the consumer is obliged to pay the service price periodically"; Art. 387 of the Hungarian Civil Code). On the basis of Article 40 point (5) of Act 92 of 1993 in cases of contracts which have changed their name from public service contracts to public utility contracts, in particular respect of newly liberalized public utility rules certain sectoral acts include from the outset guarantees for consumers, thus the Hungarian Civil Code withdraws

13 On the implementation of the directive in to Hungarian law. L. VÉKÁS: *Az Új Polgári Törvénykönyv elméleti előkérdései*. (The theoretical preliminairy questions of the new Hungarian Civil Code) HVG-ORAC Lap- és Könyvkiadó Kft. Budapest, 2001. 124. pp.

this sphere from the classic consumer situations. In various cases of public utility contracts the first step in validation of consumer interest is ensured by the customer service.

b) The phrase „outside his business or professional activities" employed by the Hungarian Civil Code apporaches the definition of the consumer by the nature of the legal relation. In accordance with these, the definition of the consumer does not refer to that the consumer could only be a natural person, but, widens the definition with extended interpretation so that in certain cases business organizations and even anyone with contractual capability may be implied. Thus the definition of consumer could not be applied on a general basis, the subjects of law of any legal transaction couldn't be submited to this single one category, but examination of the content and subject of the actual contract should be carried out in order to determine wether the consumer legal status exists. In this matter the the resolution of the Supreme Court deserves some attention, stating that within the sphere of the application of the Act 155 of 1997 on Consumer Protection – in case of the realization of other legal conditions – not only the natural persons, but business organizations may be considered consumers.

„By itself the fact that Article 20 point (1) and (2) of the Act 155 of 1997 referred by the plaintiff uses the expression of abode or residence connected to the natural person, cannot lead to the conclusion that throughout the application of the whole statute only natural persons may be considered consumers. In case the legislator would have chosen to restrict the definition of consumer to natural persons, the explanatory provisions would be using the expression „natural persons" in stead of „persons"." (Supr. Crt. Gf. VI.30.642/2000, BH 2000. 554.)

c) The third important element of the definition of the consumer according to the Hungarian Civil Code is the conclusion of a contract, which also presumes, that previous to the time of the conclusion of the contract, in theory, we could not speak of any consumers, however the Consumer Protection Act widens the possible interpretation of the consumer with the provision „addressee of information or offer concerning products or services". In our opinion the definition included in the Hungarian Civil Code should be interpreted accordnig to this as well. At the same time the definition in the Hungarian Civil Code and the provisions concerning consumers, as professor LAJOS VÉKÁS has also pointed out[14] should include all contracts concluded by consumers, and comply with conditions set out in previous points a) and b), although should not be restricted by the provision „terms of contracts not negotiated individually by the parties" which restriction is stipulated by Article 3 paragraph (1) of 93/13/EEC directive.[15]

In respect of determining the definition of the consumer the provisions of the Act on Advertisment should be considered as well.

According to the Article 2 point f) of Act 58 of 1997 on Business Advertisment Activity „consumer: all natural person, legal entity and unincorporated economic entity, to whom the advertisment is directed". So the Advertisment Act defines the concept of consumers extending beyond natural persons, thus widening the definition further which has been already extended by the Consumer Protection Act from the original meaning set out in the Hungarian Civil Code, moreover considering the call for bids legal actions affecting consumers as well.

On the whole in our opinion in respect of consumers, on the basis of judiciary practice and legal provisions curretnly in force, starting out from the concept stipulated by the Consumer Protection Act we could deliver the following definition: the consumer is that natural person, legal entity, or unincorpotated economic organization, who outside his business or professional activities, purchases, orders, receives, utilizes products, receives services, moreover informations and offers concerning products or services, together with whom to the advertisment is directed, except for the subject of a public utility contract.

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14 L. VÉKÁS: *see above* 88. pp.

15 *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*.

We could describe the directions of the changes in Hungarian legal regulation, advancing on the path set out by the Article 685 point e) of the Act 35 of 2002, that indeed the material characteristics of the consumer legal relation are coming into focus. In addition, the concept of the new Hungarian Civil Code de lege ferenda prescribes a narrower definition of consumers, thus „consumer: the natural person contracting outside the aims of his business and independent professional activities".[16] This concept in accordance with community regulation would narrow down the definition of consumers to natural persons only, moreover would draw a line between consumers and individual entrepeneurs and pursuers of individual professions (such as doctors or lawyers).[17]

3.2. The consumer contract

It must be mentioned here that Article 8 of Act 36 of 2002 inserted the notion of consumer contracts into Article 685 of the Hungarian Civil Code. The definitions set out by the act are as follows: „consumer contract: the contract concluded between the consumer and the person, who (what) contracts within the scope of his (it's) economic or professional activities; by application of the provisions on warranty and implied warranty of this Act the contract may be considered a consumer contract, if the subject of the contract is movable property with the exception of electricity, water and gas – without containers, bottles or any other packages or limitations regarding quantity or any defined liquid mesaures – furthermore the property sold in the process of executory or other official measures, additionally the used goods sold at auctions, which the owner personally may not attend to (consumable goods)". This definition is in force since 1 July 2003. Consequently three important elements should be considered in the case of consumer contracts:

a) The consumer is a contracting party, according to Article 685 point d) of the Hungarian Civil Code and Article 2 point e) of the Consumer Protection Act

b) The other party contracts within the scope of his economic or professional activities, in other words, his activity directs towards consumer contracts, thus the conclusion of the contract is not accidental.

c) In case the consumer contract is aimed for the sale of consumable goods, the Act also provides a narrower sphere, from which electricity, water and gas (practically all public utility subjects), and goods sold by way of executory processes or auctions are further excluded.

The systemic allocation of consumer contracts can be realized from the one hand in the area of general rules of contracts, on the other hand among certain types of contracts.[18]

16 The concept and thematics of the new Hungarian Civil Code 79. pp. At the same time this concept proposes separate regulation in respect of non-natural persons (e.g. schools, non-profit organizations, etc.) to whom the increased, and in the cases of consumers – justified protection should be granted on the basis of social and economic interests.

17 The definition of consumers are expressively narrowed down to natural person in the European Economic Community, see e.g. 87/102/EEC directive on consumer credit, stipulating „the consumer shall be the natural person who … carries out transactions belonging under the scope of the directive outside his business and professional activities". See M. KIRÁLY: *Az Európai Közösségek irányelveinek hatása a szerződési jogra a fogyasztóvédelem területén*. (The effect of European Community directives on contractual law in the field of consumer protection) Magyar Jog 200/6. 327. pp. In a similar aspect according to the law of the USA only natural persons are considered consumers (e.g. F.T.C. Credit Practices Rule, 16. C.F.R. 444. §.). For details see W. T. VUKOWICH: *Consumer Protection in the 21st Century. A Global Perspective*. Transnational Publishers. Ardsley, 2002. 99. sko.

18 The concept and thematics of the new Hungarian Civil Code. The text adopted by the Government Decree 1003/2003. (I. 25.) In: Magyar Közlöny 2003/8. 78. pp.

Additionally the concept of the new Hungarian Civil Code also defines consumer contracts as „contracts, concluded between the consumer and a person (trader) who contracts for purposes belonging into the scope of his business or individually profession".[19]

Thus the concept of the new Hungarian Civil Code sets out the definition of consumers in accordance with community law, also the unfavourable situation originating from the different definitions may cease to exist after the adoption of the new Civil Code.

Consumer law

The basis of consumer law should be looked for in the interdependence between production and the demands of consumption. The upsetting of the balance between them may change the power relations between consumer and producer, vendor and also service provider – see for example the case of shortage economy, or overproduction – these economic phenomena should also be transformed into the realm of law. Legal means should be ensured in order to create the ideal balance between consumers and business organizations, by virtue of the consumer in the weaker economic position may act with equal chances even against multinational corporations often wielding the features of the great powers.

Consumer protection was stipulated in many countries as constitutional rights,[20] moreover it can be deducted in connection with the interpretation of the right to social care layed down by Paragraph 17 of the Constitution, related to which is the right to education, information, legal protection and legal remedy.[21]

Consumer law is a special legal area, which cannot be inserted into the frames of classic branches of law. The field of law desired to regulate by consumer law gives a new differentia specifica of the last third of the 20th century in connection with civil legal relationships, which could be connnected to the legal status of the consumer, as well as consumer contracts. This aspect of classification replaces the consistently utilized commercial law – civil law division which has been practically evolved in the 19th century. In the course of the evolution of commercial law the aspect prevailed that in general commercial law was made up of merchant – merchant, also out of merchant – private person legal relations, whilst the realtions solely between private persons were covered by the conventional area of civil law. In conformity with this by the classic community law comprehension consumer law embraces the relations between merchants – by the terminiology of the Hungarian Civil Code: business organizations – and private persons, while in respect of Hungarian law in force – in an objective approach – it regulates the legal relations in which the subject of law dealing with the provision of products and services in a businesslike manner is on the one side, and the lay persons (as well as unincorporated economic organizations) in respect of the purchase of products and ordering of services on the other side.

Consumer law has unambigiously grown out the conception, on basis of which it could be simply identified as qualitiy protection.[22]

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19 The concept of the new Hungarian Civil Code 79. pp.

20 See the Constitution of the Republic of Portugal Art. 51. par. (1)-(2), the Swiss Constitution Art. 31/F. par. (1)-(3). A. GYARMATI: *A fogyasztóvédelemről*. [On consumer protection] Magyar Jog 1996/6. 323. pp.

21 See in details J. FAZEKAS: *A fogyasztóvédelem alkotmányos alapjai*. (The constitutional grounds of consumer protection) Publ. Univ. Mickolc. Sect. Jur. et pol. XI. (1995) 153. pp.

22 To this question see: B. KEMENES: *Gondolatok egy fogyasztóvédelmi törvény tervezetéhez*. (Thoughts on a draft consumer protection code) Novotni emlékköny. Budapest, 1991. 189. pp. and B. KEMENES: *A fogyasztóvédelem néhány elvi kérdése. Az intézmény érvényesülése Csongrád megyében*. (Some matters of principle on consumer protection. The predomination of the legal insitution in Csongrád County) Antalffy-emlékkönyv. Szeged, 1990. 95. pp.

In respect of the systemic allocation of consumer law JUDIT FAZEKAS presents the three main foreign viewpoints, respectively the normativist concept of law, according to which consumer law regulates relations created by and in favour of consumption, while by the concept of racionalization of conumer conduct the role of the consumers should be judged after the role played by them in economic mechanisms, meanwhile the protectionist viewpoint states that the aim of consumer protection is the ensuring of legal protection of the consumers, also this last concept was principally represented by THIERRY BOURGOIGNIE.[23] Moreover the accentuation of the pluralism and interdisciplinarism of the field of law named consumer law or – according to him the more appropiate – consumer rights is also linked with his name.[24]

The field of consumer law in a narrow sense exlusively means the norms of law regulating the above mentioned relations, thus can be viewed as an enclosed area within the territory of private law. Consequently the narrowly interpreted consumer law covers the legal regulations and rules, relating to relations in which the service to be performed is in the sphere of the businesslike, professinal activities of one of the parties, whilst it is excluded from the other's. In this sense consumer law can be considered as part of classic commercial law, within which it can be used as the category-pair of the field of law covering up relations existing between economic organizations (i.e. economic law).

On the other hand the entirety of legal regulations created in favour of consumers, concerning subjects of law professionally pursuing economic activities, could be added into the field of consumer law. Letting this wider sense of consumer law gaining ground, we can see that it is not only consisted of private law rules, but of public administrative regulations in favour of consumers, as well as prescriptions created expressively for the the validation of consumer interests and for the sanctioning of administrative regulations belong under the concept too. This approach also involves that consumer law also includes public administrative, contraventional, competition and criminal law rules concerning consumers.

In our judgement in order to a complex review of consumer law, the wider concept has to be followed. This also means, that consumer law cannot be interpreted on the level of the classic divisions of law, but should be regarded as a new, special field of law, which rests on provisions of other branches of law, in this manner with central elements in the area of private law reaching across the fields of municipal, contraventional and criminal law, thus producing an intersectorial barnch of law.

4. The frameworks of legal regulation of consumer law in Hungary

Fundamentally consumer law in Hungary is regulated within the scope of the Act 155 of 1997, and by Decrees of Government on questions of detials on the basis of Article 55 of this Act.

23 J. FAZEKAS: *A fogyasztóvédelem múltja, jelene, jövője a fogyasztóvédelmi törvény tükrében*. (The past, present and future of consumer protection in the light of the Act on consumer Protection) In: Fogyasztóvédelmi kódex. Budapest. Közgazdasági és Jogi Kiadó. 1998. 15. pp.

24 J. FAZEKAS: *A fogyasztói jog rendszertani és jogdogmatikai kérdései* (The systematic and dogmatic questions of consumer law) Publ. Univ. Mickolc. Sect. Jur. et pol. XII. (1996) 33. pp. In respect of consumer legal protection several namings are utilized, such as after the French, Belgian, Italian scientific literature the law of consumption (*droit de la consommation, diritto dei consumi*), the anglo-saxon consumer law, as well as the Spanish, Portuguese expression consumer protection. J. FAZEKAS: *A fogyasztói jog rendszertani és jogdogmatikai kérdései*. (The systematic and dogmatic questions of consumer law) Publ. Univ. Miskolc. Sect. Jur. et pol. XII. (1996) 38. pp.

In regards of consumer protection rules, the Act on Consumer Protection regulates this field as an enabling act, along with Decrees of Government, their authorization originating from the Act. It is important to emphasize the role of provisions of other acts connected to the area of consumer protection, complementing the prescriptions of the Act on Consumer Protection.

The Act regulates consumer rights and legal rules on vindication, compliance and enforcement of these rights to the details, yet not extensively. Accentuating the connections to other legal codes is also important.

a) Besides the Act on Consumer Protection the provisions of the Hungartian Civil Code also play a significant role, embracing numerous stipulations regarding consumer protection, thus in accordance with the general terms of contracting, as well as unfair terms of contracts, with respect to the interests of consumers and excercising rights of guarantee and warranty, in addition certain special contract types (such as sale and travel contracts). Accordingly the provisions of private legal nature included in the Act on Consumer Protection should be construed with regards to the Hungarian Civil Code, in this aspect a secondary regulational material.

b) The Act on Consumer Protection was preceded in time by acts of competition law, which affected consumer rights both on levels of general clauses and detailed rules. The Act on Prohibition of Unfair Market Conduct currently in force contains consumer protection rules as well, these allowing legal redresses besides the Act on Consumer Protection. The prescriptions of these two acts are in effect beside each other in the following aspects; in cases of infringement of the Act on Consumer Protection the General Inspectorate or Inspectorates of Consumer Protection, on the other hand, in sanctioning the violation of rules layed down by the Act on Prohibition of Unfair Market Conduct shall have jurisdiction. Nevertheless, it should be accentuated that the practices evolving on the grounds of these two acts are in an interactive relation, since the two organs pay attention to the each other's activities and proceedings.

c) Besides the provisions of the Act on Consumer Protection there are complementary prohibitions stipulated by the Advertisment Code which significantly influence consumer behaviours as well. We find the importance of the Advertisment Code mostly in preventive protection, since filtering illicit advertisments is more effective at evading the deception of consumers. The other significance of the prescriptions of the Advertisment Code may be found in the protection against transgressions of direct marketing, since either with means provided by competition law, advertisment law or by consumer law these could be used against the direct searches of dealers.

d) In numerous cases the provisions of the Act on Consumer Protection are in conformity with the statments of facts stipulated by the Code on Contravention and the Criminal Code.[25] Thus in cases of infringment of the rights of consumers not only instruments of competition law and civil law can be utilized, but in graver, socially dangerous instances, even criminal provisions do support the consumers.

e) Alongside the Act on Consumer Protection decrees of government regulating certain sectors of law are worth mentioning. By power of the Act on Consumer Protection the Hungarian Government was authorized to stipulate specified rules within the following areas:
– general safety of products, the release and control of products deceiveing in appearance, thus dangerous to the health or safety of consumers,
– the use of the unified product quality designation,

25 Practically this connection existed for instance in respect of releasing products of poor quality, false designation of quality and use of false trademarks since the passing of the Act 1 of 1978 on Domestic Trade and the Act 4 of 1978 on the Criminal Code. For details see J. PÉTERI: *A fogyasztóvédelmi szabályozás és a büntetőjog kapcsolata*. (The connection between consumer protection regulation and criminal law) Belügyi Szemle 2000/6. 64. pp.

– contracts purposing the acquisition of tenements on time-share basis,
– contracts negotiated away from business premises,
– distance contracts,
– appropiation of consumer protection fines,
– remuneration of members of conciliatory bodies,
– organization and jursidiction of the General Inspectorate of Consumer Protection,
– organizing and functioning of consumer groups (consumer clubs).

Ministers liable for sectorial control are also authorized to regulate
– the obligatory quality regulations, certifications and the issuer organizations in respect of products and services under their jurisdiction,
– the administrative departments participating as authorities in the processes.

5. Consumer data protection

The most important principles of data protection in Hungary is stipulated by the Constitution Article 59 point (1) prescribing the right to protection of personal data, connected to which it is necessary to mention the reasoning of Resolution 15 of 1991 of the Constitutional Court which orders the revelation and utilization of personal data to be purpose-bound, that is disclosure and utilization of personal data is allowed only with the consent of the affected persons, moreover data administration should be obligatory and controllable. Article 61 point (1) of the Constitution provides the right to access to and distribution of data of public interest, with regards to Resolution 34 of 1994 of the Constiutional Court, which recognizes the right to access to public data as a constitutional right, for it is the prequisite of the right to free speech, also it allows the transparency of the state, and the activities of the executive power.

The Hungarian Parliament proclaimed by way of Act 31 of 1993 the European Convention of Human Rights and it's eight Protocols, which were done at Rome 4th November 1950. Article 8 of the Convention provides that everyone has the right to respect for his private and family life, his home and his correspondence. In democratic societies intrusion into this sphere of private autonomy is only allowed on the grounds of national security, public security, public health, economic welfare, moreover public disturbance, or the prevention of crime. Article 13 enables that in case of violation of the rights and freedoms set forth in this Convention effective remedy before a national authority shall be ensured. On the power of Article 19 in case it is necessary, the European Commission of Human Rights and the European Court of Human Rights shall participate in the processes.

An expert advisory panel was set up in 1977 by the OECD, which dealt with infromatics and communication politics. The Council of the OECD accepted a directive in pursuit of the work of the panel, regulating the most significant questions of data protection. The directive's scope included the purpose-boundness of the data utilization, the restricted utilization and security matters. Personal participation in the supervision of data processing activities, and provides the liability of the data processor. The directive does not bear any obligatory force in respect of the member states, only a recommendational one.

The Recommendation R/95/4 of the Committee of Ministers of the Council of Europe on data protection in the area of telecommunication services should be mentioned among international documents, as well as the 95/46/EC Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Regarding community law, the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with respect to the processing of

personal data and on the free movement of such data is exemplary. Also playing a significant role the Convention 108/1981 of the Council of Europe on the Protection of Individuals with regard to Automatic Processing of Personal Data. In respect of Hungarian regulation on data protection the 26 July 2000 Resolution of the Committee on the apporpiate level of protection of personal data on the basis of Directive 96/46/EC of the European Parliament and of the Council is to be mentioned (permission decision of 26 July 2000. pursuant to the directive 95/46/EC of the European Parliament of the Council on the Adecqate Protection of Personal Data Protection in Hungary). Point 5 of the Committee Resolution declares, that in Hungary the protection of personal data is guaranteed by compulsory provisions of law, as well as the resolutional part states, that „in respect of Article 25 paragraph 2 of the Directive, moreover of the full scope of the directive Hungary is considered a member state appropiately ensuring the protection of data transmitted from the community".

Act 9 of 1998 provides the promulgation of the Marakesh Declaration and it's Protocols on the setup of the World Trade Organization created within the frame of the General Agreement of Trade and Tariffs. The declaration was proclaimed in several countries 7 March 1998, and the declaration on the ratification of the Agreement was deposited 29 December 1994, on the grounds of which Agreement in Hungary the entered into force 1 January 1995. Chapter 7 of the Agreement stipulates the protection of not disclosable data. Article 39 point 1 provides that in the course of effective protection according to Article 10 of the 1967 Paris Convention against unfair competition member states shall ensure the protection of not disclosable informations and data made available to governments and governmental bodies according to point 3. As per point 2 these are protected data, moreover natural persons and legal entitities shall have the option to prevent these informations legally under their control from securing, processing or disclosure contrary to fair trade practices and without their consent, as long as these informations are:

– confidential in the sense that both as a whole or in parts in any appearance or compilation is not revealed or easily revealable in respect of persons under normal circumstances dealing with informations of this nature;
– of commercial value, since their confidential nature; finally
– the person authorized for the control of the data took the reasonable meaures under the circumstances in order to keep them secret.

In compliance with the Agreement the term contrary to fair commercial practice means such a practice, such as breach of contract, offence of confidential communication, inducement to breach of contract, moreover it includes the revelation of undisclosed data to third parties who had the knowledge or because of negligence they omitted to learn that the revelation is in the scope of such practice. In case of violation of this provision, according to Article 47 of the Agreement an obligation of compensation in total damages exists.

The main prescriptions regarding data protection of consumers on the basis of data protection recommendations:

In Data Protection Recommendation 791/A/1999 the ombudsman of data protection arrived to the conclusion regarding a single case, that is in respect of the data processing of a company merchandizing cosmetics and therapeutical equipments and medicinal drugs, that although the company legally acquired the data of the searched person from the Office of Central Dataprocessing, Registry and Election of the Interior Ministry, yet in the course of the search of consumers it failed to indicate other mandatory elements prescribed by the Act on Data Protection. throug these facts the processing of the legally acquired data became illegal.

A curious question has arisen regarding the fate of a winding-up data processor company, in respect of which the Recommendation 136/K/2000 the ombudsman of data protection held that in such cases there is the option of transferring the database to an other direct marketing

company, however interested parties shall be informed. If no objections are made, the transfer of data is legal. In the instance the data-handler company was only a data processor, the data shall be returned to the manadator data handler, who may with the briefing of the interested parties designate a new data processor.

With regards of direkt marketing activity the ombudsman of data protection expressively adopted the viewpoint in respect of the general data collection of a greater Hungarian company that although it happens on a voluntary basis from the side of the data-supplier, the survey may be considered disquieting, because the data processor may receive an extensive personal profile on the data-suppliers. This even with law-abiding conduct of the data-handler could prove perilious in accordance with the rights of interested parties (673/A/2000., 681/A/2000., 683/A/2000., 684/A/2000. etc.).

In the 2000 Annual Report of the ombudsman of data protecion[26] deals with questions of internet data protecion in deteails. In this respect the ombudsman pointed out to the legislators that the regulation of unasked business messages (spam) is incomplete in Hungarian law.[27] It also refers to the fact that according to Hungarian legal regulations in force certain data-processings done by interenet service providers are without any authorization of acts. Particularly the Recommendation 295/A/2000 pointed out, that in the course of regsistration of domain names the detailed data-supply of the owner is justified, since the openness of data attained by thesse means, since in this province the openness of data is justified by the borderless, international nature of the internet. In accordance with these data the openness and accessibility is also justified alongside the requirement of purposefulness.

The ombudsman of data protection provided in Recommendation 439/A/1996 of 1 July 1997 in respect of bank secret. The recommendation refers to the matter in 3 points. On the one hand, the management of a bank account can only be assigned to an other bank in the client's rights are invariably ensured, thus in case of a natural person the agreement is justifiable if it is in accordance with the constitutional and statutory requirements of personal data protection, moreover with the rules of the Act on Bank Secret. On the other hand, in the instance of such assignments it is necessary to request a notice from the clients on their consent to the handling of their personal data, together with the management of their bank and credit account by the other bank. In case of a negative reply the personal data of the client shall be immediately deleted from the registry and the client shall not incur any damages regarding any interests nor bonuses. On the third hand, the bank shall only assign the classified data of the client to the other financial institution, if the client or his/her legal representative designating the exdact sphere of bank secret by way of an authentic act or a private act of full powers agrees to it.

The ombudsman of data protection in his Recommendation 496/K/2000 of 24 August 2000. dealt with the provisions on data protection in connection with electronic commerce. the ombudsman scrutinized the rights to data protection of customers in respect of the matter of regular customer cards useable via the internet. In this case he held the viewpoint, that „the consent necessary for personal data handling …– until the passing of the Act on Electronic Signature – cannot be granted by way of e-mail, since according to Hungarian law it cannot be deemed as written notice".

In respect of the connection between data protection and advertisments, moreover in association with data protection and programme service of public interest the Recommendation

26 The Annual Report of the Ombudsman of Data Protection. Adatvédelmi biztos irodája, Budapest 2001.

27 Since that time the legislation on information society services has recovered. In details see the chapter on electronic commercial contracts.

of 30 October 1996 of the ombudsman of data protection, which summarized the results of the emanation regaring the coupon processing, data-handling of the winner and the release of these data of the „Five from Ninety lottery". In this Recommendation the ombudsman expressed in point 7.6. that in course of the organization of gambling the constitutional interest of protection of personal data in all cases shall have the priotity over interests of advertisments. In point 7.7. he held that, „special attention has to be paid to the mutualpredominance of freedom of information and protection of personal data in respect of public service televeision. The private sphere of private persons should be regarded with greater respect than of the public persons. In the conflict of the legally protected data of citizens and „news" the protection of privací shall have the priority.".

Zusammenfassung

Die Regelung des Verbraucherschutzrechtes in Ungarn

Die Studie stellt die Entstehung der Regelungen des Verbraucherschutzes vor, und führt eine detaillierte Analyse der Lage der die Verbraucherrechte regelnden Normen im ungarischen Rechtssystem durch. Das Verbraucherschutzrecht ist schwer in das System der klassischen Rechtszweigen einzuordnen. Es ist auch als ein übergreifendes Rechtsgebiet im ungarischen Recht bekannt, dessen Regeln zum Teil im Zivilgesetzbuch, zum Teil im Gesetz über den Verbraucherschutz, und letztendlich – vor allem als Ergebnis der Rechtsharmonisation der Europäischen Union – in einzelnen Gesetzen und Regierungsregelungen zu finden sind. Die ungarische Rechtsregelung des Verbraucherschutzes wurde in den letzten 15 Jahren von einer wesentlichen gerichtlichen Praxis begleitet, aufgrund derer die einzelnen Begriffe des Verbraucherschutzes und die Ratenregeln sich herauskristallisiert haben.

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The supremacy of EC law – a special relationship between EC law and National law

1. Introduction

It is said that the EU is a unique legal system and it justify the fact that after the recent expansion of 1st May 2004 the EU comprises 25 States with diverse legal traditions.
The process of integrating the economies and legal systems of various European States is clearly an enormous task.

A supranational kind of international organisation means the solution of the mentioned task. This kind of organisation generally has institutions which act independently of their Member States; it is empowered to take decisions by majority; it prohibits States from making 'reservations' or 'limitations' to the legal commitments of the organisation; it implements its own laws at an international level and it allows individuals to enforce their rights before a national or international court.
Such a system purposes an effective regime for implementation an enforcement that is more characteristic of a nation state than an international organisation.
In fact it is considered as a supranational organization which requires particular relationship between its law and those of the Member States.
In turn, the relationship between Community law and National law is characterized by the application and enforcement of Community law in the Member States. One of the most important feature of this relationship is the supremacy of Community law over National law.

Other words, the impact of Community law upon the laws of the member States depends on the principle of supremacy of Community law besides the direct effectiveness of Community law.

It will be proved in the followings by presenting a brief historical development of the doctrine of EC law's supremacy supporting with the most significant judgments of the ECJ.

2. The establishment and development of the principle of supremacy

The wide scope of the EC Treaty, covering a number of areas normally reserved to national law alone, coupled with the extended application by the ECJ of the principle of direct effects, led inevitably to a situation of conflict between national and EC law.
In such a case, which law was to prevail?

It's widely known that the EC Treaty is silent on the question of priorities and the closest thing of it is Article 10 requiring all Member States to „ … take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising out of this Treaty or resulting from action taken by the Community institutions. They shall facilitate the achievement of the Community's tasks."
With accordance to this in a series of important judgments the ECJ described how, in its view, EC law was supreme to national law.

The first cautious statement of the principle of supremacy of EC law came in the case of Van Gend en Loos[1] where the principal question in the case was the question of the direct effects of Article 25 (ex12). Strictly speaking, this issue did not raise the issue of supremacy because, if the ECJ found the Article 12 to have direct effect, Dutch national law would automatically deem it superior to domestic law.
Nevertheless, in one paragraph, the ECJ indicated that it was also prepared to deal with the issue of supremacy if it should arise directly. The ECJ stated that
„The object of the EEC Treaty, which is to establish a Common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights…"
In addition to declaring that Article 25 was directly effective, the Court went on to say that:
"…the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited fields."
(Although the main emphasis of the judgment relates to the doctrine of direct effect, it is also significant because, by referring to the 'new legal order', the ECJ indicated that the Community was not just a 'normal' international law organisation.)[2]

Another opportunity for the ECJ to affirm the principle of supremacy was in the Costa v. Enel[3] case.
Signor Costa refused to pay the bills4 of the newly created national Electricity Corporation Enel, and argued that the company was in breach of EC law. They argued 'lex posterior'; the Italian Act nationalising the electricity company was later in time that the Italian Ratification Act, the Act incorporating EC law, therefore was argued to take priority. The reasoning of the ECJ in this Case happened as follows:
"By contrast with ordinary international treaties, the EEC has created its own legal system which, on the entry into force of the Treaty, became an internal part of the legal systems of Member States and which their courts are bound to apply.
By creating a Community of unlimited duration, having its own institutions, its own personality, its own capacity and capacity of representation on the international plane and,

1 Case 26/62 Van Gend en Loos v. Nederlandse tariefcommissie [1962] ECR 1, [1963] CMLR
2 Josephine STEINER - Lorna WOODS: Textbook on EC Law 8th Ed., Blackstone Press Ltd., 2003., P.66.
3 Case 6/64 Costa v. Enel [1964] ECR 585.
4 the principle sum of L 1,925, or approximately £1.10

more particularly, real power stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights, albeit with limited field and have thus created a body of law which both binds their nationals and themselves.
The integration into laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on the basis of reciprocity. Such a measure therefore can not be inconsistent with that legal system…
The precedence of Community law is confirmed by Article 189 (now 249) EC, whereby a regulation 'shall be binding' 'and directly applicable in all Member states'. This provision, which is subject to no reservation, would be quite meaningless if the states could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.
It follows from all the observation that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basic of the Community itself being called into question.
The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail."

It is clear in each argument made by the ECJ above that Community law had to be given primacy by national courts over any incompatible national law.
What seems strongly in the above mentioned judgment is the Court's teleological or purposive approach the aims of the Community and the spirit of the Treaties are constantly emphasized, and there is not much support in the text of the Treaties for their proposition that Community law has a 'special and original nature' of which would be deprived if subsequent domestic law were to prevail.
(In connection with the above mentioned, we must note that the ECJ's arguments can be divided into two main groups: a) those relating to the nature of the Community and b) those relating to the purposes of the Community although there is no express basis in the Treaty for either of these points.)[5]

It was a bold step to support its conception of Community legal order by asserting that the States had permanently limited their powers and had transferred sovereignty to the Community institutions.[6]

In the case of Internationale Handelsgesellschaft[7], the ECJ has gone further to confirm the supremacy of EC law.
Here, the conflict was between not a treaty provision and a domestic statute, but between an EC regulation and provisions of the German Constitution. The plaintiff claimed the Regulation infringed, inter alia, the principle of proportionality enshrined in the German Constitution and sought to nullify the Regulation on those grounds.
The ECJ stated that:
"Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the

5 Josephine STEINER – Lorna WOODS: Textbook on EC Law 8th Ed., Blackstone Press Ltd., 2003., P.67.
6 Paul CRAIG – Grainne De BUREA – EU Law – Text, Cases and Materials OUP, 2nd Edition 1998., P.259.
7 Case 11/70 Internationale Handelsgesellschaft mbH v. Einfuhr – und Vorratsstelle für Getriede und Futtermittel [1970] ECR 1125.

uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, can not because of its very nature be overridden by rules of national law, however frame, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Therefore the validity of a Community measure or its effect within a member state can not be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principle of a national constitutional structure."[8]

It is clear in the ECJ's ruling that Community law prevails over all form of national law, including national constitutions and fundamental rights enshrined in those constitutions. Community measures derive their validity solely from Community law, and those the validity of a Community measure or its effect within a Member State can not be affected by objections that it runs counter to either fundamental rights as guaranteed by the constitutions of the State or the principles of a national constitutional structure.[9]

Underlying the mentioned judgment one can see concerns similar to those expressed in Costa: the need to ensure the effectiveness of Community law, whatever the cost to the national legal order.

Although the reasoning was convincing the national courts refused to acknowledge the absolute supremacy of EC law (e.g.: Internationale Handelsgesellschaft mbH [1974] 2 CMLR 540).

There were other problems of application for the national courts and the question raised: even if the principle of primacy of EC law were accepted in theory, what was a national judge to do in practice when faced with a conflict?

The ECJ suggested a solution to this problem in the case of Simmenthal SpA[10] and also confirmed the principles established in Costa v. Enel that the supremacy of Community law logically must limit national law making powers.

It held:

"Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the Institutions on the one hand and national law of Member States on the other is such that those provisions and measures not only by their entry into force automatically inapplicable any conflicting provision of concurrent national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the member state – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.

Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of the obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundation of the Community."[11]

And it was also predictable when the Court said:

"From this reasoning it was clear that unless Community law is given priority over conflicting national law at once, from the moment of its entry into force, there can be no uniformity of application throughout the Community."[12]

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8 Case 11/70, supra note 106, para. 3 of the Judgment.

9 Josephine SHAW: European Community Law, Mac Millan 1993, P. 165.

10 Case 106/77 Ammistrazione delle Finanze dello Stato v. Simmenthal SpA [1978] ECR 629.

11 Case 106/77 Ammistrazione delle Finanze dello Stato v. Simmenthal SpA [1978] ECR 629, para. 18.

12 Josephine STEINER – Lorna WOODS: Textbook on EC Law 8th Ed., Blackstone Press Ltd., 2003., P.69.

"…a national court which is called upon… to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing…to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means."[13]

The principles expressed in Simmenthal SpA were applied by the Court in R v. Secretary of State for Transport, ex parte Factortame Ltd.,[14] in the context of a claim before the English Courts by a group of Spanish fisherman for an interim injunction to prevent the application of certain sections of the Merchant Shipping Act 1988, which denied them the right to register their boats in the UK, and which the claimants alleged were in breach of EC law. The question of the 'legality' of the British provisions under Community law had yet to be decided, following a separate reference to the Court of Justice. The British Courts were being asked to give primacy to a putative Community right over an allegedly conflicting national law, and to grant an interim injunction against the Crown, something which they considered they were not permitted to do under national law. Following a reference by the House of Lords asking whether they were obliged to grant the relief in question as a matter of Community law, the ECJ pointed out that national courts were obliged, by Article 10 (ex 5) EC, to ensure the legal protection which persons derive from the direct effect of provisions of Community law.

Moreover:

"The full effectiveness of Community law would be…impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgement to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief if it were not for a rule of national law, is obliged to set aside that rule."[15]

However, it is necessary to distinguish between non-application and invalidity, since the result in practice of the operation of setting aside conflicting national law is close to the invalidation of the rule. A national rule which is set aside for being inconsistent with Community law, is inoperative only to the extent of this inconsistency; the rule may continue to be applied to cases where it is not inconsistent, or to cases which are not covered by the Community norm,[16] and it may be fully applied again if and when the Community norm ceases to exist. Things are different only when EC law is intended to harmonize national legislation, then inconsistencies must be removed by repealing or modifying national law to the extent required by harmonizing act. In this case, the possible disapplication of inconsistent national norm by the court can not be an excuse for the legislator's failure to change the law.[17]

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13 Case 106/77 Ammistrazione delle Finanze dello Stato v. Simmenthal SpA [1978] ECR 629, para. 24.

14 Case C-213/89 R v. Secretary of State of Transport, ex parte Factortame Ltd. [1990] ECR I-3313 (Factortame I).

15 Para 21 of the judgment in Case C-213/89 R v. Secretary of State of Transport, ex parte Factortame Ltd. [1990] ECR I-3313 (Factortame I).

16 For example, restrictions of the rights of non EU citizens. See Case C-264/96 Chemical Industries plc (ICI) v. Kenneth Hall Colmer [1998] ECR I-4695, para. 34 of the judgment.

17 Brunno De WITTE, supra note 40, p. 190. For a recent affirmation of the rule that national authorities have a duty to eliminate conflicting national norms quite apart from the disapplication of those norms by the courts, see case C-197/96 Commission v. France [1997] ECR I-1489.

3. The acceptance of the principle of supremacy – the member states' response

A little bit different from direct effect, supremacy was more slowly and reluctantly accepted, even in the founder Member States.[18] The very reason for this is that supremacy of EC law may affect the principle of national sovereignty and the guarantees of fundamental human rights. After a shaky start (see the cases: Costa and Internationale Handelsgesellschaft mbH) the courts of Member States have now broadly accepted the principle of supremacy of EC law provided they regard it as directly effective.
They have done so in a variety of ways: in some cases by bending and adapting their own constitutional rules; in others by devising new constitutional rules to meet the new situation. The point to note here is that in each system it seems that the national courts have accepted supremacy on the terms of their constitutional system. That is, they have argued for the supremacy of Community law on the basis of national legal provisions, not the provisions of Community law itself.[19]

Among original six, no special efforts were required from the courts in the Netherlands and Luxembourg, where the supremacy of international treaty provisions over national legislation was accepted prior to 1957.

Of the other four countries, the courts in Belgium reacted most promptly and loyally to the ECJ's injunctions. Although the Belgium Constitution was silent on the domestic effect of international or European law, the Supreme Court adopted the principle of primacy as it had been formulated in Costa, and based it on the nature of international law and of EC law. The other Belgian courts soon followed the same line when said in the case of Le Ski [1972] CMLR 330 that the EC Treaty was a higher legal norm and should be accorded supremacy.

In France, although the text of Article 55 of the Constitution recognized the priority of international treaties even over later French laws, the courts were surprisingly slow to accept that this constitutional provision could actually be used as a conflict rule in real cases and controversies. The French judicial system is divided between the administrative courts and the ordinary courts. The Cour de Cassation, taking the lead of all ordinary courts, decided to cross the Rubicon in the 1975 Cafés Jacques Vabre judgment,[20] in which the supremacy of Community law over French law was accepted.
The Conseil d'Etat, the Supreme Administrative Court, followed suit much later with the Nicolo decision (1989), after what must have been a very painful revision of established truths.[21] Since this decision, the Conseil d'Etat has recognized the priority of both Community regulations and directives over French statues, without discussing the theoretical basis for that supremacy, and the French Constitution has been amended to give effect to changes made by the TEU, so that 'the Community is now placed on a clearer constitutional footing in France'.[22]

In Italy and Germany, the acceptance of the supremacy of EC law is not easy, since their Constitutions have given significantly more protection to fundamental human rights than those

18 Tamara K. HERVEY: Enforcing European Community Law in the Member States, in Phillipe BARBOUR (ed.): The European Union Handbook, Fitzroy Dearborn Publisher 1996, p. 229.
19 Josephine STEINER - Lorna WOODS: Textbook on EC Law 8th Ed., Blackstone Press Ltd., 2003., P.71-72.
20 Decision 24 May 1975, Administration des Dounanes v. Société 'Cafés Jacques Vabre' et SARL Weigel et Cie [1975] 2 CMLR 336.
21 Raoul Georges Nicolo [1990] 1 CMLR 173.
22 See P. OLIVER: The French Constitution and the Treaty of Maastricht, 1994, 43 ICLQ 1, 10.

of the other Member States.[23] Fundamental rights are higher legal norms than all others applicable in the national legal systems and so provisions of law conflicting with fundamental rights provision may be set aside as unconstitutional. This position is potentially in conflict with the principle of supremacy of Community law, since a national court finding that a directly applicable measure of Community law infringed a national constitutional fundamental rights provision would be obliged to set aside the Community law. Therefore, the actual duties imposed on national courts by Costa went well beyond what the mainstream constitutional doctrine, at that time, was prepared to accept in term of the domestic force of international treaty law.[24]

In Germany, the Bundesverfassungsgericht (Constitutional Court) originally adopted a position that where there is a conflict between guarantees of fundamental rights in the Constitution and in Community law, the fundamental rights prevail, so long as the European institutions have not resolved the conflict.[25]

It said:

"EC law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source. The ECJ cannot with binding effect rule on whether a rule of EC law is compatible with the Constitution, nor can this Bundesverfassungsgericht rule on whether a rule of secondary community law is compatible with a primary rule of EC law. This does not lead to any difficulties so long as the two systems of law do not come into conflict with one another in their substance.

The ECJ responded to this position with the assurance that fundamental rights were already protected in Community law as general principles of law.[26] So, the Bundesverfassungsgericht has subsequently modified its position by confirming that so long as the European institutions, and in particular the ECJ in its case law, generally ensure effective protection of fundamental rights similar to that guaranteed under German Constitution, then it will no longer examine the compatibility of Community legislation with fundamental rights.[27]

In Italy, the message, in Costa, was primarily addressed to the Italian Constitutional Court. This Court although has gradually come to recognize the supremacy of Community law over national legislation, but still had some reservations towards the concept of supremacy of Community law, in particular supremacy over national fundamental rights provision.

In Frontini,[28] the Corte Costituzionale (Italian Constitutional Court) while confirming that, in general, provisions of Community law have 'full compulsory efficacy and direct application' in Italy, held that if a Community provision should violate fundamental constitutional or human rights principles the Corte Costituzionale would ensure that Community law was compatible with those principles.

In the more recent case of Granital,[29] the Corte Costituzionale expressly affirmed the principle of supremacy of EC law, but still reiterated its caveat from Frontini concerning review of Community provisions in terms of their consistency with fundamental rights protections.

For the nine countries joined the European Community after Costa, the situation was rather different. For them, supremacy and direct effect did not require ex post constitutional creativity but was a matter of voluntary acceptance as acquis communautaire.

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23 T.C. HARTLEY: The Foundations of European Community Law, 4th Ed., Oxford University Press, 1998., p. 242.

24 Brunno De WITTE, supra note 40, p. 197.

25 Solange I [1974] 2 CMLR 540.

26 Case 11/70 Internationale Handelsgesellschft [1970] ECR 1125.

27 Solange II [1987] 3 CMLR 225.

28 Case Frontini v. Ministero delle Finanze [1974] 2 CLMR 372.

29 Case Granital [1984] 21 CMLR 765.

Greece and Ireland, when they joined had put their constitutions in order.
Article 28 of the Greek Constitution, adopted prior to accession, recognizes the primacy of international conventions over any national legislation.

In Ireland, given the inability of the dualist constitutional tradition to cope with the demands of membership, a special EC law was added to the Constitution vouchsafing the direct effect and primacy of Community law.
In Pigs and Bacon Commission,[30] it was held that Community law takes legal effect in the Irish system in the manner in which Community law itself provides. So, since Community law provides for supremacy of Community provisions, Irish courts must give effect to that rule.

In the United Kingdom, the reluctance of the courts to alter their long-standing deference the doctrine of the Sovereignty of Parliament inevitably led to difficulty with UK compliance with Community law. In fact, the question of supremacy floated around for many years until the Factortame II judgment,[31] where the House of Lords for the first time disapply the later Act of Parliament for being inconsistent with the EEC Treaty. It is still discussed whether the House of Lords decided on the basis of sophisticated statutory construction or recognized a genuinely new constructional rule, giving priority to Community law over any type of national law, but the later view seems more convincing, also in the light of later UK case law.[32] Nevertheless, the judgment of Lord Bridge that "it has always been clear that it was the duty of a United Kingdom court… to override any rule of national law found to be in conflict with any directly enforceable rule of Community law",[33] is evidence that, in some circumstances, the UK courts will now recognize the supremacy of Community law explicitly and directly. And now, we can affirm that, supremacy of Community law over national legislation and sources of national law lower in rank than legislation,[34] seems to be accepted in most of the Member States.[35] Supremacy and direct effect were to be recognized because the EC Treaty was unlike other international treaties. And, EC law is now often presented as being unique because it is endowed with direct effect and supremacy.[36] However, direct effect and supremacy of EC law have not been completed. In 1950, while writing about the domestic status of international treaties, Morgenstern stated: "only the full integration of international society, by giving international law the means of enforcing its authority directly within the state, can establish the supremacy of international law in its fullest sense".[37] EC law now is only halfway on the road traced by Morgenstern.

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30 Judgment 30 June 1978 [1978] Journal of the Irish Society of European Law 87.

31 Case C-221/89 R v. Secretary of State of Transport, ex parte Factortame Ltd. [1991] ECR I-3905.

32 See P. P. CRAIG: Sovereignty of the United Kingdom Parliament after Factortame, 1991,11 YEL 221.

33 Factortame Ltd v. Secretary of State for Transport (No. 2) [1991] 1 Appeal case 603. There is also a notable summarized phrase concerning the acceptance of supremacy: "Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas… national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy".

34 Bruno De WITTE described it as "ordinary" Supremacy. Primacy of EC law over National constitution is quite another matter. I do not propose to discuss this matter. For more details, see Bruno De WITTE: Community Law and National Constitutional Values, (1991) 2 LIEI 1.

35 In case of Denmark, its Constitution contains no rules on the relation between Community law and National law, and the doctrine of primacy of EC law has never expressly been accepted by the courts.

36 Brunno De WITTE, supra note 40, p. 208.

37 See F. MORGENSTERN: Judicial Practice and Supremacy of International Law, (1950) 27 The British Yearbook of International Law, 42.

4. Conclusion

The key to an understanding of the effect of the European Community law in the Member States, and consequently its enforcement at the suit of individuals, is the relationship between Community law and National law. It can hardly be denied that the Community now exercises considerable substantive powers which the Member States no longer exercise or lay claim to exercise – the exceptional cases being so infrequent as to be regarded as major crises. Where Common organizations of the market should exist, national market organizations are no longer specially protected against the rigors of the basic Treaty rules.[38] Over the past forty years, the Community has grown into a unique organization, much of the success of the European integration must be attributed to the ECJ. Nevertheless, due to its singular nature, the Community faces a number of problems when ensuring proper implementation and enforcement of Community rules. The European Court has remedied these problems with its most important judicial creation – the doctrine of direct effect and supremacy. Having been allowed to invoke Community provisions before national courts, individuals have been made a direct participant in the European integration process, thanks, in large part, to the principle of direct effect and supremacy.[39]

The ECJ, in introducing the notion of supremacy, was instrumental in providing a view of the Community as a body that went beyond what was normal for an international law organisation. In a number of key judgments it identified the Community as an independent legal order, supreme over the national legal systems. One of the mechanisms used to justify this was the effectiveness of Community law, a doctrine that the ECJ has used again and again in different contexts to justify the development of Community law in a particular direction. As has been noted, however, the success of this project cannot be ascribed entirely to the ECJ. To a large part, it has been dependent on the cooperation of the Member States, particularly their courts. In a relatively short space of time the courts of Member States, despite their different constitutional rules and traditions, have adapted to the principle supremacy of EC law where it is found to be directly effective. Credit for national courts' acceptance of the principle of supremacy of EC law must go to the ECJ, which has supplied persuasive reasons for doing so. However, equal credit must go to the courts of Member States, which have contrived to embrace the principle of primacy of Community law while at the same time insisting that ultimate political and judicial control remains within the Member States.

As Fragd, Brunner and Carlsen v Rasmussen, indicate, the courts of Member states, particularly their supreme courts, will be vigilant, and use all the means at their disposal, to ensure that the EU institutions do not exceed their powers or transgress fundamental constitutional rights, particularly in the new post-Maastricht political climate, with its emphasis on subsidiarity.[40]

As a result, direct effect, supremacy of Community law, especially the matter of horizontal direct effect of Directives and supremacy of Community law over National constitutions, continue to be a sensitive and controversial issue in academy and practical application of EC law and the draft constitution will put this issue beyond doubt by stating clearly that supremacy lies with the EU (Art I-6).

"The constitution and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States."

38 John USHER: European Community Law and National Law. The Irreversible Transfer?, George Allen & Unwin 1981, p. 83.

39 Brunno De WITTE, supra note 40, p. 205.

40 Josephine STEINER – Lorna WOODS: Textbook on EC Law 8th Ed., Blackstone Press Ltd., 2003., P. 85-86.

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Case 26/62 – Van Gend en Loos v. Nederlandse tariefcommissie [1962] ECR 1, [1963] CMLR 105.
Case 6/64 Costa v. Enel [1964] ECR 585.
Case 11/70 Internationale Handelsgesellschaft mbH v. Einfuhr – und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125.
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Case C-197/96 Commission v. France [1997] ECR I-1489.

Zusammenfassung

Die Suprematie des Gemeinschaftsrechtes – die spezielle Beziehung zwischen Gemeinschafts- und Nationalrecht

Wie es auch aus dem verfassungsmäßigen Grundvertrag der Europäischen Union ersichtlich ist, übt die Union Primat über das Rechtsystem der einzelnen Mitgliedsstaaten aus.

Die europäische Gemeinschaft, und später die Europaische Union hat einen weiten Weg zurückgelegt, bis der erwähnte Grundsatz alsVertrag zu einer schriftlichen Deklaration kam.

Ziel dieser Arbeit ist, das Prinzip der Suprematie des Gemeinschaftsrechts anhand der historischen Entwicklung vorzuführen, und in ihrer Umgebung darzustellen.
Dazu ruft die Arbeit die Gerichtsentscheidungen der Europäischen Gemeinschaft zur Hilfe.

Nach der Erkenntnis des vorgeführten und erörterten Prinzips der Suprematie trifft die Feststellung zu, wonach die Europäische Gemeinschaft eine, von den Mitgliedsstaaten unabhängige Rechtsordnung repräsentiert, welche über der Rechtsordnung der einzelnen Mitgliedsstaaten steht.

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Institutional and Legal Features of the Hungarian Land Ownership and Land Use System as Main Results of Market-Economic Transition and Access to EU

Introduction

According to historical experience in Europe, a civil democratic land reform, as a rule, has two decisive criteria. First, it is characterized by elementary civil values, especially related to private land ownership. Consequently, land as a means of production is given to the land-user by the reform in economic sense as a functioning property: in viable farm size and together with indispensable factors of production, capital goods. This way can be enforced the most important civil value pattern of modern land policy which ever since its birth has been striven for fulfilling the demand of peasantry, e.g. 'the land has to belong to its cultivator.' As a principle it means the basic unity of land ownership and land use, on the one hand legally. This requires that the producer as land-user and a natural person has to be owned and possessed his cultivated plot. On the other hand the economic requirement in this case means that the land ownership is not merely a legal title for an asset but a real and functioning means of agrarian production.

Second, the civil typed land reform pursues such a land and agricultural policy which in the long run consistently exerts the interests of the majority of producers. The latter institution of democracy in practice must assure that the land owner producer as land-user due to his appropriate support (financing) by the economic regulators and state's budget (by advantageous credit terms, agricultural prices etc.) should have all possibilities for the maintenance of acceptable living standards, both for the producer and his family.

From 1989 the collapse of Soviet colonial empire created a historical turning point for the COMECON countries to change radically their political and social structure, covering also the land circumstances of agriculture. However, in Hungary the policy decision maker has denied to society the fulfilment of civil democratic land reform and instead of it there has been executed only the historically late original accumulation of capital in form of partial indemnification and land privatization which has exerted exclusively the interests just of small elite of power.

The refusal of land reform has evoked serious consequences afflicted the modernization of society. Namely, our agriculture has failed to establish the viable model of family farming system, but has assured the survival of large-scale farming based on cruel exploitation of wage labourers. That is why the great majority of new land owners in economic sense cannot be considered beneficiaries of functioning property, but just as formal subjects of legal title without its real contents. In reality, the change of political regime within the elapsed 16 years in this field has attained no more result than on the ground of private ownership the transformation of party state's socialist typed large scale farm units into capitalist latifundium system. Evidently, such an antisocial and retrograde value pattern of agriculture and farming structure for Hungary as EU member-state, being it essentially an institutional denial of civil scale of values, all by its economic and legal means hampers, moreover excludes the possibilities of civic modernization, as well the chance of our country whenever to catch up with more developed nations. Therefore, this type of large-scale farming in its reality unacceptable for the society, so the civil democratic land reform to be realized has remained unchanged a hot political issue and challenge for us in the third thousand years.

The main objective of this paper is to analyze what has caused the deadlock of modernization for Hungarian land fund, in spite of the carefully prepared process to a market-economic transition directed by the land policy decision maker. I focus first and foremost on the system of economic and legal institutions which have exerted the requirements of EU membership concerning the land (ownership and lease) market. Finally, there must be investigated which possibilities have left to Hungary for the national self-protection in land market regulation under the Common Agricultural Policy (CAP) reforms, in accordance with EC legislation and that of 'four liberties' institutionalized by acquis communautaire. The agricultural farm regulation system, which has been maintained in state-member jurisdiction, seems to be of vital important means for Hungary in order to make approaches to the so-called eco-social model of agriculture. This one is striving for enforcement of the basic needs of the agro society (by maintaining the population, employment, life quality, environmental protection, nature conservation, rural development etc.),this way more or less it could counterbalance the overwhelming preponderance of global capital and the neo-liberal dictate of the CAP.

I. Historical heritage

The importance of agriculture in the economy, as a rule, is tightly related to the level of economic development, not only in Europe but all over the world.[1] As for Hungary, our agriculture traditionally has been playing rather an outstanding role in the national economy. This fact is due primarily to its advantageous geomorphologic endowments assured by the Carpathian Basin. However, historically it must be emphasized that the agriculture in succession was strongly backed also by the quality of human resources, what is more in spite of our low density of agricultural population. Although in this region of Europe the development of society after the Middle Ages became inorganic and was interned by several external factors – so the nation was conquered and suppressed for centuries by foreign states – especially in the field of agriculture it can be observed a continuous shaping of commodity features and that of value patterns for the peasantry's acquisition.[2] Scientifically it has been proved that in Hungary from the earliest feudalism (here to say nothing of the paradigm has

1 Karen MACOURS - Johan SWINNEN: A Comparison of Agrarian Transiiton in Russia, China and Eastern Europe", World Bank Discussion Papers, Manuscript, p. 3.

2 Endre TANKA: A földtulajdoni és a földhasználati rendszer szerkezeti átalakulása a magyar mezőgazdaság földreformja nyomán. Agrárgazdasági Kutató Intézet, Budapest, 1994.

been evolving for individual acquisition of assets and products by the peasantry during the Middle Ages) the main branches of intensive labour-using cultivation (particularly the wine-yards and the orchards) independently from the ruling ownership system were dominated by the land-user peasants as landowners, at least in a sense of the functioning property.

It is not accidental that even the communist state's dictatorship could not liquidate totally this informal proprietary power of private acquisition. On the contrary, that was forced to compromise with the peasant's elementary individual interests which claimed for the self-sufficiency at least a minimum sized parcel in order to product the necessary crops both for the household and the surplus as commodity for the market. That is why the so-called second economy (that is "small production" of nearly landless social strata consisting of part-time farmers, household and auxiliary plot-holders, state farm's wage workers, their family members, pensioners etc.) from the early 60's till 1989 accounted for 35-40% of the total agricultural output. At the same period of time, the irrationally grown "mammoth" large-scale state farms and cooperatives, in spite of their industrialized plant-system and that of hierarchic Taylorian typed labour organizations, as well that of their highly expensive investments, could amount to agricultural GDP no more than 55-60% proportion.

The agriculture even after the collapse of COMECON market gave the 17-18% share of gross national output and the 20-21% share of national income. Its products accounted for a 21-22% proportion of exports, whereas the agricultural imports represented only 8% of all imports. But it must be admitted that this pre-eminent position of the agrarian sector was due not so much to its own performance as to the low level of output of underdeveloped other competing sectors, mainly that of industry.[3]

II. The land privatization and its sequences

1. Historical preliminaries of the land tenure system

In Hungary the land represents about 20-25% of the national wealth and nearly about 40% of natural resources of the country. The total land territory reaches 9, 3 million ha out of which in 1989 cultivated 69, 7%. As for as Europe is concerned, this proportion is highly favourable since only the United Kingdom has larger farmland fund than ours by her 75% proportion. The 54% of the land fund belongs to arable lands. This high share of more intensive used farmland is larger by twofold than that of EU average and is larger by fourfold than that of OECD average.

Before 1945 in our country the semi-feudal system of latifundia prevented the formation a modern private land ownership for the peasantry. E.g. most of the peasants were deprived from land or they had only unviable dwarf- holdings while a tiny minority of rich landowners possessed the big preponderance of territory as latifundium.

After the World War II. the country gained a historical chance to create the organic unity of land use and land ownership by the institute of peasant's private property. Still, this promising possibility for modernization failed to succeed due to forming communist state dictatorship. Namely, the Communist Party had to follow the commands of Soviet leadership in order to prepare the establishment of kolkhoz model. For that purpose Stalin personally claimed to apply

3 Endre TANKA: Market-economic Land Reform in Hungarian Agriculture. Association for International Cooperation of Agriculture and Forestry, Tokyo, 1991. vol. 3 No.3, p. 11.

by the Hungarian Workers Party (that is by the communists) such a tactics that within its land program have to promise a certain piece land for every claimants who are willing to promote the communists by their votes. This misleading scheme could easily disguise that economically the distribution of land fund to dwarf-holdings, as improper land allotment for landless people, inevitably will reproduce the unviable small-scale minifundia, on the other hand politically this step directly leads to violent collectivization against the peasantry and the society.

This way the Land Reform in 1945 totally set aside the requirements of rational land utilization and instead of establishment the family farming by viable measured small- and medium-scale farms, that created an unviable system of dwarf-holdings. Although the Reform covered 35% of the country's acreage, the 650,000 allotted families received no more land than 3 ha in average. Almost 80% of the farms disposed of lands smaller than 6 ha and the share of farms larger than 30 ha did not even amounted to 1%. In addition to, the hidden strategy of Stalinist typed collectivization built on kolkhoz model rather soon has come to light. Just after fulfilling the Reform the Communist Party easily could argue in favour of that the minifundia are incapable for intensive farming, the state cannot supply them with the necessary means of production and with capital, so these are to be reorganized into socialist large-scale cooperatives.

This land structure was the economic base of violent collectivization between 1950 and 1960 which as a final result has forced nearly 1 million peasants to enter into about 4,000 farmers' co-ops, depriving them of their private land property and individual farming, autonomy of existence as well creating the irrationally over-centralized and over-concentrated socialist mega-farms.

Among the numerous troubles in functioning of the so-called socialist land tenure system a mention must be made on the lack of real proprietors, about the Taylorian typed labour organization and the hierarchic enterprise structure of large-scale farming which inevitably involved the consequences of inefficiency as well irrational utilization of lands. E.g. between 1945 and 1990 the agriculture has lost an acreage of one million ha. It has been proved that, among the reasons of such a large losses, there had a decisive role of irrational industrialization and the waste of soils by large-scale land-users. However, these harmful tendencies were strongly increased by the repeatedly forced collectivization and recentralization. Namely, the party state compelled the small farmers to organize co-ops also in such regions which respecting its endowments were quite unfit for large-scale farming. (For example, wheat and other crop cultivation in mountainous fields.)

In 1989 on the surface of land relations there existed three sectors of ownership, e.g. the state's, the cooperative's and the private's one. The 16, 1% of farmlands (that is 0, 9 million ha were owned by the state and were cultivated by 130 state farms. The 75, 6% of lands (that is 5,5 million ha) were owned and used by 1245 co-ops, out of which 3,5 million ha belonged to common property and 2 million ha were owned by co-op members privately. Finally, the 8, 3% of the land fund (that is 0,9 million ha) was owned by private persons and was utilized as household plot or auxiliary small farm. As for the land use of private sector, the cultivation of 534,ooo ha acreage was carried out on 1,4 million small farms most of them did not have more but a half hectare's piece of land, in average 0,62 ha. Regarding the land use structure, 85% of the whole area was used by approximately 1500 big farms. The average size of state farms made out about 7600 ha and such farms employed about 860 workers in average. In case of co-ops the average farm size was 3800 ha where about 380 persons were employed. The sizes of large-scale farming in practice executed the ruling economic philosophy by which 'the larger the size, the more socialistic the enterprise.'[4]

4 The *average farm size* of co-operatives between 1960 and 1987 has grown from 790 ha to 4,061 ha, totally by 514 %. During the same period of time the average farm size of state farms has increased from 2,735 ha to 6,949 ha, altogether by 254 %. (Endre TANKA: Market- economic Land Reform in Hungarian Agriculture. Association for International Cooperation of Agriculture and Forestry, Tokyo, 1991. vol. 3 No.3, p. 15)

2. The legal technique of partial compensation

During the period of socialism Hungarian land tenure was similar in its main features to that of other COMECON countries, although it had some distinctive marks being assured its unique character. Undoubtedly, the supremacy of collective property and the enormous concentration of large-scale farms were common components of the agrarian structure of most pre-reform CEEC-s. This system destroyed private land ownership and deprived farmers of the possibility to acquire land. Compared with other CEEC-s, our land tenure structure had two distinctive peculiarities. One of them is the lack of ethnical issues. The Hungarian land policy did not face any political conflict of ethnicity during the period of pre- collectivization or after that.

The second feature was the illegal institution of common cooperative land property. This was quite unknown in other COMECON countries. In these states the legal procedure adopted for mass collectivization to provide co-ops with a title of common land use which formally maintained the private land ownership of the members of co-ops. This was not the case in Hungary where the Act IV of 1967 established a system of cooperative land property. Under this law, all lands used by the co-op were compulsorily transferred to it. Co-ops practically acquired the ownership of land almost free of charge. No compensation was paid to the landowner unless he (or she) was willing to enter the co-op within a prescribed period of time. (Also in the latter case the compensation in favour of co-op member was restricted to a symbolic land rent.)

However, this Act was unlawful because it drastically violated the regulations of the Constitution of Hungary, e.g. Act XX of 1949. Even under this 'Stalinist type' Constitution, the state was obliged to ensure farmers' right concerning private land ownership, similarly the ownership of assets earned by work and the right of free disposal in case of inheritance.

This infringement of Constitution could have been remedied after the change of government in course of post 1989 legal norm control exerted by the Court of Constitution. However, land policy decision-makers failed, for obvious reasons, to initiate such a legal remedy. Namely, the constitutional cancellation of co-operative land ownership would have required the restitution of landownership in kind at least 3,400,000 ha used and owned illegally by co-operatives since 1967.[5] Since this area amounted to one-third of the total land fund, this remedy would have destroyed the whole concept of the planned privatization of landownership which rejected both the restitution of farmland to its former owners and land distribution to landless farm workers.

The post-1989 land reforms in CEEC-s were generally oriented to Western European values and strove for the introduction of land market economy by providing the identity of land use and land ownership for natural persons in the form of family farms. Accordingly, the restitution in kind received priority consideration and the land was restituted to former owners or their descendants. In Albania former owners were compensated for the non-restitution of land, while in other countries farm employees were compensated when the land was restituted to former owners. As a result of political debates has emerged two value principal considered acceptable by the society. One of them was the re-privatization or the so-called historical

5 In 1989 the *5, 5 million ha land fund of co- ops* in legal terms consisted of *three different forms of ownership*. The 3, 2 % of them was owned by the state, 34, 6 % of them was owned by the co-op members privately but was used by the co-ops commonly and the 62,2 % of them was owned by the co-ops collectively. This latter area amounted to 3,400,000 ha. Furthermore, due to manpower changes in generations of co-op members, in 1989 600,000 of them were landless workers because they entered the co-operatives without bringing in land ownership. In this relation the landless strata of co-op members amounted to about 80 %. (Endre TANKA: Market- economic Land Reform in Hungarian Agriculture. Association for International Cooperation of Agriculture and Forestry, Tokyo, 1991. vol. 3 No.3, p.19.)

compensation. This made possibly to give back lands in kind, seized before by the constrained collectivization, to their original owners or for their descendants. The other principle based on rational land use aimed at the allotment lands with a suitable size for those farming workers who were landless or owned just a plot under half ha.

Hungarian land policy rejected both principles mentioned above. Instead of implementing a civil type land reform, the government enforced land privatization that served the claims to original capital accumulation of the ruling elite and its nomenclature interests almost exclusively. This strategy meant a violent and uneconomic political dictate against the society and involved in sharp contradiction with the civil valued modernization. Namely, the denial of re – privatization has excluded again in the long historical run the organic unity of landowners and land users as natural persons, in the mean time it has conserved the domination of legal entities latifundia for the future. The partial compensation instead of establishing viable small and medium size farms in reality preserved mostly the land tenure structure of state socialism being characterized by the insolvable conflicts between large- scale and small- scale farms. Such a land privatization obviously neglects the benefits arising from the entrepreneurship based on family labour power and gives up the driving force of individual ownership based on personal land use which is indispensable means in the process of bourgeois civilization.

The privileged elite by the economic and legal regulators was able to obtain collectively owned land and other public assets without cadastral limits and at a minimum price. Moreover, these transactions, illegal or not, had to be legalized by guarantees of the new Civil Constitution. The legal technique of partial compensation were apt to serve the interests of the elite in the following manner:

Firstly, partial restitution eliminated the land market. Between 1990 and 1994 the purchasers were allowed to buy farmland at an average price of 10,000 HUF/ha, which can be considered a symbolic low price. As the privatization of land proved to be a long lasting process, no land market could develop in this period. Legally the original accumulation of land capital in favour of ruling elite made possible the Compensation Act and the Act on the Rearrangement of Co-operatives. E.g. these laws ensured the spontaneous (that is not state controlled) privatization for the management of state enterprises and that of the co-ops. While the public sector collapsed, the elite possessing capital and compensation vouchers purchased public assets at a low price and obtained farms became bankrupt or liquidated. The basic institution of this process became the Act XIX of 1989 which opened the unlimited land market since July 1,1989. Under this law the private persons and their companies could purchase land owned by state or co-ops easily. This created an opportunity for the elite, until the first Compensation Act in 1990 didn't come into force, to obtain parts of state farms and co-operatives of high value and also those assets which could be operated independently.

Secondly, the legal regulations had to ensure on one hand that land should not be obtained by the people from whom the party state sized them illegally. On the other hand it had to guarantee that the ruling elite could acquire lands without cadastral limits and at a minimal price. The first claim was exerted by the system of partial compensation and by the technicality of compensation bonds. As the Court of Constitution had refused the post legal control concerning the unlawful Act IV of 1967, the legislation denied the land restitution in kind and subordinated the land privatization to general rules of the historical compensation. This legal concept dealt with the unlawful annihilation of private land ownership had been exerted by party state in the same way of dealing with other type injuries of private ownership which were unfair but were not unlawful.[6] This institution prevented the injured party from

6 See the Act XXV of Partial Compensation titled 'in the interests of re-settling of ownership's relations Act made about the partial indemnification of *damages caused unjustly* (not illegally!) in the citizen's properties by the state after 8th of June, 1949.'

asking back his seized land in kind or in market value, but it made just a title for getting some compensation bonds (as a partial, in reality a symbolic indemnification) of limited nominal value. Since these bonds were transferable to anyone, the bidding for lands created possibilities for speculators and unauthorized people to buy up bonds at a symbolic low price and also allowed them to attend the auctions in order to acquire ownership of land in sufficient quantity and quality almost free of charge.[7] Undeniably, the partial compensation has opened a roundabout way for the ruling elite, especially by making use of land -jobbers and other agents, to acquire landownership monopoly expelling from this possibility the legal beneficiaries in spite of the basic fact that under the law they themselves have not been entitled to any compensation at all.

On the other hand the modified Act LV of 1994 on Arable Land (hereinafter referred as Land Act) abolished size limits in the case of auctioned land. The law stated that the ownership of land obtained by auction has to be considered as an exception to any legal limits on the purchase of property, also including lands exceeding 300 ha acquired by a person. (Section 4.) Practically, this rule made it possible for the possessor of compensation bonds to buy up farmlands to the highest optional degree, that is why the enlargement of size for large-scale farming legally has become unrestricted, more exactly it was subjected just to supply and demand of available lands as well to liquid capital of the purchaser.

Secondly, the partial compensation in reality deprived the great majority of agricultural workers entitled to indemnification of proper land restitution in kind. One decisive stratum of this population were landless labourers representing about 40% coop- members and employees, as well even higher percentage of state farm workers. The law assured an employee a plot with the value of 20 Gold Crown, while in case of a coop- member this value amounted to 30 Gold Crown. (These value- limits permit to acquire for the beneficiaries utmost 0,5–1,5 ha land.) This provision involved the creation of non- viable minifundia with a size of half or maximum one and a half ha providing thus an area of the same size as that of pre- 1989 by household plots and salary plots. Moreover, the entitled beneficiaries for 16 years neither can get their allotment in kind at all because their land fund in legal terms has become a constituent of the so- called proportional share of co-op land property which informally has been frozen in order to serve the original accumulation of land capital in favour of foreigners and internal elite.

Here a mention must be made on the hard issue of proportional share owners' property possessed and utilized by the co-operatives. This highly complicated legal category covers 3, 6 million ha of lands which indisputably are owned by the ex- members of co-ops. The constitutional defence and guarantees of private ownership undeniably claim to reinstatement of that property in kind for the shareowner or his (her) descendant. However, in spite of fifteen-fold modification on this matter of the Act II of 1993 rendered to solve the conflict, the state and its official bureaucracy has failed to fulfil this requirement, against the grave infringement of Constitution by such a negligence.

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7 This chance was fulfilled by the hidden institution in course of *bid by the agreement system.* E.g. for lack of higher offers the law granted the land to persons who attended the auction at 500 HUF/ Gold Crown as upset price. According to land quality, the average land value of different parcels in Hungary makes out 20 Gold Crown/ha. So, in bidding system one ha land at the auction was available for 10,000 – 20,000 HUF in the case when no entitled person was willing to offer for the plot more than 500 HUF/ Gold Crown. Since everyone was interested in obtaining land for the lowest price, the mechanism of bid by agreement formed rather soon, when the participants agreed with each other informally in advance regarding the auctioned land. As anyone could buy in the market compensation bonds, so speculators of ruling elite obtained cheap land of good quality and in the claimed size across their agents who attended and informally directed the bidding process.

Theoretically, the shareowners as individual proprietors of their land used by the co-operative, are by law entitled to the restitution of their entire piece of land in case they claim back their defined proportion of the land property in kind. However, in reality their property share for more decades has been defined and registered only by its Golden Crown value. In addition to, as the given piece of land within the elapsed time was utilized for miscellaneous and often changing purposes, occasionally it was exchanged by legal contracts to other assets, by now it became unknown its original place and location. This proportional share property belongs to the exclusive land fund of co-operative and freely allowed to be utilized according to its interests and disposals, mostly in form of long term leasehold, particularly ensured for foreign companies and capital investors.

Admittedly, this institute in practice has become perhaps the most important means for ensuring the original accumulation of land capital and land ownership in favour of global capital investors and land – jobbers by the Land Act. E.g. the first place in order of rank assured for the leaseholder by that law in case of applying the pre – emptive rights has established a legal guarantee also for foreigners to purchase even the proportional shareowners' plots prior to any other claimants. (Section 10.) Another root of the trouble is that the land fund of the co-operatives has been used for other purposes. For this reason it has often become impossible to restitute a physical plot of land to the shareowner who wishes to establish an independent holding as a private farmer. It goes without saying that the shareowner being entirely defenceless, for 16 years he cannot get back the lost property, thus there it is quite easy for the foreign lessee to acquire his land at minimal rent and to define the term of leasehold by contract as a possibly long duration in order to guarantee the title to acquiring land ownership by the legal pre-emptive right. Consequently, the legal quibbles made it possible that even in 2005 1,5 million ha area out of the 3,6 million ha acreage of co-operative's proportional share ownership legally not yet settled and the entitled owners regarding the entire land fund cannot hope either in future to receive back their seized property at any time.

Thirdly, the legal methods for transformation of co-ops also precluded the individual farmers from acquiring cheap lands by bidding system. E.g. the privatization of land and that of other co-operative property was sharply separated by the Act on Transformation issued in 1990.[8] Therefore it was not possible to get a separated property asset and land altogether from the co-operative either till the end of December 1992. The artificial separation of land from the production means by such a legal tactics prevented many people, who might have had the chance, to become private farmers.

Moreover, within that process the mass media directed in favour of ruling large-scale lobby (represented by the Corporation of Agricultural Co-operatives) was successful to preserve both co-operative property and members together.[9] This value saving for the ruling elite was successful: more than 90% of the co-operatives transformed only formally, all those remained unchanged productive typed co-op forms and kept the 235 billion HUF as the value of common property for the benefit of the management.

8 Co-operative members and employees could ask for land only on the ground of the Compensation Act of which fulfilment those days was just a promise and uncertain. Similarly, the Act III of 1993, as special title for land property by the claimants for proportional share – ownership, postponed its execution and hampered the restitution of lost landownership for its owner.

9 The misleading propaganda called upon coop-members to hamper the transformation of co-operatives by false slogans: 'dispersing of the co-operatives should be prevented, since those ensure work and guarantees for its members.' This political manoeuvre rather soon came to light reflecting that actually it has exerted just the interests of ruling elite for the private acquisition of capital and other agricultural assets. For that very reason had to be excluded the distribution of common co-operative property among the shareowner members.

In January 1, 1993 two regulations came into force which in the mean time deprived many hundred thousand of co-operative members both of their means of production, of functioning property, as well jobs and thus made their livelihood impossible. According to first regulation after January 1, 1993 the co-op members who leave the co-operative must not carry out any share in business from the co-operative. Under the second regulation the obligation of co-operative to assure employment for its members has been ceased and it may employ anyone just according to its own interests and possibilities. Consequently, from 1993 many hundred thousand of full-time workers as co-op members lost their jobs and property, have become unemployment and poverty stricken, moreover they often had to leave even the agriculture for ever.[10]

Finally, between 1988 and 1993 out of the total of 1,080,000 full-time agricultural workers 730,000 persons had to leave the agriculture because they at the same time lost their jobs, common property and livelihood. This ratio of population considering the concerned households and family members approximately amounts to two million people. In addition to, the drastic and dramatic decrease of agricultural manpower inevitably is going on, thus its ratio within ten years already reached the 85% of pre-reform quantity and by 2002 the number of full-time workers employed in agriculture was no more than 227,000 people. After the access to EU that crisis even more is on sharpening by its outrageous consequences smitten not only the agriculture but indirectly the whole Hungarian society. According to official declarations of the government, due to rearrangement and modernization of the present agricultural structures, that is building up the final construction of the dominant large-scale farming system based on wage-work, our agriculture in future will support at the very most 80,000- 100,000 full-time workers. Obviously, the great majority of[11] agricultural producers who unexpectedly became poverty stricken and could not assure a minimum subsistence level for their families, were being deprived of their means of existence and were virtually excluded from the process of land privatization.

Admittedly, there are other essential issues in the process of land privatization which have actually prevented the agrarian population from obtaining land as well shifting to individual (small- scale) farming and competitive commodity production. Unfortunately, the topics of this paper cannot afford analysis covering all the constituents in details. Anyhow, it is worthy to note that during the whole period of privatization the relative shortage of farmland increased, because land compensation proved to be a long lasting process in which creation of the legal titles for authorized persons took about 7 to 8 years. For this reason, those who got a title for a compensation card at a later stage and could not attend the first stage of auctions, were practically deprived of the possibility of obtaining proper parcels since the lands of good quality sold out rather quickly.

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10 The fact is that the outsider co-op owner hasn't got right to dispose over the co-operative's property at all. Due to the annual balance (that is income calculation) of the co-operative such an outsider ex-member is deprived of the dividend, so the share in business for the outsider owner means just a symbolic property. The management of co-op from the very beginning has strongly striven for acquiring the common property, namely buying up the shares in business for a small proportion of the lowest nominal price, deeply under its market value. In addition to all this, the state's budget continuously, even these days (in 2005) has been providing those transactions by financial aids at the expense of taxpayer citizens.

11 From the viewpoint of social modernization it must be emphasized that the constrained and continuous cut of agricultural manpower in reality means the *liquidation of Hungarian peasantry* subdued by regulators of original accumulation of capital in favour of the ruling elite in order to be established the new large-scale farming system based on exploited wage-work. Hungarian sociologists have recognized soon from the 90's that this liquidation of a basic social class (and that of its different strata) historically bears a close resemblance to the well-known clearing of estates principle applied in England of mid-ages against the peasantry.

In legal sense it became more than a paradox, may say rather a self-contradiction of regulation, that the Compensation Act seemingly created guarantees in order to ensure and stabilize the acquired landownership in favour of entitled persons by law. Simultaneously, these rules in practice have served not the authorized persons to compensation but the unauthorized acquirers of land property. E.g. the right of land acquisition was legally due only to those people who were obliged to use that land themselves for agricultural production and not to withdraw it from cultivation, at least in the following five years. Moreover, authorized people were allowed to enter their right of property in the land register without any charge. The landownership fell under restraint of alienation and encumbrances for five years. Consequently, the lands obtained by the first Compensation Act became legally transferable only in 1996.

In reality, this regulation did not defend the entitled persons' interests either in the slightest degree due to legal quality of compensation bonds being those transferable at any time to anyone. Actually, as land-jobbers, other speculators and the commissioned agents of ruling elite acquired at the auctions the landownership, all the mentioned institutions have reinforced their proprietor's position, while the ban on alienation and encumbrances regarding the newly acquired land property could easily be dodged by the informal pocket contracts.

How can be summarized briefly the final balance of partial compensation and that of land privatization?

First, although the land privatization covered 5,8 million ha land fund of Hungary and the beneficiaries of land ownership made out at about 2 million to 2, 5 million new proprietors, only at most 15% of this population belongs to entitled persons to compensation by law who acquired landownership in kind and can utilize the land as functioning property.

The above mentioned land fund legally consisted of two different parts. On one hand the first proportion was meant to be used for partial compensation. The total area of lands acquired by compensated persons was 2,227, 804 ha laying in 703,202 land parcels and of which total value reached 40,194,507 Gold Crown. The average Gold Crown value for each ha was 18 and the area of each land plot was 3 1 ha. On the other hand the second part of land fund made out at 3, 6 million ha. This latter acreage constituted the co-operative's proportional share ownership claimed back in kind about by 1, 9 million proprietors. The average size of such parcels was 1, 5 ha. As it previously was analysed and borne out by legal facts that latter land fund virtually has been frozen in order to prevent the restitution of landownership in favour of its lawful proprietors and this way to ensure a huge land fund to the unauthorized beneficiaries for original accumulation of land capital. As for the first land fund meant for compensation out of its beneficiaries just 15% of them was entitled legally for indemnification in order to acquire land ownership, while 85% proportion of this population consisted of unauthorized speculators, land-jobbers and commissioned agents of the ruling elite.[12]

Second, the land policy regarding land privatization, in spite of obligatory undertaking and public declarations by the concerned decision makers, was not neutral at all in defining the terms of different sectors and following common values, as well considering the adverse interests of affected actors in agriculture. Conversely, the institutions established by the land policy, has often openly exerted the one sided and selfish interests of the ruling elite in order to create its land ownership monopoly and to stabilize the new typed large-scale farming system.[13]

Third, the land privatization in our country couldn't play its historical role, since it has failed to ensure a functioning landownership for a significant part of agricultural population. Its hidden but real mission became the establishment of land capital and monopoly by land use and landownership in favour of the narrow ruling elite, as a result of original accumulation of capital and agricultural assets. This objective has claimed to reorganizing the party state's large-scale faming into new typed capitalist latifundium system.

That long run purpose has strongly required on one hand the institutional denial of family model, on the other hand the drastic liquidation of farming population regarding its vital conditions, livelihood, possibilities for individual farming, chances to acquiring land property for viable measure land cultivation and, last but not least, the total extermination of its peasant's culture as well traditional value system. All these destructions are indispensable preconditions for shaping an obedient, cheap manpower as a modern slavery in order to sustain the latifundia, and profiteering based on exploited wage-work. Evidently, the new model of our agriculture has been evolving by the land privatization, in this century means a deadlock for civil modernization of society.

Fourth, the process of land privatization has clearly proved that the original accumulation of land capital and that of other assets, for example foodstuff industry, are significantly

12 This essential basic fact of land privatization was revealed already in 1994 by a *klaster analysis* made in the Institute for Agricultural Economics and Information. (Endre TANKA: A földtulajdoni és a földhasználati rendszer szerkezeti átalakulása a magyar mezőgazdaság földreformja nyomán. Agrárgazdasági Kutató Intézet, Budapest, 1994., p. 28-38.) That survey was built on a classification according to the different groups of new landowners are working in the agriculture or not. This research showed that among the 2, to 2, 5 million of new landowners, the ratio of those who possess sociological and legal background as a precondition to become a landowner is too low. E.g. the material landownership means ensuring land for cultivator farmer as a functioning property, while according to legal approach it is necessary to guarantee the right of using, possessing as well disposing of land should be ensured on a minimum level at least in order to enforce the owner's interests. By calculations in details it was justified that in general only *10 to 15 % of newly formed family farms and other agricultural entrepreneurs can be considered as a small or medium farm producing commodities.* Later on this research's statement was confirmed by an Agricultural- Economical Structure Census (István SZŰCS – Béla CSENDES – Béláné PÁLOVICS: Földbirtok-politika. A földtulajdon fejlesztésének irányai. Budapest, 1997, p. 17.) as well by the survey of State's Auditory Office.
Similarly, another sociological case study, prepared for international comparison, has revealed the *break off of the continuousness in land tenure*, as a consequence of land privatization, *traditionally practiced by individual farming families for 6 to 8 decades.* That survey signed a nation-wide trend due to consequences of legal and illegal technique of our land privatization process. E.g. in the investigated five countries of ECC the new owners of big farms (cultivating 120 to 300 ha acreage) never owned any land before the reform and they are mainly the former co-op presidents and medium level leaders of the co-op. At the same time *only 68 %* of the investigated population as *previous landowners* has land and they form a stratum of *small landowners.* In comparison with Polish and Slovak beneficiaries, the Hungarian families have more land ownership at most one ha or even smaller plots and the smaller ratio is that land ownership of 20 or more ha. (Mihály ANDOR – Tibor KUCZI – Nigel J. SWAIN: Közép-európai falvak 1990 után. In: Szociológiai Szemle No. 3-4., 1996, p. 137-140.)

13 E.g. the agricultural programme of Horn- Cabinet between 1994 and 1998 undertook ensuring living in agriculture for more than one million Hungarian families as full-time workers. Similarly, the government promised assistance for more than half million families engaged in auxiliary small- farming. According to survey data of Central Statistical Office, the number of active agricultural wage- earners decreased from 885,000 in 1989 to 298,000 in 1996. It means that the *jobs of 587,000 wage-earners ceased during seven years out of which two years belong to the four-years governing course of Horn-Cabinet.* It has been clearly justified by the figures that, in quite the contrast to declared programme and other false promises of the government, the agricultural and land policy did not ensure the employment and livelihood for one million families, none the less the part-time farming for half million families. Conversely, instead of it its cruel dictate, exerted in favour of the ruling elite to be achieved successfully its original capital and land accumulation, as a sequence has deprived more than half million agricultural workers of their jobs during about ten years. Due to that misleading policy, regarding the concerned households and family members, around *two million people became unemployed and poverty stricken.* It must be added that the regional and social policy cannot assist properly this stratum of society, because of lack of indispensable sources, either for the time being and in future.

different regarding their main features. E. g. the acquiring of industrial capital decisively by foreign investors, may need this process longer or shorter period of time, after all is restricted to a definite (mostly rather short) cycle which comes to an end by creating the monopolistic ownership of foreign capital to be ruled that sector or the whole branch of national economy. Accordingly, the privatization of Hungarian food industry has essentially been finished by 1997 as 62% of its national property was acquired by foreign capital.

As for the privatization of land and/or agricultural assets, there is not the case at all. The different process of privatization in this field derives from the basic fact that acquiring of land property by the farming legal entities and foreign capital has become excluded for a transitional time.[14] That is why the unauthorized persons to land property on one hand had to dodge the law in order to acquire landownership despite the legal prohibitions.

Such a task needs not only special legal techniques for assuring a roundabout way but also requires a long duration of time to be organized successful transactions in this matter. On the other hand the provisional ban, extended 3 to 10 years, on property acquiring by the foreigners, practically means that the process of original accumulation of land capital in Eastern Europe cannot be restricted to a single cycle as a shorter definite time but partly this process should be a long lasting one, partly it has to be continued after the access to EU by Hungary. However, there obviously is going on an essential change within the above mentioned process, which is a basic alteration regarding the beneficiaries of land capital accumulation. Namely, while in the first stage of land privatization the landownership was acquired mainly by the internal ruling elite, in the second phase of this process, under the EC legislation and due to institutions of the newly reformed CAP, first and foremost foreign capital investors and the proprietors of global agro-business will acquire the landownership, in particular excluded by their total capital value all the internal actors of the land market, among them ousted inland large-scale landowners.

III. New structure of land tenure system and farm management types

Hungary has 8,816,400 ha of cultivated land, out of which 83% is owned by individual proprietors, 10% is owned by the state, 4% is owned by economic companies and 3% is owned by co-operatives.[15] (These latest data were published in 2003.) According to land registration, the total acreage of outskirts (that is arable lands and other agricultural branches of cultivation) in 66, 7% proportion is owned by natural persons, while 33,3% of that is owned by legal entities. Out of the latter category the state is the most dominant proprietor by its 24, 8% share.

The distribution of land use between natural persons and legal entities essentially differs from that of landownership. Accordingly, the 51, 7% of cultivated land (3,774,000 ha) is used by individual farms, 32, 2% of that land (2,346,000 ha) is utilized by economic companies and 16,1% of that (1,175,000 ha) is used by co-ops.[16]

14 Under the Land Act 'subject to the exceptions set out in Subsection (2), *non-resident natural persons and legal entities may not acquire title of ownership of arable land.*' (Section 7.)

15 Norbert POTORI - Gábor UDOVECZ: Az EU-csatlakozás várható hatásai a magyar mezőgazdaságban 2006- ig. In: Agrárgazdasági Tanulmányok No. 7, 2004. p. 53.

16 Iván OROS: A birtokszerkezet Magyarországon. Statisztikai Szemle No. 7 In: Gazdasági Tallózó, July of 2002, p. 64.

It must be added that these official data of statistics seem to be rather unreliable, moreover misleading for conceptual reason. I.e. it is a nationwide experience has been revealed for years by the sociology that the individual farming and associated one cannot be separated economically from each other in practice. It is often impossible because a natural person, as private agricultural entrepreneur many times operates a large-scale homestead by his employees and commissioned management in every respect of farming (production, processing, marketing etc.). The private investor has to establish such a model of large-scale enterprise in order to assure the benefits and advantages granted by law (especially taxation and financing) to individual entrepreneurs. On the other hand, the utilization of proportional shareowner's land cultivated by companies with limited liability (LTD-s) and co-operatives in land registration similarly appear as individual holding, though in reality that constitutes the big field of large-scale farming. This method with its other advantages makes possible for the legal person, as large-scale cultivator, to dodge the law which prohibits increasing of upper limit of leasehold prescribed by regulations. Consequently, the individual farming shown by statistics even in decisive proportion could be in practice an actual large-scale cultivation based on associated and organized manpower for optimal production.

Anyhow, the officially 48% proportion of large-scale farming in itself reveals the disruption of organic unity regarding the relation between landownership and land use. Similarly, the increased role of leasehold seems to be also a basic consequence of the above mentioned fact. In Hungary, since 53% of the 5,8 million ha land fund is cultivated by legal entities on a lease basis, the land lease market plays an outstanding role. This proportion in case of arable land makes out at 63,5%. The 93% of the lands used by co-operatives on a title of leasehold, while this proportion in case of firms not having legal entity makes out at 85% and at legal persons reaches 60%. The lack of land capital in case of private farming strongly prevents restructuring the reasonable farm size. That is why the typical small-scale farmer is not only a landowner but he is a lessee and lesser at the same time too. In case of that his area is not enough for farming, he can increase it only by land leasing, since available lands with suitable price are not to be bought anymore. For this reason the owners are often enforced to lease out their lands, because of lack of own production means and that of capital. This economic background reflects the fact that in case of individual farmers and private entrepreneurs, even being those full-time commodity producers, the proportion of leased land fund makes out at 55%.[17]

Surprisingly, the Hungarian statistical data published for international comparison simply made disappeared the large-scale sized farming in our agrarian structure. E.g. both by data of Central Statistical Office and Eurostat we are informed on that in Hungary the latifundium system is unknown being the average size of homesteads just 6,7 ha. Accordingly, this average size is exceedingly small and quite unfit for large-scale cultivation. At the same time this unrealistic low farm size not only suggests but directly explains (makes it understandable) that the Hungarian proportion compared to average sizes that of EU 15 countries, we can find even smaller average sizes only in Greece (4,4 ha) and in Italy (6,1 ha). Simultaneously, it is proved by this comparison that the Hungarian average farm size is far behind that of EU average being that 18, 4 ha.[18]

How would it be possible? Perhaps these data were unauthentic? Not, in the least. The simple explanation for this trick (that is juggle of statistics) lies just in the unfair method applied for comparison. E.g. the Hungarian data on this issue on one hand are deliberately restricted to the mixed categories of individual and associated farming, on the other hand those simply omitted the farm size categories above 100 ha, so fully put aside the sizes of large-scale farms. Although, it is undeniable that even the average size of Hungarian large-scale farms

17 Norbert POTORI – Gábor UDOVECZ: Az EU-csatlakozás várható hatásai a magyar mezőgazdaságban 2006- ig. In: Agrárgazdasági Tanulmányok No. 7, 2004. p. 56.

18 Norbert POTORI – Gábor UDOVECZ: Az EU-csatlakozás várható hatásai a magyar mezőgazdaságban 2006- ig. In: Agrárgazdasági Tanulmányok No. 7, 2004. p. 57.

makes out at 503 ha. By the way the latter artificial reduction of average farm size also can be considered a trick of statistics, since some years ago it was amounted to 1800 ha. This seemingly rapid decrease in farm size in reality doesn't mean an actual reduction in farming acreage, but it is due to changed calculation which among the different types of legal land users has omitted the forest companies as those often possess 10,000 ha to 25,000 ha territories. This officially published farm size more than twenty five- fold that of EU average farm size (18 4 ha.)[19]. Otherwise, in comparative analyses of Western and East European farm sizes we must face the danger of comparing 'apples and oranges' due to basic divergence that the farm size by seven state members of EU- 15 is strictly limited to small and medium acreage under the law, while in Hungarian agriculture it is freely increasable, being entirely unrestricted.

Actually, according to authentic figures of CSO data on the details, the 59, 5% out of total land fund is cultivated by 0,5% out of the total farms. The farm size of 0, 1% of total farms exceed 1,000 ha acreage. As for the regional distribution of large-scale farming its average size is characterized by measures of 500 ha to 10,000 – 20,000 ha. Nowadays it has rather got accustomed the situation in which the whole outskirt of the settlement belongs to just a single landowner or capital investor to be operated it as latifundium.

The over-centralized and dominant large-scale farming, the lack of medium- size farms, as well the hundreds of thousands of unviable dwarf farms in reality constitute an essential part of the hard historical heritage left for our region by party state' socialism.

Analysing the different international models of land concentration and types of farm sizes, Zvi Lerman, a leading economist of World Bank, has pointed out the main coherence in this field. Accordingly, the organic development of farming structures has evolved in the United States, in Canada and also in EU 15 the medium farm sizes which occupy 35% – to 40% of the cultivated land. The 60% of land fund there has been distributed, in most cases evenly, between large- scale and small-scale farms. (Here must be stressed that the latifundium with its 10,000 ha to 20 000 or 30, 000 ha acreage does not exist either in USA or Canada, not to mention of the EU15. E.g. in USA the largest farm-size in average does not exceed 500 ha in case of maize cultivation and 200 ha in case of corn plantation.) It is not the case in ECC-s where remained the extreme divergence between large-scale mega- farms and the tiny parcels of dwarf holdings.

Professor Lerman has emphasized: ' … in CEE transition economies four countries – Bulgaria, Hungary, Czech Republic, and Slovakia – sharply deviates from the market pattern. Here 90% of farming units (the small household plots and family farms) control less than 10% of land, and the top 10% of farming units – the largest collective and corporate farms – control about 90% of land. (It must be added: in case of Hungary, by Lerman's calculation, 10% of all farming units, that is large-scale holdings, utilize 92% of the total land fund, while 90% of all the farms, namely the small-scale holdings possess just 8% of the total land fund. – Remark by E. TANKA) This pattern is a manifestation of a sharply dual farm structure, with millions or hundreds of thousands of very small farms at the bottom end of the size scale and thousand or merely hundreds of very large farms at the top end. The sharply dual farm structure was a dominant feature of the Soviet model of agriculture in the pre-transition era, with an even more dramatic concentration of land than what we observe today: 98% of Soviet farms (the millions of small household plots in the individual sector) controlled less, than 2% of land, while 2% of the largest farm enterprises controlled 98% of land.'[20]

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19 See: Endre TANKA: A magyar birtokpolitika stratégiai jövőképe uniós tagságunk első évtizedében. In: Valóság, vol. XLVIII. (2005) No. 4 p. 5.

20 Zvi LERMAN: Status of Land Reform and Farm Restructuring in Central and Eastern Europe: A regional Overview " In: Structural Change in the Farming Sectors in Central and Eastern Europe, World Bank Technical Paper No. 465, Washington, 2000. (ed. by Cs. CSAKI – Z. LERMAN) p. 15.

The gradual concentration of land and farm holdings seems to be an accelerating process in recent years. E.g. within 3 years (between 2001 and 2003) the number of farming units has increased from 5,392 to 6,891, while the proportion of individual farms has decreased by 20% (from 960,000 to 765,000). Evidently, the concentration in both sectors is carried out in favour of large-scale latifundia. This trend has clearly focused by the fact that from 2003 the total land fund of individual farms in 75% proportion is cultivated only by 1, 6% of individual farms, that is by 12,500 homesteads.

The land tenure structure of private farmers is characterized by a decisive share of dwarf holdings and the extensive fragmentation of parcels. By the latest figures the different lands for cultivation in this sector are scattered about in 7, 7 million plots. As a statistical micro-census in 1997 has stated, there were 1, 8 million private farms of which 1,026,000 were smaller than 0,5 ha, 403,200 were smaller than one ha and 302,400 households owned farms of a size between 1 and 10 ha. In the group of private farmers with holdings smaller than one ha (which constituted 79, 4% of all private farm households) 57% of them owned only 0, 2 ha land. This proportion and its figures give special information about the basic failure of misled land privatization. Regarding the total number of landowners (that is 1,8 million people) nearly 80% of them could obtain no larger land by privatization as it was ensured before the change of regime by co-op household plots and salary allotments of state farms.

Historically, it is instructive comparing the individual farm structure of 1997 with that of 1947. It is striking that in the case of dwarf and medium size holdings the present size of holdings is considerably smaller today. E.g. in 1947 the number of holdings with 5 ha or less was 991,803 and represented 60% of the holdings, while in 1997 the number of farms under 1 ha was 978,264 which was 82, 4% of all farms.

As for the new tendencies in restructuring of individual farm sizes, it is observed that its main proportions essentially cannot shift to viable units, either from the 90s. According to latest data 94, 7% of the farms has a size acreage under 10 ha cultivating 35% of total land fund. 4, 6% of the farms has a homestead size between 10 ha to 50 ha which makes out 34, 4% of the total land fund. The next group of farms has a homestead size 50 ha to 100 ha covering 12% of the total land fund. This group constitutes 0, 5% of all farms. 0, 2% of all the farms has a homestead size of 100 ha to 300 ha, their acreage covers 13, 4% of the total land fund. Finally, just 249 farms has an acreage over 300 ha covering by this group 4,5% of the total land fund.[21]

Undoubtedly, the farm structure of private farming is overwhelmed by the distressing predominance of dwarf holdings.

After 1989 also in our agriculture has evolved the diversity of market-oriented large farm structures, as new corporate farming models, registered like joint-stock societies, limited-liability partnership, and private companies. The new large farms became profit-motivated corporations with freedom to adjust their labour force to operating needs and to reward labour according to performance.

In the transitional economy the company with limited liability (LTD) has become a dominant type of large farms. As it is proved by statistics, LTD-s have in recent years increased their cultivated area more than twofold as compared with co-operatives. LTD-s intend to follow the requirements of economic growth, to form the optimal combination of land, capital and labour as factors of production in order to realize maximum profit. On the other hand, they reject the basic obligations of agriculture and that of CAP evoked by global and sustainable development, such as ensuring suitable living conditions for local inhabitants, providing economic basis for the self-organization of local communities, supporting employment and other means for maintaining viable rural communities and local agricultural population.

Moreover, not only are LTD-s unilaterally profit-oriented, but due to the economic crisis and the constraint of competition, the production oriented co-operatives also seem to have become a hidden

corporation of capital which have given up their social functions and the solidarity principle of the co-op members. A widespread model in agriculture is the holding-type co-operative. Here the management of the property appears only formally on the legal surface, while the actual farming decisions and business are made by the different LTD-s of the co-operative, whose business share holders are mostly outsider investors. Similarly, there is a new tendency to conduct large-scale farming on the basis of private ownership. Private persons who own and lease 300 to 500 ha, do not work as farmers but organize the different branches of cultivation by wage-earners. For this reason these dominant new large-scale types of land tenure are approaching a model of East-European latifundium system based on wage labour. After the access to EU by Hungary rather soon came to light that this industrialized latifundium, as a destroyer both of human society and natural environment, actually has meant for achieving the agricultural and foodstuff industrial dominance of GMO production. Undeniably, regarding the chance on modernization, the decisive preponderance and antisocial role of large-scale latifundium seems to be the most retrograde element of our land tenure structure.

IV. Substantial features of legislation on land market

Analysing the process and consequences of land privatization, it could clearly be observed that beside the economic regulations also the land law played an outstanding role in shifting from party state's farming model to a market-economic one. Hence, by a special study ought to be revealed the history of legal institutions in details of which have evolved the landownership and land use system in our agriculture harmonised with the requirements of EU legislation. Out of the complexity of this highly compound and subtle topic now we can deal only with some basic institutions related to acquis communautaire, on the other hand in view of special regulation by Hungarian land law.

The effective EC legislation has evolved two very opposite institutions to stipulate the member state's sovereignty in the field of land relations. On one hand the Article 295 (ex Art. 222) of the Treaty of Rome (that is Consolidated Version of the Treaty [22] Establishing the European Community) has stated that 'this Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.' On the other hand the Article 56 (ex Art.73b) has declared that 'within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.'

The latter regulation was amended by a substantial rule. E.g. '1. The provisions of Article 56 shall be without prejudice to the application to third countries any restrictions which exist on 31 December 1993 under national or Community Law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets. In respect of restrictions existing under national law in Estonia and Hungary, the relevant date shall be 31 December 1999. '

2. Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of this Treaty, the Council may, acting by a qualified majority on a proposal from the Constitution, adopt measures on the movement of capital to or from third countries involving direct investments – including investment in real estate – establishment, the provision of financial

21 Norbert POTORI - Gábor UDOVECZ: Az EU-csatlakozás várható hatásai a magyar mezőgazdaságban 2006- ig. In: Agrárgazdasági Tanulmányok No. 7, 2004. p. 57.

22 See in Blackstone's EC Legislation 2004-2005 (15th Edition by Nigel FOSTER), Oxford Univ. Press p. 1-108.

services or the admission of securities to capital markets. Unanimity shall be required for measures under this paragraph which constitute a step back in Community law as regards the liberalisation of the movement of capital to or from third countries.' (Article 57, ex Art. 73c)

How should be comment these pre-cited rules concerning to sovereignty and national jurisdiction of member states as regards the regulation of landownership and land use within its state's territory ? Practically, the Article 295 of Treaty excludes the competence of the Union from the area of system of property ownership in member states, covering also their land relations, irrespective of the different functions of the concerned land. (Arable land, real estate etc.) [23] In legal terms in this field has constitutionally been guaranteed the integral and intangible national sovereignty for member states. Actually, this institution was established by the founders of EC but not in favour of all consecutive member states. Although, this rule of Treaty by now is effective too, but the Eastern enlargement of EU has denied it from the newcomer EEC-s. It is not the case for Malta which joined to EU together and at the same time with EEC-s, however could insist to reservation of Article 295 of Treaty, in favour of own sovereignty. Accordingly, Malta which has 391,000 inhabitants and just 31,600 ha territory, even as a very small nation was able to defend its state' s sovereignty opposite to EC law, so became entitled constitutionally to prohibit acquiring landownership by foreigners on the state's territory.

How about this issue in case of other new members of EU? The European Court of Justice and the European Commission qualified land for new members as capital, therefore took the issue of land out of the agriculture package during the accession negotiations putting it in the Chapter 4 of 'capital and payments'. Accordingly, as any restriction on the free movement of capital is prohibited both between the members and toward third countries, also the land as capital requires its unrestricted, free transferability (move-ability) in the land market in favour of acquirer of landownership.

The announcement of the EU Commission (97/C/220/06.) completes the interpretation of Article 56, according to which all discriminative and non- discriminative measures are prohibited connected to the free movement of capital (that is also for land mobilization). This is a qualitative surplus requirement for the new members assuring privileges in favour of the global capital investors. E.g. the EU-15 members are to be guaranteed only a national treatment for the foreign EU citizens and firms when they wish to settle down and acquire landownership in abroad,that is on the territory of another EU member state. (Legally in this case the land to be acquired does not qualify as capital, thus the transaction fells under Article 295 of Treaty, as well the general rules of settlement.) In contrast, the new members, save for Malta, must warrant the international prerogative, the 'greatest favor' (as an extraordinary treatment which is discriminative against the national citizens) for the free movement of capital, actually for the entitled beneficiaries of property acquiring.

Here must be emphasized the special and outstanding role of the basic principle as regards 'free movement of capital'. Under the Constitution 'the free movement of persons, services, goods and capital, and freedom of establishment shall be guaranteed within and by the Union, in accordance with the provisions of the Constitution.' (Article 1-4) However, these so-called 'four freedoms' are not equal ranking categories at all, since the need for capital utilization freely all walks of life both practically and legally precedes the claims to free movement of persons, services and goods. Accordingly, the Article 56 of Treaty stipulates the free movement of capital as a universal and a prime value of acquis which points far beyond the operation of land market.

Constitutionally, the prerogative of capital has become institutionalized by the prescription of Treaty as follows: 'whilst endeavouring to achieve the objective of free movement of capital…to the greatest extent possible…the Council may…adopt measures on the movement of capital to or from third countries /involving direct investment – including investment in real estate-

23 This regulation is similar to that of EU Constitution (e.g. Treaty Establishing a Constitution for Europe) under which Article I-12 stipulates the areas of *exclusive competence of the Union*, while Article I-13 declares the *areas of shared competence* between the Union and the Member States.

establishment/ without prejudice to the other Chapters of this Treaty… (Article 57/2) This institution reveals a sharp inconsistency among the 'four freedoms /liberties/', because the superiority of capital has openly subordinated all the common policies of acquis (CAP, environment, regional policy, rural development etc.) under the requirements of the free movement of capital, dictated by the profit-motivated interests of global capital investors.

Hungary joining to EU in reality resigned its sovereignty in respect of free disposal over his state's territory and that of national regulation of landownership and land use system. This basic fact clearly proved also in legal terms, e.g. by the EU Constitution and the effective Treaty of Rome. First, the Constitution stipulates the Union law in the following manner: '

The Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States.' (Article 1-5a)[24] Second, the prior and compulsory act in this matter is the Article 56 of Treaty of Rome which excluded the member state' sovereignty out of regulation the land market if it would hurt any interest of unrestricted capital flow. That is why in Hungary the land constitutes only a physical and geomorphologic part of state' sovereignty, as well that of territory, but it is not the case in legal terms, being the state deprived of its sovereignty. For that very reason the state may not (moreover must not) practice either disposal and self-determination in the regulation of ownership and land use or on behalf of public interest (public power), because the state has to submit it to the profit needs and coming into power of the free movement of capital. Accordingly, in our land relations the Union law fiercely hampers the possibilities of national self-defence, as regards its efforts to liquidate the antisocial and antidemocratic latifundium system.

It must be added that beside the above mentioned rules the acquis also has established other institutions in order to enforce the unconditional rule of capital movement. Among them seems to be most outstanding the possibility of Union's veto against the safeguard measure applied by the member state if that tries to balance the overwhelming pressure of capital movement. Similarly, there are rather effectual institutions for liquidation of state's sovereignty the so-called 'punishment by Treaty of Nice' as the suspension of membership's right, as well the flexibility clause of Constitution.[25]

The Hungarian Land Act (Act LV of 1994 on Arable Land) ever since its birth in succession has consistently been evolving the neo-liberal legal system for land market regulation in favour of the requirements of global capital. The main constituents of this comprehensive scheme are the following institutions:

A/ The European Agreement (that is Convention on Association between EC member states and Hungary, promulgated by the Act I of 1994) stipulated the land use of EC enterprises and private persons settled in Hungary. This law, in accordance with the rules of Treaty of Rome on free movement of persons and their right of establishment,[26] restricted the leasehold or other land use of foreigners by four joint preconditions. Accordingly, the foreign enterprise could only be entitled for obtaining a title on Hungarian land use in case of its settlement, if the firm became registered in Hungary by the competent authority, if it is proved that the land use is indispensable to practising the registered activity of the enterprise, finally the title of land use became restricted to leasehold, excluding other typed of land utilization (e.g. part tenancy, part cultivation etc.)

24 The *doctrine of primacy of the Union law* was even more emphasized and guaranteed by the Preliminary draft Constitutional Treaty of the Convention Presidium. Under this 'union law shall prevail over national law'. Furthermore, 'Member States undertake not to submit a dispute concerning the interpretation or application of this Constitution to any method of settlement other than those provided fore in this Constitution. They always comply with the judgements of the Court of Justice without delay and in a complete manner.' (Article 64 /2/ and 63 /1/ in: The Constitution of the European Union, Discussion Paper, 10 November 2002. Text of the EPP Convention Group Meeting in Frascati, 83.

This institution of the Agreement could never come into force in our land relations, because it is a part of international law has been established by different states, and the Hungarian legislature has denied to adopt it in our internal sources of law.

In practice, this single institution could have prevented the illegal land use and acquiring land property with unlawful pocket contracts by speculating foreigners. However,instead of enactment of it into the Land Act, the section 23. of that Act has opened an unrestricted land lease-market for the foreigners, disregarding also the requirement of their settlement in the country and assuring them to maintain as well manage a Hungarian latifundium from abroad, by foreign capital investors.[27]

B/ The Land Act has established the boundlessness of farm size in order to ensure proper land fund for latifundium farming. This need on one hand was served by the liberalized rules of acquisition of landownership, on the other hand by the institution of pre-emptive and pre-lessee rights established for the beneficiaries of large-scale land users. As for the limits of acquisition of ownership by domestic private persons, those allow for a family of four to obtain 1200 ha which can be increased by leased area even to 30,000 to 40,000 ha. Moreover, by the

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25 'Unanimity shall be required for measures under this paragraph (Art.57 /2/) which constitute a *step back in Community Law as regards the liberalisation of the movement of capital* to or from third countries.' (Treaty of Rome) Practically, this rule means that if any of the member states would restrict anyhow the free movement of capital, regardless of national interests, either in the Council or in the Commission even one vote against the measure is enough to annihilate the proposed regulation, on a title of defence the superior common value, that is claims to profits of the capital owners. The *Constitution* stipulated, in accordance with the rules of Nice Treaty, the 'suspension of certain rights resulting from Union membership' (Article I-58). This institution and its sophisticated procedure makes possible for the Council, as a final consequence, suspending certain of the rights (or all of them) from the application of Constitution to the Member State in question (including its voting rights in the Council) in case of an adopted European decision, which determined *'the existence of a serious and persistent breach by a Member State of the values* mentioned in Article I-2.' Obviously, the infringement of 'four liberties' (among them the free movement of capital) can be a solid legal ground to be punished properly the member state by this vindicatory sanction. Finally, the *'flexibility clause'* of Constitution orders the following: 'if action by the Union should prove necessary to achieve one of the Union's objectives, and this Constitution has not provided the necessary competences, the European Parliament and the Council shall jointly take the appropriate measures on a proposal from the Commission. By way of derogation from Article 95, the assent of the majority of the members of the EP and unanimity in the Council shall be required.' (Article 71) Consequently, in case of emergency – as for the extreme and constitutionally unfounded claims exerted by the capital flow – there is a legal title for the Council to act as a legislator, in favour of the capital, *in spite of the lack of constitutional competence.*

26 '…restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Freedom of establishment shall include the right to take up and pursue activities as self employed persons and to set up and manage undertakings… under the Constitution laid down for its own nationals *by the law of the country where such establishment is effected,* subject to the provisions of the Chapter relating to capital…The Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular: …e/ by enabling a national of one Member State to the territory of another Member State *to acquire and use land and buildings situated in the territory of another Member State*, insofar as this does not conflict with the principles laid down in Article 33 /2/ (that is relating to CAP) – Article 43, 44, Treaty of Rome)

27 'The size and value of arable land allowed to be leased by foreign private persons and legal entitities may not exceed 300 ha or 6000 Golden Crowns, respectively.' (Section 23.) As it previously was pointed out, this measure in legal terms means an *unrestricted farm size,* increasable by optional titles: part tenancy etc. It is also essential that under the Land Act *'foreign legal entity'* means a foreign-registered unincorporated organization. (Section 3.d) Consequently, the foreign person or firm who joined a Hungarian society, legally has to be considered not foreigner but an internal subject of law.

modified Land Ac, since 2002 the upper limit of acquirable landownership in case of a family has been increased to 1,000 ha.[28]

The compulsory order granted by law in case of pre-emption and pre- leasehold has assured the exclusive priority for lessees, also for those as legal persons, regardless of their permanent adress being in abroad and the lack of their settlement in Hungary. Hence, this privileged group of beneficiaries can legally exclude the home private farmers (local neighbors, residents, small-scale producers etc.) from the land market, thus those became institutionally deprived of the possibility of commdity producing individual farming.

C/ The Hungarian state under the Land Act in practice gave up controlling of public interest over the land mobilization, especially in case of foreign transactions. Although, by the latest expert's estimations, the nationwide proportion of illegal (and in a smaller ratio of legal) land transactions in favour of foreigners makes out at around one million ha, and the law in some cases makes possible to annihilate the unlawful contract, and remedied the lawsuit (Section 9.), our land policy does not undertake the combat against the illegal spreading of capital movement. On the other hand, the Hungarian legislator, in contrast to Treaty of Rome and Treaty of Accession, has assured the acquisition of landownership from May 1, 2004 both for the EU national private persons and for their legal entities. These violations against the EC laws, practically has destroyed the derogation concerning the temporary ban on land property acquisition by foreigners, in vain was stipulated that provisional ease for 3 to 10 years in favour of Hungary by EU Commission.[29]

D/ Finally, mention must be made of the National Land Fund (NLF) has been set up by the government in 2002.

According to original objectives of its foundation, its main task was to allow state intervention into land market and leasehold market by economic means. Hence, the NLF intended to decrease the shortage of farmlands by buying up parcels from non-agricultural owners, at the real market price. It was planned that a continuos land accumulation by the Fund will serve the requirements of land consolidation, arrange competitive farm sizes, decrease land rents, eliminate illegal pocket contracts, allot land to young proficient farmers on privileged terms and assist in establishing projects for specialized production. In one word, its basic destination was to assure proper land supply for family farming and promote the rational decrease of the dominance of large-scale farming system in land use structure. On the other hand, the NLF had to practise the ownership rights on behalf of the government on the 1, 5 million ha farmland and forest area. The NLF works as a State Budgetory Institute.

Soon after the change of government, since the Autumn of 2002, the institutional functions and means of NLF radically have been altered to be served, instead of national and public interests, the

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28 'A domestic private person may not acquire ownership of arable land if it would increase the *size of a land in his control and that controlled by his close relative in the same municipality to one-quarter of all arable land in that municipality, or one thousand ha.'* (Section 5./2/)

29 The root of the trouble is that while the *settlement of the foreign proprietor*, unambigously has required by the Treaty of Rome, and also Treaty of Access, the *Hungarian Land Act put aside this precondition in favour of foreign beneficiaries.* E.g. under this Act 'the provisions pertaining to resident private individuals (concerning the acquisition of title for landownership) shall apply to the EU national wishing to settle in Hungary for at least three consecutive years and is pursuing agricultural activities.' (Section 7. /2/) In addition to, though the Treaty on Access has entitled, exceptionally, *only the natural person* as 'self- employment farmer' to obtain landownership, the *Land Act extended this exceptional possibility also* to legal entities of this category as 'individual entrepreneur, individual firm or self-employment'. (Section 3.o.point) Under the Hungarian Act on Economic Companies the *one-man LTD* is regulated as a typical individual firm empowered with *legal entity* and, of course, there is not restricted its capital force in any respect at all. Simultaneously, while EU citizen foreigners, even as legal entities, are authorized by law in Hungary to acquire land ownership, the *inland legal entities, especially economic companies and co-operatives are excluded from this possibility at least for 3 to 10 years.*

stabilization of latifundium system, decisively in favour of foreign capital investors. This fact can clearly be reflected by two obvious reasons. First, all the transactions of NLF, included transfering land ownership or land lease by public auctions for anyone, are strictly subordinated to the compulsory legal order of pre-emptive rights and pre-leesee rights prescribed by the Land Act. That is why the NLF by the law is entitled to offer the different titles for land ownership and land use first and foremost for the leaseholder large-scale farming units, legal entities, that is for the beneficiaries of foreign and home latifundia. Second, the legal method for the accumulation of land fund in favour of large-scale farming elite, must be considered both immoral and unlawful which has become strongly contrast with the land policy and methods of CAP applied by old member states of EU.

Namely, the main instrument of influencing the land market by NLF is the program called 'life annuity for land'. In the framework of it the NLF buys the land of owners older than 60 years and then pays them a life annuity. The requirements of eligibility are: the extent of the land has to be at least 0,3 ha and the purchase price cannot be less than 100,000 HUF. Maximum purchased area is 20 ha, and the maximum price is 3 million HUF. In reality, this kind of transactions is an important means to be get rid of the land property its nominal owner, actually the many thousand of proportional co-op shareowners whose property has artificially been freezed by the state. Moreover, this method excludes the proprietor from obtaining a real market price for the lost ownership, because the available price is irrealistic low, while the emptor speculates to the death of vendor. E.g. the life annuity is not transferable either to the heirs of seller, so the buyer can be freed of paying the due amount of purchase price in case of the death of vendor. The only legal solution to this problem, in order to avoid this immoral conflict, has evolved for ages and is successfully applied in EU countries by the institute of pre-pension and pension system for agricultural farmers. Accordingly, the pensioned farmer, who is willing to cede his landownership for the new farmer as land user, is guaranteed by the law to get for it a real market purchase price.

V. Agricultural farm regulation as an instrument of national self-protection

The liquidation of sovereignty, as well the loss of self- determination over land market and territory in case of new members of EU is only one of the crucial elements of the institutional system in wake of the CAP reform in effect as from 26 June 2003, which determines the future of the agriculture in the EU. The main elements of the CAP, which affects the new members, among them Hungary negatively, are the following:

- the Constitution of the EU that dismantles the sovereignty of the new member states over land and agriculture,
- the legal dictate and economic force of opening up the unrestricted land market in favour of global capital investors, on the title of free movement of capital;
- the gravely discriminative agricultural support of the farmers in the new member states over ten years, pricing them out of competition, moreover constrained most of producers also to leave the agriculture;
- the economically absurd, non market friendly quota system, similar to plan economy, which aims to wither away the agriculture of the new member states, to destroy even their self sufficient capacities in order to transform them to demand markets of the Western dumping of goods.[30]

30 As for the comprehensive critique of CAP system and of its new reform see in details: Endre *Tanka*: Magyar birtokpolitika az Európai Egyesült Államokban. (*Hungarian land tenure policy in the United States of Europe*) Alterra Publisher, Budapest, 2004. p. 215-258.

The CAP, especially the 2.pillar based on the CARPE (regional and rural development policy), recognizes the eco-social model of agriculture, thereby the requirement of the need of the agro society (maintaining the population, employment, life quality) along with need for economical development. This model is not guiding for the eastern block of the EU, rather it indicates the neo-liberal dictate of the CAP. This meets unilaterally the utility requirements of the international agro capital in the service of global capitalization with the establishment of large-scale farming based on monopoly of foreign land ownership. This process can be countered only by establishing a national self-protecting institutiom system.

The agricultural farm regulation may ensure to keep land ownership in the hand of local small and medium holders and entrepreneurs. That would warrrant the establishing and maintaining of agricultural plants. In doing so, the state would be in the position to regulate the land ownership and/or land leasehold of the farm indicating that any plant holder – foreign or local, natural person or legal entity – may possess only one plant, indipendently from its capital power of which size cannot exceed as it is regulated by the law. (E.g. must define the minimum and maximum size of different typed farm homesteads, that is for small, medium and large-scale farming, expressed the measure by the land quantity occupied for cultivation).

Historically, the agricultural farm regulation was put in place in the EC in order to stabilize family farms and to prevent the rearrangement of feudal latifundium system. As soon as the CAP achieved its purpose, to be ensured the suitable self- sufficiency for the Community, the new objective was set to hold back overproduction. In the market and production regulation it was designed to counter capital power that would curb equal opportunities for the actors of agriculture and would excluse the bulk of the producers out of the market.

The social and economical justification of the farm regulation lies in the fact that the production and market regulation of CAP – in the long term – is based on the restrain of resources, on reducing production, not only through quantity measures but through the application of selection mechanism at the same time.

The actors of agro economy must not accept in any regions of the EU – referring to the free movement of capital as a privilege – the unrestricted power of capital, because that would sqeeze all weaker actors out of the production and agro market. The consequences would point far beyond the market regulations. It would destroy not only the whole system of CAP but would cause loss of balance and the fall of integration.

The laws of farm regulation define accurately, in line with the acquis, the objective and subjective conditions of establishing farm. The law must define conditions of the small, medium and large farms, particularly the minimum and maximum sizes of them. The farm regulation does not exclude the economically reasonable large farms but it liquidates the unrestricted size of the farm and it forces the capital to operate only one and size-limited farm holding.

Zusammenfassung

Die Studie erklärt die wirtschaftliche Eigenart des ungarischen Grundeigentums und des Verhältnisses der Bodenbenutzung, welche sich im Laufe der marktwirtschaftlichen Umgestaltung und der Vorbereitung auf den EU-Beitritt herausgebildet haben.

Die Institution und die rechtliche Analyse konzentriert sich besonders darauf, welche Anforderungen die Modernisierung stellt, sowie welche Möglichkeiten die nationale Notwehr im Harmonisierungsprozess mit dem Gemeinschaftsrecht hat.