Studia Iuridica Caroliensia

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STUDIA IURIDICA CAROLIENSIA

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Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar

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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 to you.

Our Dear Reader 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 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 2008.

Budapest, May 2007

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.

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 2008 lesen.

Budapest, Mai 2007

Dr. Gábor MÁTHÉ
Dekan

Dr. Lóránt CSINK

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Creating Presidential Status in Hungary

Separating powers and defining their relation were vital questions to deal with at the political transformation in Central Europe. During the decades of socialism, Hungary's Constitution based on the model of the Soviet Constitution did not allow to separate powers according to Montesquieu's theory. On the contrary, state-power was united; there was only division of labour among the leading persons and institutions of the country. Beside the fact that the division of labour did not mean separation of powers, not even in a legal sense, in fact the powers and functions were interlocked according to the strong cooperation of their possessors.

Like other states in Central Europe, Hungary's constitution of 1949 was created upon the Marxist concept. According to the original text of the Constitution, the Parliament exercised *all* the rights deriving from people's sovereignty (Sec 2. of Art 10.). So the Constitution created a "super-powerful" body, whose powers were well beyond the classical function of legislation. However, the real legislative power was not delegated to the Parliament but to the Presidential Council of the People's Republic that adopted statutory decrees, which could derogate Acts of Parliament.[1] Also in practice did the Presidential Council exercise legislative powers, to set a good example, in 1982 the Parliament adopted only two Acts; on the central budget of 1983 and on the approval of the implementation of the central budget of 1981. Meanwhile, the Presidential Council adopted 42 statutory decrees.

Accordingly, the form of government, the relation among president, government and Parliament had become a crucial question of the political transition in Hungary in order to construct the democratic state order. Like other countries of the socialist block, Hungary faced the duty of finding the way to create the new state organisation.

In the countries where constitutional continuity is unbroken, state organisation is being shaped by smaller modifications and long-term reforms. On the contrary, the countries of political transformation had to break with the former regime's heritage and to set new basis of constitutional order; and the creation of the model was influenced not only by legal expectations but also by political bargains. In this essay I review the development of the form of government in Hungary and the circumstances that influenced the process, paying close attention to the development of the presidential status.

1 The legislative power of the Presidential Council was nearly unlimited until the adoption of Act on legislation (1987). Statutory decree could supplement, amend and repeal Acts, with the only exception that it could not amend the Constitution.

Historical Heritage of the Hungarian Parliamentarism

During the development of the form of government it is important to see the tradition of parliamentarism or presidency in the said country, i.e. to see how the relation among president, government and parliament has shaped. However, the republic, as the form of state, had no serious tradition before the political transition. When the idea came up (at the freedom fight in 1848 and after World War I and II) it was either not introduced or it lasted only for several months. Therefore, the republican form of state has not become inveterate in the Hungarian public law.[2] In spite of this, it could be clearly seen in 1989 that the republic had no alternative, reintroducing kingdom was rather a nostalgic vision than political reality.

In its history, the form of government was regulated the most detailed way in Act I of 1946 on the form of state of Hungary (the so-called Little Constitution). Unlike its nomination, the Little Constitution cannot be deemed as a Charta-constitution, as it concerned only the questions of state organisation and among them the status of the president the most. It mentioned the fundamental rights only in the preamble without detailing any of them. Neither did the Little Constitution contain provisions on the economic and social order. Furthermore, the Little Constitution was not elaborated in the governmental system, these questions hardly came up during the parliamentary debate. The sole aim of its adoption was to introduce the republican form of state.[3] This aim can be seen from its preamble, too: "in the name of the Hungarian Nation and upon its appropriation, the National Assembly constructs the form of state that suits to the will and interest of the Nation: the Republic of Hungary".

The Little Constitution was "president-orientated", most of its provisions dealt with the election, powers, responsibility and the termination of office of the president. Characteristically, it contained only one paragraph on the judiciary: "Courts exercise judicial power in the name of the Nation, and they return their verdicts and other decisions in the name of the Republic of Hungary".

As the provisions of the Little Constitution on the presidential powers have been kept by the Constitution of 1989 in a great part, I do not analyse them in this essay. In fact, I concern three institutions that differ from the present text of the Constitution.

Firstly, the president's right to appoint the prime minister. Although the Little Constitution did delegate such a right to the president, he/she was bound to the Parliament's will because the president had to "respect the principle of parliamentary majority" (Sec. 2 of Art. 13). At the creation of the present text, the direction of the decision-making was inverted; the prime minister is elected by the Parliament, upon the recommendation made by the president. Therefore, the president's freedom to choose has increased *de iure,* as he/she has no constitutional obligation whom to recommend.[4] The Little Constitution gave a smaller field to the president, as he/she could hardly avoid appointing the candidate of the parliamentary majority. Although at the political transition the president lost the right to appoint the prime minister, his/her constitutional possibilities have increased in choosing the head of government.

Secondly, I shall discuss the right to dissolve the Parliament. Unlike the Constitution of 1989, the Little Constitution has not listed the circumstances under which the president is

2 Péter PACZOLAY: Prezidenciális vagy parlamentáris demokrácia – választhat-e Közép-Európa? In: Politikatudományi Szemle 1992/1. p. 173.

3 János SÁRI: A köztársasági elnök alkotmányjogi státusa. In: Magyar Közigazgatás 1990/7. p. 577.

4 However, the Parliament has the tools to get through its will concerning the person of the prime minister finally.

entitled to dissolve the Parliament, but defined the possible initiators of the measure. As for the Little Constitution, the president could dissolve the National Assembly upon the recommendation of the government or two-fifth of the deputies. Concerning dissolution, the president's right was both greater and smaller than it is at present. Smaller, because the president could dissolve the Parliament only upon recommendation and was not allowed doing it unsolicited, not even in the case of confidential crisis between the National Assembly and the government. But this power was also greater in a sense that the president could dissolve the parliament upon the request of the parliamentary minority (without reasoning) and having regard that the National Assembly could not dissolve itself and neither was the president bound to the recommendation, the president could keep the parliament in office; even against its will.

Finally, the biggest difference between the Little Constitution and the Constitution of 1989 was in the question of presidential status. According to the Little Constitution, the "executive power is exercised by the president via ministers who are responsible to the National Assembly". So the president was not only a possessor of the executive, but formally he/she was the head of it.

The Little Constitution did not want to create a strong president, in the question of the form of government it voted for parliamentarism. The president depended on the Parliament, which can be seen from the oath of office saying that the president fulfils his/her obligations *in accordance with the National Assembly,* for the welfare of the Hungarian Nation.[5]

The Roundtable of the Opposition and its Antecedents

In Central European states like Hungary, the political transition is rather a process than an exact event. On the other hand, the time of the legal transition could be defined more easily; this is the time when the political events turn to the form of (public) law and the institutions of the new state order appear in the constitution. In Hungary the date of the legal transition is 23rd October 1989 when Act XXXI. of 1989 amending the Constitution came into force. This Act has not only modified the Constitution but set new basis to it, so materially it rather a new Constitution than the amendment of the old one.

But the political transformation has started earlier. One important antecedent of the transition was that a maverick journal called "Beszélő" published the "Treaty of the Society" in 1987. The treaty aimed at the independence of the nation and political pluralism but wanted to achieve it not in a revolutionary way but by making a compromise with the Communist Party. In a legal sense, the most interesting suggestion of the treaty related to the form of government. It wanted to create a strong president with great powers of foreign policy and let the Communist Party to recommend someone but wanted free parliamentary elections in exchange. At the time of its publication, the Communist Party refused the suggestion. Although later on, in spring 1989, it pleaded many times to the treaty, the balance of forces have changed a lot by that time.[6] So the treaty based on the Polish scenario and tried to create semi-presidential form of government. Upon this concept the president (signed by the former regime) and the (freely elected) parliament would represent nearly equal forces in order to ensure the peaceful transition.

Although the Communist Party did not accept the Treaty of the Society, the first signs of the new era had come up also inside the party in 1987, as it realised that without the changes

5 PACZOLAY, infra p. 174.

6 Csaba TORDAI: A Társadalmi Szerződéstől az Alkotmánybíróság határozatáig: Kísérletek az államfői tisztség jogi szabályozására. In: Politikatudományi Szemle 1998/4. pp. 63-64.

of the political system, the economic reform could hardly be successful. On 19-21 February, 1987, a conference was held in Szeged on the "Current questions of the development of socialism in Hungary".[7] However, contrary to all expectations, the conference failed to result in important changes.

The beginning of the political transition took place in March, 1989, when the Roundtable of the Opposition settled, gathering all movements opposing the Communist regime. Concerning the state organisation, the Roundtable of the Opposition aimed to encumber the strong president. One reason of this could be the bad experience of the Presidential Council and the second one, which is more important, was that the participants of the Roundtable of the Opposition founded the free parliamentary election (in which their success was predictable) closer than the possibility to decide who the president would be. They wanted the executive power to be practiced by a government being responsible to the Parliament, and not by the president who is politically not responsible to anybody. They did not want the president to have large competencies neither against the government nor against the Parliament. But it seemed more important to clear the theoretical question whether the president should be part of the executive. Even in parliamentary states, like the Check Republic and Slovakia, the president is formally part of the executive branch and the Little Constitution regulated the question similarly. In fact, the participants of the Roundtable of the Opposition aimed the president to be excluded from the executive, as they were afraid of the interpretation saying that there is hierarchic relationship between the president and the government in favour of the former. Accordingly, they did not want to approve the president's right to take part at the government's sessions.[8]

The Roundtable of the Opposition was a political body first of all but its relevance in public law is undoubted. This is underlined by the fact that during its procedure the Constitutional Court has referred to the aims of the Roundtable of the Opposition, as a guideline for interpretation.[9]

The Roundtable of the Nation and its Role in Creating State Organisation

It could be interpreted as the winds of change when the Parliament adopted two Acts regulating significant rights such as freedom of assembly and to associate in the early 1989. These Acts were based on the principle that "everything is permitted that is not forbidden" and later on the Communist Party did not keep aloof from creating the "socialist pluralism".

By the summer of 1989 the Roundtable of the Opposition had strengthened, as some parliamentary deputies had renounced for public pressure and the candidates of the united opposition could take their seats. Since 1949 this had become the first time when (partial) pluralism existed in Parliament. On 10th June, at the "Hunting Hall" of the Parliament the leaders of the Communist Party agreed the opposition in commencing political negotiations in merits.[10] Therefore, on 13th June, 1989 there settled the Roundtable of the Nation comprising

7 Kálmán KULCSÁR: Két világ között. Rendszerváltás Magyarországon 1988-90. Akadémia Kiadó, Budapest, 1994. p. 75.

8 TORDAI, infra p. 64.

9 Decision 4/1997. (I. 22.) CC.

10 István KUKORELLI – Imre TAKÁCS: A Magyar alkotmány története. Az Alkotmányozás rendszerváltás jellemzői. In. Kukorelli, István (ed.): Alkotmánytan I. Osiris, Budapest, 2003. p. 62.

the participants of the Roundtable of the Opposition, the deputies of the Communist Party and the members of the "third wing". The Roundtable of the Nation had rarely had plenary sessions, the main issues were concerned by the two committees, one of them dealt with the political transition, the other one with the economic questions.

It is hard to define the legal role of the Roundtable of the Nation. The Roundtable of the Opposition settled, as the condition of the negotiations that the Parliament (sill having communist majority) did not amend the constitution; this would be the duty of the new, freely elected parliament. They wanted the legislation not to anticipate the political agreements, as they feared that the Parliament disrespects the results of the negotiations. The parties also agreed that the Roundtable of the Nation was not about to make a constitution and would not perform public law functions. However, the new constitutional order was based on the negotiations of the Roundtable of the Nation to a great extent.

Form of government became one of the most crucial issues of the Roundtable of the Nation. Concerning the topic, three questions needed to be answered:

1. What will be the president's status and powers in the Constitution?

2. How will the president be elected?

3. When will the president be elected related to the time of the parliamentary election?[11]

The answers to these questions basically influenced the structure of Hungarian parliamentarism. I agree with Béla Pokol, who stated that the relation between president and government depends on the regulation of two fields: the election of the president and the nature of *sui generis* powers.[12]

1. As for the first question, the Communist Party aimed strong presidential powers. Having regard to the political situation, it expected with good reasons that it would decide who the president would be. The Party wanted to strengthen the competencies of the president, especially in the field of foreign policy in order to get the transition across to other Eastern European states, especially to the USSR. On the other hand, most of the opposition (especially the liberal SZDSZ and Fidesz) wanted to introduce a weak president who had very little connection to the government.

The opposition was afraid of the former regime trying to retrieve the authority by armed forces and a president elected by them might assist to such a coup d'état. Therefore, they introduced guarantees to state of emergency, according to the suggestions the Parliament could control the events even in that case. The participants quarrelled enthusiastically on the president's power to adjourn the Parliament's sitting for thirty days. Thus the Parliament is obstructed during the adjournment, it cannot exercise its right to control governmental bodies in state of emergency. Regarding this, the opposition wanted to repeal or at least limit the president's right to adjournment.[13]

The most basic limitation of the president's power was decided on 4th September, 1989. The Roundtable of the Nation agreed that the important decisions of the president need to be countersigned by the competent member of the government. On 12th September the president's mission was set as follows: "the president represents the unity of the nation and monitors the democratic operation of the state". This declaration rather refers to a neutral president representing the state than to a president acting on behalf of the executive.

To sum up, the Roundtable of the Nation drew up a president who was relatively strong in a parliamentary state but who did not definitely link to the executive.[14]

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11 Petr KOPECKY – Ania van den MEER KROK PASZKOWSKA – Marc van den MUYZENBERG: Hatalom és stabilitás, az elnöki intézmény négy közép-európai országban. In: Társadalmi Szemle 1995/7. p. 82.

12 Béla POKOL: A Magyar parlamentarizmus szerkezete. In: Társadalmi Szemle 1993/10. p. 13.

13 TORDAI: infra pp. 68 and 71.

14 TORDAI: infra p. 70.

2–3. The manner and the time of the election of the president were closely connected. The Communist Party had no doubt of "owning" the institution and it had already had its candidate to the presidency: Imre Pozsgay. The Party could accept two solutions. The first one would be that the president is elected by the Parliament which was practically under the Party's direction, so there would have been no difficulties in electing the Party's candidate. However, as the old Parliament missed legitimacy, a president of their election would have hardly been accepted. Furthermore, the opposition settled the condition that no reforms (including the president) should be introduced by the old Parliament.

As for the second solution, the president was going to be elected directly. The Party had confidence in the fact that the reform-politician Pozsgay enjoyed great popularity, so he would have good chances to win over the opposition's candidate. In exchange for accepting its proposal, the Communist Party offered to dissolve the Worker's defence, a paramilitary organ serving the regime.[15]

In the question of the election, the opposition was divided. The conservative MDF accepted direct elections but the liberal SZDSZ aimed the president to be elected by the new, freely elected Parliament. The Roundtable of the Nation agreed that if the election of the president took place before the parliamentary elections, than he/she would be elected directly and if the Parliament settled before than the presidential election would be indirect. During the negotiations, the participants decided in favour of the former one, and appointed the day of the election to 3rd December, 1989.

The Roundtable of the Nation talks lasted until 18th September, 1989. In the three questions I mentioned above, the participants seemed to agree but the SZDSZ and the Fidesz did not sign the agreement because of the manner of the presidential election.

The results of the Roundtable of the Nation negotiations concerning state organisation were criticised in many ways. István Kukorelli stated that the agreement was practically "the modernisation of Act I. of 1946 strengthening the Parliament" and the Roundtable itself resulted in a fragile political consent.[16] In parallel, Péter Paczolay reckoned that short-term aspects, personal ambition and political battles shaped the status and powers of the president that resulted in inconsiderate constitution making.[17]

On the contrary, the undoubted result of the Roundtable of the Nation could be that the Act XXXI. of 1989 amending the constitution and being the foundation of the transition based on its agreements. Nevertheless, the Roundtable of the Nation did not settle the constitutional position of the executive, so the Constitution had no provisions on this.

The Referendum and the Decision of the Constitutional Court

The Roundtable of the Nation materially agreed in the direct election of the president. The SZDSZ and the Fidesz having a different point of view, canvassed for signatures in order to hold a referendum. They wanted the following four questions to be decided by the citizens:

1. Do you want the president to be elected only after the parliamentary elections?

15 Jon ELSTER: Bargaining over Presidency. East European Constitutional Review 1993/94 Fall, Winter p. 96.

16 István KUKORELLI: A Magyar kormányzati rendszer egyenetlenségei. In: Alkotmányfejlődés és jogállami gyakorlat. Hanns Seidel Alapítvány, Budapest, 1994. p. 196.

17 PACZOLAY: infra p. 174.

2. Do you want parties not functioning on workplaces?
3. Do you want the Communist Party to account for the fortune it possesses?
4. Do you want the Worker's defence to be dissolved?

Kulcsár stated that the real goal of the initiative was to learn the answer for the first question. In the other three questions the people's opinion was nearly unanimous (in all cases ca. 95 per cent of the voters voted in favour) and legislation had already decided on them.[18] Act XXXIII of 1989 on parties declared the exodus of the parties from workplaces and Act XXX of 1989 dissolved the Worker's defence; the result of the referendum only verified these acts. Similarly, the Audit Office had already had the right to monitor the economic activities of the parties before the referendum. The Parliament's Decision 41/1989 (XII. 27.) declaring the result of the referendum only asked the Audit Office (with defining a deadline) to perform its investigation.

The referendum itself was held on 26th November, 1989 with a high rate of participation. Finally, in the first question with a very little majority (only 6,000 votes) the citizens voted in favour. Although the referendum formally pertained to the time of the election only, this also affected the manner of the election, as I mentioned before.[19]

Before the referendum the Parliament had already adopted Decision 26/1989 (XI. 10.) appointing 7th January, 1990 as the date of the presidential elections. Its legal basis was that Act XXXI of 1989 amending the Constitution kept the manner of the election open. Upon its regulation, were the president elected before the parliamentary elections, the president would be elected for four years by the citizens in general and equal election with direct and secret ballots. Consequently, the Parliament adopted Act XXXV of 1989 on the election of the president. The Act was not out of several specialities. Firstly, it required the two-thirds of the citizens to take part at the election in the first round to be valid. Now, from a historical viewpoint one can interpret the regulation as naïve; since 1990 there have been no election or referendum when such a majority of citizens would vote. Secondly, the result of the first round could be taken into account even if it was invalid, i.e. if the two-thirds of the majority of the citizens did not vote. A second round was about to hold in such a case and there was no need to repeat the election. And thirdly, comparing to other states it was illogical that the second round was open to every candidate who reached the 15 per cent of the votes. In every state where the president is elected directly, in the second round the voters can choose only between the two candidates gaining the most votes in the first round. Furthermore, in case of many candidates it could have easily occurred that none of them would have had the 15 per cent of all votes.

According to the result of the answer for the first question, the Parliament repealed its decision on the day of the election of the president.

The tribulation over the election had not finished yet. The relation between the referendum and the Parliament's power to amend the Constitution was interpreted in the very first decision of the Constitutional Court.[20] The Court stated that the answer for the first question of the referendum did not obstruct legally the Parliament to amend Article 29/A. of the Constitution that regulates the election of the president. So the Court upheld the Parliament's right to decide the question, referring that the voters decide only the *time* of the election and not the *manner* on the referendum (although the two things were connected to each other). The Court also referred that the referendum had not been about to verify an act but to decide a sole question not making necessary the Parliament's legislation. The voters did not vote on the concerning Article of the Constitution, so the Parliament was free to amend it.

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18 KULCSÁR: infra

19 The relationship between the time and the manner of the election was quite clear during the campaign of the referendum. The MDF fostering the direct election, asked their supporters to vote "no".

20 Decision 1/1990. (II. 12.) CC

Having regard the Court's decision, an independent deputy of the Parliament, Zoltán Király, initiated to amend the Constitution in order to elect the president directly; still under the operation of the old Parliament. The draft was accepted and from 12th March, 1990 upon the so-called Lex Király the Constitution declared the President of the Republic was elected by the citizens.

Agreement between MDF and SZDSZ

The general parliamentary elections were held on March, 1990. The most seats were won by MDF, which intended to form a coalition government with the Christian-democratic KDNP and the country-party FKGP. The SZDSZ became the strongest party in opposition. Before the new Parliament settled, the governing party MDF and the SZDSZ in opposition had had to agree for the following reasons:

- Correcting some institutions where the old Parliament disrespected the agreements of the Roundtable of the Nation (including Lex Király)
- Introducing chancellor-government and constructive motion of no confidence in order to roll back the radical right wing
- Reducing the number of Acts requiring two-thirds majority.[21]

This latter had special importance. The fact that many decisions (especially the limitation of fundamental rights) needed constitutional laws, the functionality of the country was endangered. The agreement was signed on 2nd May, 1990. In this the parties agreed in terminating the institution of "constitutional law" and introduced "two thirds laws" instead but defined 20 issues only where such a majority was required.[22]

Upon the agreement, the indirect election of the president became possible. Although the MDF supported the direct election at first, after its success of the parliamentary election it founded the question of the president a bargain: the SZDSZ could nominate the first president of the Republic.

Evaluating the Agreement

After the agreement the provisions of Lex Király were repealed. All the questions concerning state organisation were answered, the model of "weak president, relatively strong government, strong parliament" were created.[23] But placidity based on the consensual president proved to be illusory: later on there turned up everyday political battles between president and government.[24] The solution was also provisory in a sense that after 1990 the Parliament could not elect consensual president. Although in 1995 the president was elected with two-thirds majority but just because the governing parties had such a majority. In 2000 the president was elected only in the third round (where simple majority is required) and in 2005 a neck-to-neck competition took place between the two candidates.

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21 TORDAI: infra p. 74.

22 A Magyar Demokrata Fórum és a Szabad Demokraták Szövetsége megállapodása. In. Magyarország politikai évkönyve 1991. Ökonómia Alapítvány, Budapest, 1991. p. 428.

23 KUKORELLI: infra p. 196.

24 PACZOLAY infra p. 174.

Lots of criticism has come up against the agreement, many of them just after its signature. István Somogyvári charged it with inconsequence, referring that the president cannot "monitor" state organs if he/she gets mandate from Parliament. Expect for the judiciary, Parliament controls all powers, and the president becomes "useless" eventually, as he/she has no regulative powers and the representative competencies can be performed by any other person or organ.[25]

Having signed the agreement, the political transition and the constitutional process was finished. These were opposed once in 29th July, 1990: the socialist MSZP initiated to hold a referendum on the direct election of the president. But the referendum proved to be invalid, only 13 per cent of the citizens took part, so it could not influence the constitution making.

The three steps of the transition, the Roundtable of the Nation, the Roundtable of the Opposition and the MDF–SZDSZ agreement have been criticised in many ways and I find most of them well-founded. On the other hand, they put the relation of the powers to a democratic field. Although they did not miss political bargains, they created a stable regulation on the powers and status of the president. The Article 30/A. of the Constitution (on the competencies of the president) was amended only once since 1989; in 1st December, 1991 the competencies of the president enlarged with the right to appoint the president of the Hungarian National Bank (before that the president of the issuing bank was elected by the Parliament).

Naturally, I do not mean that the relationship of president, government and Parliament has been constant since the political transition. The relationship has also been shaped by the decisions of the Constitutional Court which interpret some presidential rights in a tight, some others in a broad meaning. I find that during the transition a clear constitutional regulation has been created concerning the head-of-state that has proved to be a favourable basis for the future development.

Zusammenfassung

Die Frage der Präsidialeinrichtung in Ungarn im Laufe des Systemwechsels

Die Frage der Teilung und der untereinanderen Verhältnisse der Gewalten in Mittel-Europa bezeichnete sich betonter, als in den anderen westeuropäischen Ländern. In den Jahren des sozialistischen Systems konnte Trennung der Gewalten im Sinne der Theorie von Montesquieu nicht realisiert werden; im Zeichen der Gewalteinheit existierte nur Arbeitsteilung unter den im Staatsleben führende Rolle spielenden Stellen und Personen.

Im Laufe des Systemwechsels ist die Regierungsform auch in Ungarn eine Zentralfrage geworden: die Bestimmung der untereinanderen Verhältnisse des Präsidenten, der Regierung, des Parlaments und der Aufbau der demokratischen Staatsordnung. In solchen Staaten, wo die Verfassungskontinuität ungebrochen war, wurde sich das Modell des Staatsapparats durch zahlreiche kleinere Änderungen und Reformen entwickelt. Dagegen musste von den systemwechselnden Staaten die Erbe der Vergangenheit radikal liquidiert werden. In den letzterwähnten Staaten mussten die Institutionen des öffentlichen Rechtes auf neuer Grundlage gelegt werden,

25 István SOMOGYVÁRI: Az államhatalmi ágak megosztásáról. In: Társadalmi Szemle 1994/1. pp. 84. and 86.

und im Laufe der Modellsuche spielten sowohl die politischen Unterhandlungen als auch die öffentlichrechtlichen Überlegen ein bedeutende Rolle.

Dieser Artikel bietet einen Einblick in die wichtigen Teile der Modellsuche: der Oppositionellrundtisch, der Nationalrundtisch, die Volksabstimmung im Zusammenhang mit dem Präsidentenwahl weiterhin der Einfluss der Vereinbarung unter der konservativ MDF und der liberal SZDSZ auf die Regierungsform.

In Ungarn ist die Demokratie durch mit dem alten System geführte politische Unterhandlungen, also durch keine Revolution erreicht worden. Die Bedeutung des Oppositionellrundtisches war, dass er die früheren partikulären Oppositionellinteressen vereinigte, und konnte es am Nationalrundtisch gegen die Partei der Kommunisten einheitlich veröffentlichen. Der Nationalrundtisch kann keine verfassungsgebende Versammlung betrachtet werden, doch bildet sie die Grundlage der Verfassung von 1989.

Am 23. Oktober 1989. – mit dem Inkrafttreten der Verfassungsänderung – wurde der öffentlichrechtliche Systemwechsel beendet. Es bedeutet aber nicht, dass alle Fragen im Zusammenhang mit dem Staatsapparat hätten beantwortet werden.

Die Vereinbarung unter der konservativ MDF und der liberal SZDSZ hatte eine großen Einfluss auf die Weise der Präsidentenwahl und den Umfang seiner Kompetenz, daneben verwirklichte das System „des schwachen Präsidenten, der verhältnismäßigen starken Regierung, des starken Parlaments".

Das Verhältnis zwischen dem Präsidenten und der Regierung ist dynamisch, ihre Verbindungen verändern sich fortlaufend entsprechend den momentanen Machtverhältnissen.

Der Systemwechsel hat aber im Sinne der Stellung des Präsidenten eine stabile Verfassungsregelung ausgebildet die eine günstige Grundlage nur weiteren Rechtsentwicklung geschafft hat.

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Historical View Over the Institutions of Law Enforcement*

1. Introduction

Penalty is the same age as society and it mirrors its age, its characteristics, its dominant ideas, its devices used in the struggle against crime. Penalties and their enforcement have always suited the given social era. "Ever since humans have lived in communities of various sizes, they have had respect for each other. They have adjusted themselves to each other as this is what they have been expected to do. With the passing of time these expectations have become firmly established as normatives. Basically, these normatives refer to human behaviour and this is the reason why they are called behavioural normatives. Initially they only existed in peoples' consciousness. Each member of society was aware of the expectations of others and in case they did not behave accordingly, their behaviour was condemned, despised and in many cases they were even ostracised."[1]

Primitive societies' commonly taken responsibility which was based on revenge, as well as the destructive private wars of herds came to be followed in the antiquity and in the early

* Nowadays the international legal-literature – depending on which country or national legal system are we talking about – uses with totally different content the notion of law enforcement. For example the US legal system uses the expression of law enforcement for almost all the stages of imprisonment, starting from the arrest, police actions troughout the enforcement of penal sentences and the regulations concerning the prison rules too. In Canada for the imprisonment and its rules they use the notion of: execution of sentences. In Europe, and mainly in german legal system they use the notions of: detention law, correction law, correctional law, imprisonment law, enforcing the penalty of imprisonment and enforcement of penal sentences. The present article's author belives that according to the content of hungarian imprisonment rules the propper expression would be: correction law or imprisonment law. All above mentioned notions prove that the law enforcement is in a constant movement on a large scale. Being aware that by the European Union the law enforcement has to start his own harmonization too [see: György VÓKÓ: Európai Büntetés-végrehajtási jog, Dialóg Campus, Budapest, 2006.] this is the best time to find the prefect notion for the hungarian law enforcement. So the present article will use the above mentioned notions in accordance to the text content.

1 József FÖLDVÁRI: Magyar Büntetőjog – Általános Rész. Osiris, Budapest, 1997., p. 19.

middle ages by compensation, composition and by administration of justice that was built upon the "talio" principle.[2] To describe the millennia of slave-holder and feudal societies from the point of view of penal studies, most expressive would be to characterize them as the era of torture and capital punishment, the time of punishments humiliating body and soul. Thus, revenge had the significance of guarantee and retaliation from the side of the offended was inevitable. When state and law were established the new organisation of power built its punitive system upon nationality traditions. As a matter of fact, two periods can be distinguished: one is the era of revenge when, apart from a few events of public retaliation, most of the crimes were personal matters, the punishment being no other than satisfaction demanded by the offended. The other period is that of state punishment in which the right for penalty and law enforcement were exerted by the state.

Nowadays, however, in the center of penal law and criminal procedure as well as in the centre of the conception of law enforcement is the defence of and respect for the human, be that the perpetrator or the offended party. Nourishing from the long past and learning from its mistakes, today's modern code of law enforcement focuses its questions referring to the European harmonizational results around the efficiency of provisions taken for the prevention of crimes. The demand for legality and humanity, as well as the need for efficiency have been improving the code of law enforcement to a great extent all over the world.[3] In contrast with the revenge campaigns of ancient times, today's law enforcement has to assert constitutional principles and rights, and meet the requirements of international human rights. These can be fulfilled only by a high-standard law enforcement, one that meets and helps practical demands. This present-day, modern law enforcement is actually the collection of rules that determine the enforcement of penalties and provisions finally inflicted throughout a criminal procedure, namely: the activities of the legally authorized government institutions; the conditions and mode of the enforcement of penalties and provisions; the rights and obligations of the given government institution and those of the convict. To the conditions of the enforcement of penalties and provisions belong the institutions in the framework of which the punitive power of the law can be carried out. These are called the institutions for law enforcement.

2. The beginnings of law enforcement

One might believe that the penalty of imprisonment is a legal institution existing since ancient times, however, the deprivation of personal freedom – as an independent punitive mode – developed only in the modern age. For instance, we do not find the institution of law enforcement in Hammurapi's codex or in Moses' laws at all. In contrast to this, it can be found in the writings of ancient Greek wise men, at the Romans and in the Indian caste-system. The variety of punitive theories was not the result of an inner movement. From among the ancient Greeks Prothagoras based his conceptions on the social viewpoints of provisions of crimes. According to his teachings penalty is needed not because of the criminal act, but with the view that it keeps everyone from committing crimes in the future. The basis of Aristotle's theory for punishment was constituted by the principle of justice. According to this, the balance defined by the legally secured goods is disturbed by the crime, and should accordingly be restored by punishment. The timeliness of this Greek theory's main stream was given by its era's heading towards the public administration of justice. This also meant the moral

2 György VÓKÓ. Magyar büntetés-végrehajtási jog. Dialóg-Campus, Budapest-Pécs, 2004., p. 20.
3 VÓKÓ: Magyar büntetés-végrehajtási jog. p. 20.

establishment of governmental punishment that denied blood feud. The Greek – and Plato among them – did not separate morality and law.[4]

Slavery and imprisonment resulted in deportation, which was the combination of the two. The mixture of slave work and imprisonment was forced labour. Somewhat lighter deprivations of civil rights were expulsion, the designation of a place for living by force, and exile. The latter was a preferred way of punishment especially in the Greek cities. However, the prison as a term can be found already in the writings of classics like Plutarchos. In the case of the Romans, it appears in the notes of Ulpianus – written about the emperor Pius' orders – that there existed punishment before the sentence (preliminary imprisonment was considered a punishment as well) and punishment after the sentence. There is another view according to which the prison didn't only have the function of custody, but also became a general punitive mode in the imperial era.[5] In the Indian caste-system there existed the possibility to consider the changing of one's status as punishment and, moreover, there were orders regarding imprisonment already in Manu's code of law.

The Roman penal law – which adjusted itself to the brutalitiy of the system and to the manners of slavery – even if not approaching the level of civil law, had principles which were considered to be developed in earlier times. The penalties it contained became later the basic institutions of penal law. "In the antiquity and in the first half of the Middle Ages the well-known prisons were mainly serving not as means of law enforcement, but as places ensuring law enforcement, so that the suspect could be brought to court."[6]

The first decrees regarding cases of imprisonment are related to the name of Theodosius, who gave decrees in the year 435 and who was later followed by Justitianus in 529. The purpose of these decrees was to maintain prisons, to control their operation, but at the same time they took measures about surveillance and supervision. In 533 the 50 books by Digestas Pandectae came in force and from among these number 47 and 48 were the books of penal law. The 9th book of the Codex Iustinianus, which was published in 534, dealt with penal law as well. The rules regarding the passing of sentences were later put down by the imperial decrees in an ever growing circle and thus the principle of *nulla poena sine lege* – i.e. punishments are to be ordered exclusively by the law – came into force. This pinciple has been one of the most important priciples of penal law up to the present day.[7]

The punitive sytem of archaic law is not very diversified, nearly all the sanctions imposed on crimes were capital punishments. Another feature of the punitive system is the appearence of the talio principle in its specific forms, eg. the burning of the person who caused the fire. Imprisonment – as seen today – was not known in the antique Rome. The purpose of prison-like buildings (eg. Tullianum) was only the custody of the prisoners during criminal procedures. In those times it was not so much the idea of punishment that dominated the enforcement, but rather that of deterrence and prevention.[8]

In the classical era the following fundamental ideas of modern penal law developed: unintentional crime (assault causing death), premeditated crime and crimes committed because of sudden temper, complicity, attempt and relapse into crime. A number of new punitive modes developed as well. Among these were the different forms of exile such as expulsion, simple banishment and deportation, however the perpetrators of certain crimes were degraded to slaves and thus forced to do mine-work or communal labour (ad opera publica). As a matter of fact,

4 VÓKÓ: Magyar büntetés-végrehajtási jog. p. 31.
5 György VÓKÓ: Magyar büntetés-végrehajtási jog. Dialóg-Campus, Budapest-Pécs, 2004., p. 32.
6 József FÖLDVÁRI: A büntetés tana. KJK, Budapest, 1970., p. 113.
7 György VÓKÓ: Magyar büntetés-végrehajtási jog. Dialóg-Campus, Budapest-Pécs, 2004., p. 37.
8 György VÓKÓ: Magyar büntetés-végrehajtási jog. Dialóg-Campus, Budapest-Pécs, 2004., p. 38.

imprisonment in its formal sense remained foreign to Roman Law all the time. The leaders of the *opera publica* were not aiming at fulfilling the punitive task (retributive or preventive) but rather at making more and more profit by exploiting slave-work. This situation remained in the states of medieval times as well: the purpose of the prison was the custody of the prisoners waiting for their case to be judged.

As for the harmonization of prisons and law enforcement, it is worthy to talk about it starting from the era when modern prisons and civil law regarding law enforcement were already developed.

3. Law enforcement in the Middle Ages, or "the domination of fist law"

3.1. General regulation

In the decades of the Middle Ages the government authorities, the leading class that was in power was short of sources of information. There was hardly any opportunity for instructing people, for accustoming them to follow rules and keeping them from committing crimes. Thus, the administration of justice resorts to effective and obvious resources i.e. the publicity of law enforcement. The tortures suffered by the condemned throughout the long process of their execution is the example for the inevitable relationship that exists between crime and punishment. The prison, with its isolated world, did not serve this purpose. On the other hand, it is indisputable that the prison as an institution was constantly present in the history of Hungarian legal practice. Sporadically though but we often learn of their presence in the decrees and letters of judgement that were left to us by Andrew III, Sigismund from Luxemburg, Ladislaus Jagello, Max Habsburg. Its widespread presence before the 16th century is also proven by the record of "divine judgement" from Nagyvárad. The prison is known by the urban law starting from the 16th century, courts regularly impose the 'black hole' and the dungeon is considered an indispensable part of our castles.

Apart from all these and from the cruelty of the enforcement there existed faith in the religious morality regarding people's changeability. Trusting in people's betterment, at first the penal institution imposed penalties of educational nature (i.e. fasting, clerical education, smaller financial or light physical punishment), and only after these was capital punishment imposed.[9]

There are various terms used for imprisonment as a penalty in the Middle Ages. Beside the most frequently used dungeon, the condemned were often in captivity, locked in towers, castles, even cages, stocks and pillory. All these are the proof for the diversity of medieval Hungarian penalties. Terminologically the *dungeon* and the *jail* are difficult to be differentiated. Those who committed heinous crimes were locked in dungeon under the surveillance of the law-servant or the executioner. The jail was a means to punish lighter crimes, the short-period custody was usually applied in the town-hall under moral and humane circumstances with the surveillance of a guard. Smaller offenses, perpetrators of a higher rank, bourgeois people were punished this way. However, the dungeon was the classical feudal prison in Hungary.[10]

9 György VÓKÓ: Magyar büntetés-végrehajtási jog. Dialóg-Campus, Budapest-Pécs, 2004., p. 40.
10 Kinga BELIZNAY: Erdély. Szabadságvesztés a feudalizmus korában. In: Börtönügyi Szemle 1995/3. p. 75.

3.2. Imprisonment in medieval Hungary

In Hungary imprisonment was mentioned already in Saint Stephen's code of law according to which those who eat meat on Friday have to spend one week fasting and locked up. Another reference is the provision appearing in the code of law by King Saint Ladislas I, which said: "those who kill someone with an unsheathed sword, should be thrown into dungeon". The quoted chapter of the decree is about safety custody before a judgement, yet another passage unambiguously refers to the prison as a means of punishment.[11] The 77th chapter in Kálmán Könyves's decree prescribed that "no servant of Hungarian nationality" or anyone else born in Hungary may be sold to a foreign country. There are opinions that this was the first prohibition referring to the expelling of Hungarian citizens.[12] However, already in the age of the Árpáds there appeared the designation of a place for living and internment. The fragment of the record known as *The Regestrum from Várad* proves with the help of nearly 400 legal cases that the prison was an existing institution. Thus, in the age of the Árpád's the prison (in addition to exile, expelling, internment and the loss of one's status) was an active part of the punitive system and by the 15th–16th century the *"eternal prison"* had also appeared. From the point of view of the Hungarian history of prisons the above mentioned provisions are of considerable importance. They represent evidence for the fact that dungeons already existed in the age of our first kings and, moreover, they were means known and used by the government authorities and in private administration of justice as well. Thus, basically, the prison as an institution is the same age as the Christian Hungarian state itself.[13]

As for the functions of imprisonment, in certain counties of Hungary the following could be distinguished: custody applied as a safety provision; punishment serving as a sanction in civil law; custody as a real imposed punishment, and deprivation of liberty carried out instead of a punitive sanction aiming at imprisonment. The custody during the time of proceedings lasted until the declaration of the sentence. The punitive ways applied as sanctions in the civil law had a role mainly in the establishment of the imprisonment for those in debt. The institutions of real imprisonment prevailed in the framework of jails, dungeons, prisons, captivity, and in that of being locked in a tower or in a castle. Example for the deprivation of liberty carried out instead of a punitive sanction aiming at imprisonment is the case of Elizabeth Báthory from the second half of the 16th century. Stocks, cages and pillories were punitive ways laying stress on humiliation. The cage for example was used in places where there were no dungeons or prisons suitable for keeping someone confined. Especially those people were locked in cages, who were drunk during the Sunday service, swore or were mischievous after eight o'clock in the evening. The stocks were made of thick hard wood equipped with iron mounting, the timble-work always being cut out cylindrically by pairs.[14] In the gaps they squeezed the convict's legs at the part between his knees and ankles. In such public stocks were put those, who shouted and swore in the pubs or in the streets during the night. A swearing nobleman only had to pay one forint as a punishment, while peasants were instantly locked into stocks. Finally, the pillory or in other words *the column of shame,* was placed in the central square of the town or village, the perpetrators of minor mistakes being stood next to or tied to it. Mainly those women were tied here who behaved in a lewd way.

11 Barna MEZEY: Középkori tömlöctől a modern büntetés-végrehajtási intézetekig. ELTE, Budapest, 2000., p. 11.

12 György VÓKÓ: Magyar büntetés-végrehajtási jog. Dialóg-Campus, Budapest-Pécs, 2004., p. 29.

13 György VÓKÓ: Magyar büntetés-végrehajtási jog. Dialóg-Campus, Budapest-Pécs, 2004., p. 29.

14 Kinga BELIZNAY: Erdély. Szabadságvesztés a feudalizmus korában. In: Börtönügyi Szemle 1995/3. p. 87.

The efficiency of the punishment was always influenced by the proportion of the possible disadvantages and the advantages likely to result from the crime. In the feudalism stealing a hen was a necessary act for a serf in order to support his family, and thus his behaviour counteracted the capital punishment that was held out in prospect. In erlier times, in the case of a slave deprived of everything but his life, except for capital punishment, there remained only one way to punish him i.e. physical punishment.

The Hungarian legal codes written under European influence were familiar with nearly all types of mutilation. Saint Stephen sentenced perjurers to the cutting of their hands, and slanderers to the cutting of their tongues. Thus in our early feudal law both the talio-principle and the mirror principle were present. When punishing a thief servant, the dominant purpose was that of stigmatization. After his first perpetration his nose was cut, whereas after the second act they cut his ears. Our rulers from the 14th and 15th century prohibited the cutting of the parts of the body. Stephen Werbőczy, who was master of judgements, the king's personal consultant, palatine, chancellor and, above all, the greatest Hungarian jurist of the 16th century, took steps against these cruelties. However neither the "Triple Book", nor the Decrees could stop this bloody practice. Mutilation gradually came to be an aggravating secondary punishment. Numerous judges ordered that the evil-doers be tormented before being broken on the wheel or before being executed, and before the enforcement of the penalty two pieces of strap had to be cut from their skin from head to toe.[15]

Corporal punishment was used as a disciplinary punishment throughout the process of enforcing the penalty of imprisonment, the latter constituting the main part of the punitive system. During the times of feudalism prisons used to serve safety purposes enabling captivity during the process of investigation. "The present-day penalty of imprisonment was unknown in the Middle Ages. Prisoners being under investigation were taken to cellars, towers of town-walls and castles, where they were put in chains and tortured to extremes throughout the process of investigation. It was only in the 14th century in certain Italian cities, that authorities first imposed longer periods of imprisonment as punishment."[16]

Medieval dungeons could not have any rules to be applied uniformly. Regulations in dungeons – if any – changed from estate to estate and castle to castle. Prisoners were mainly left to their guards' pleasure. The circumstances in the prisons were formed under the influence of three main factors: the place of imprisonment, the necessity for aggravation and the general judgement of society. The first pieces of information we have about prisons indicated castles as the places to enforce punishment. Beyond the known historical information (eg. Sigismund's captivity in Siklós or Salomon's captivity in Visegrád) we know about the existence of prisons in almost every castle of ours. The frequent imprisonment-penalties resulted in increased needs for space in prisons and legal authorities (counties, priviledged districts) tried to satisfy these by making a greater use of castles.

In Transylvania the Government made arrangements according to which in case there was no suitable dungeon owned by local authorities, "malefactors be taken to near castles".[17] What is still common in these prisons are the cellar- or hole-like places, stuffy, unhealthy conditions, lack of cleanness and the striving for the cheapest possible placing. Thus it is obvious that the imprisonment that manifested itself in plain custody sharply differed from the strictness of the feudal law enforcement. In practice this lead to further torment in dungeoning. At the time there was an attempt to raise the 'black hole' to the level of other punishments. With this purpose the circumstances in the prisons were worsened, prisoners were regularly threatened

15 György VÓKÓ: Magyar büntetés-végrehajtási jog. Dialóg-Campus, Budapest-Pécs, 2004., p. 25.

16 Oszkár SZŐLŐSSY: A magyar börtönügy vázlata. Magyar Kir. Igazságügy-minisztérium. Budapest, 1920, p. 4.

17 Law passed by the Parliament, (Gyula)Fehérvár, 24 April – 21 May, 1643.

and physically tormented thus turning prisons into a specific and combined way of punishing. Prisoners crammed into dark and cellar-like dungeons were hardly fed, in case of illness medical treatment was not provided, airing was out of question and so were candle light or heating. Walks were allowed at celebrations or fairs with the purpose of deterring free citizens by letting them see public corporal punishment of ragged and staggering prisoners who were chased into the crowd. By the 18th century slave-work had spread as well. Prisoners were commanded to communal labour and thus imprisonment became a complicated sanction, an ever-changing combination of corporal punishment, locking up and forced labour.

The effect of social judgement resulted in the aggravation of the circumstances in prisons. While in the Antiquity political enemies were murdered or exiled, in the feudalism imprisonment was thought to be better. Soil castles all had their dungeons while castles made of stone or surrounded by a wall had their prisons. During the times of the absolutism such buildings were established as the lead chambers of the Tower Bastille or the Doge Palace. A new form of imprisonment was the galley slavery, which introduced the principle of a new, economically relevant consideration. The feudal society was the mass of small communities and autonomies separated from each other, having a life within narrow bounds and resting upon the pillars of particularism and feudal privileges. The existence of those hardly ever crossing the borders of their towns or villages was determined by their close environment. Beside all these, it must be emphasized that in case someone did not obey primary orders, suitable sanctions had to be carried out, eventually obtaining law enforcement by force. The blunt prestige of the authorities had to be restored, laws passed by them and their will be enforced, their power of disposal needed to be expressed. But, at the same time, the moral balance had to be restored as well, the sense of justice of the inhabitants or of those insulted needed to be satisfied. Thus the expectations of religious ethics – the basic pillar of feudalism – were met.[18]

The punitive ways were defined by the harsh reality of the Middle Ages, just as was the quality of enforcement. Beside a narrow set of social values there existed a rather single-coloured punitive scale. The judge could choose from among mutilation, corporal punishment, financial and humiliating penalties. Imprisonment occured as an exceptional phenomenon in the form of dungeons and jails. During the times of feudalism law enforcement was strongly influenced by the conservation of the institutions promoting communities which were developing from a clan-society into a class-society.[19]

The varying social judgement of law enforcement during the times of feudalism could not be altered by the prison-improving movement of the liberalism either. The hindrance of modernization of prison cases highly proved the fact that in every society there only developed sanctions which met the expectations of the given era and suited its approaches, economic possibilities and shared its set of values.

4. Law enforcement in the modern age

4.1. International view

During the formation of modern civilized society in western European cities imprisonment had its first appearence in the 16th–18th centuries. However, the development of prison cases started only at the end of the 18th and the beginning of the 19th century.

18 Barna MEZEY: Középkori tömlöctől a modern büntetés-végrehajtási intézetekig. ELTE, Budapest, 2000.
19 Barna MEZEY: Büntetés-végrehajtás a feudalizmusban. ELTE.

In the 17th century the enforcement of imprisonment had no developed system, there was no guarantee for the legality of keeping someone in prison. In the middle of the 16th century the authorities started to arrest dangerous vagabonds whose number had increased after the wars. The purpose was to get them used to a decent lifestyle. Later they realized that such safety measures were to be taken against criminals as well. Then they started to send the condemned to workhouses. It was in 1553 that a royal castle near London (Bridewell) first was turned into prison for criminals, prostitutes and work-shirkers.

Thus, in the modern age, not only those were sent to prison who did not pay taxes or were heretics. Vagabonds, prostitutes, lunatics with no maintenance and VD-patients (patiens suffering of veneral diseases) were too assembled here. This combination of institutions dealing with poverty cases, collection of taxes, public health and with law enforcement remained till the most modern times. Moreover, in the 17th century in the Netherlands children were kept here whose parents asked for the correction of their behaviour. The law enforcement locking criminals in the same institutions with all kinds of wrecks of society and leaving their fate to the prison-owner was a characteristic heritage of the feudal chaos.[20] Instead of this cistern of the feudal dungeons a new prison with punitive purposes needed to be established to serve as means for the modern punitive way i.e. imprisonment. 'The scientific approach of the task required the presentation and critical examination of the existing circumstances in prisons. This tiresome job was done by John Howard: his detailed and objective findings served as a basis for the reforms.[21] *Howard became the high sheriff in Bedford Shire in England which approximately equals a county head of justice. He visited the prisons in his county one by one and got to know the terrifying condition they were in. The main problem he saw in the fact that prison keepers did not get any salary thus the basis of their income being the maintenance inflicted on the prisoners. Those not being able to pay were left to languish in cold and hunger until they were sentenced to gallows, put in the pillory or deported.*

After Beccaria's appearence capital punishment was forced back into a narrower circle and penalties of mutilation came to an end. Those committing major crimes were more often deported to plantations overseas instead of being executed. All these met the requirements of the increasing need for workforce of the developing manufacturing industry. This was when forced labour and imprisonment came to the front. The prisons served rather punitive purposes than purposes of other laws. The first prison built for this purpose in Europe was the Rasp Huis in Amsterdam. In this prison, which was established in 1595, there was a spinhouse (Spinnhaus) for women where serious forced labour was employed. In comparison with other European prisons a main feature of Dutch prisons was cleanness and tidyness. The Dutch payed great attention to sanitary suitability, they considered employment to be an important question. The same was the situation under the reign of Queen Maria Theresa in Belgium, in the prison (maison de force) established in 1773 Geneva. This was the first modern prison where – during the day – the condemned worked in common rooms under strict supervision, while at night they slept separately in sleeping-cells and they were already grouped in certain cathegories.[22] The specific prisons of the French, the 'hopitaux généraux', was again the place where insolvent debtors, tramps, prostitutes, lunatics and severe VD-patients were locked up together with criminals waiting for their sentence. There were often rebellions which were followed by brutal suppression. In contrast with this, in the German

20 Barna MEZEY: Középkori tömlöctől a modern büntetés-végrehajtási intézetekig. ELTE, Budapest, 2000., p. 16.

21 János SZÉKELY: "Rács mögött" A szabadságvesztés-büntetés történeti áttekintése – tanulmány. In: Börtönügyi Szemle 1999/5. p. 21.

22 György VÓKÓ: Magyar büntetés-végrehajtási jog. Dialóg-Campus, Budapest-Pécs, 2004., p. 54.

trade cities it was only later that the prisons – where only those criminals were kept who were waiting for their sentence (in small numbers and under terrible circumstances) – were used for locking up lunatics, beggars and tramps. It was Hamburg that first ordered the locking up of beggars and tramps proudly saying that beggary had disappeared from the streets while the maintenance costs for the prisons had fallen as prisoners able to work were forced to production. Howerver, the administration of prisons had run into debt within ten years, by the year 1801. With the appearence of modern English machines and French ideas it was clear that such kinds of prisons had become outdated not only from a humanitarian and penal point of view, but also from the point of view of employment policy.

The certain penal codes only included main lines for orders, detailed regulations were left to internal instructions. Obviously this resulted in a legally unstable imprisonment. Having no legal regulations concerning detailed questions of enforcement it was impossible to talk about basic principles either. Directors of the first prisons were given free hand in the development of prison-regime the result being several specific types of prisons to compensate the disadvantages of a common system. A few types of this system were for example: solitary confinement in cells, the silent (Auburnian) system, combined system (the one from Geneva and the Obermayer version), the gradual systems, the Maltese system, the ticket-system, the system from Corfu, the elmira system etc.[23] In these systems of law enforcement great importance was attached to the employment of the condemned in useful productive work, their moral betterment and their learning to work were considered to be key-questions. Education was introduced into their practice.

In Switzerland, in 1895 the so called punitive work establishment was organized in Witzwili. The condemned doing agricultural work were allowed to move freely on the establishment not having to endure the damaging and oppressive effects of a locked prison. This was considered to be the reason for its successfullness. In contrast with this, in Russia imprisonment became a way of punishing starting from the 16th century. From the 18th century political enemies of the tsarist system were kept prisoners in the fortresses in Petropavlovszkaja and Slisszelburg. By the end of the century the number of political prisons had highly increased. In 1775 workhouses and forcing houses were introduced. Even those could be interned here who had not done anything against the law. For example landowners or farmers sent their pheasants and workers here. Those braking the order of the prison received corporal punishment usually enforced by the supervisor with a whip. The critics of the feudalist punitive system attacked the brutality of the punitive processes, they claimed for penalties in proportion with the crime committed. By emphasizing the inhumanity of punitive ways they demanded the development of law enforcement system that had purposes of betterment. In the whole of Europe there started a relentless criticism of the absolute theories based on Aristotelian principles and religious ideologies. Voltaire's, Montesquieu's and Rousseau's views concerning law enforcement were summarized by Beccaria and Filangieri. Thus, theories concerning penalties parted from speculative philosophy and became an independent branch of science.[24]

4.2. Hungarian law enforcement in the modern ages

In the 17th century a few types of prisons developed in Hungary as well. Landowners had prisons next to the ruling chair in the castle, in the estate building or in the cellar of the castle.

23 György VÓKÓ: Magyar büntetés-végrehajtási jog. Dialóg-Campus, Budapest-Pécs, 2004., p. 27.
24 György VÓKÓ: Magyar büntetés-végrehajtási jog. Dialóg-Campus, Budapest-Pécs, 2004., p. 31.

At the service of county authorities castles served as prisons. The cities developed their 'carcer' in the townhall or its cellar or even in the executioner's house.[25]

The first time imprisonment appeared in the collection of Hungarian laws was in the 12th paragraph passed in 1723 under the reign of Károly III as penalty to be imposed on those committing incest. The sources of penal law were the statutes from counties and towns, the arbitrary practice of ruling chairs and occasional laws. With the gradual spreading of imprisonment county prisons, dungeons of towns having municipal rights and of estates having the power of life and death served as places for its enforcement up to the middle of the 19th century. The thought of establishing a punishment house on a national level first occured in 1763 in the Governing Council obviously under the influence of the well-tried institution from the Netherlands.

In the Hungarian history of prison cases preceeding the formation of modern civilized society the government once made an attempt to establish a central prison: in 1772 a correction house (Domus Correctoria) was opened in the former castle of Count Ferenc Esterházy. The institution that was later transferred to Tallós (1785) and to the casemates of the castle in Szeged became the home of numerous enlightened ambitions. Humane accomodation, decent catering and corrective training were the things the government tried to employ. However, the effort did not last too long as it was proved that the enlightened prison cases constituted a considerable financial burden.Thus the legal harmonization between prison cases and law enforcement in Hungary are considered to have begun with the criminal laws passed by Maria Theresa and Joseph II.[26] The Constitutio Criminalis Theresiana in Maria Theresa's Code of penal law defined two types of imprisonment penalties: penalties to be spent either in bridewell or in prison. But there also existed the institution characteristic for the Enlightenment, i.e the workhouse. Increasing the severity of a sentence was still possible by employing other penalties as caning and flogging. Depending on the sentence the penalty had to be spent in irons or without. The whole mentality of the legal code was determined by two main piers: capital punishment and torturing. Due to this the Theresiana was soon repealed. After only two decades it was replaced by Joseph II's Sanctio Criminalis Josephin. He abrogated capital punishment and allowed its adoption only in case of summary proceedings. As for the duration of the penalty it could last from one month to 1000 years. The basis of the rather complicated time constituted the degree of wickedness experienced in case of crimes. In their structure Josephinist criminal laws tried to meet the requirements of enlightened, modern expectations, in case of the regulation of differentiating there occured features enabling the distinction of civil prison: visitors, the stopping of bed, food-restriction. Still, there was no getting rid of the feudal demand which could only consider the prison as a place for corporal punishment and accordingly claimed for the aggravation of the dungeons. In Hungary the Sanctio Josephina was immediately repealed after the death of the emperor. The parliament formed the *Deputatio Juridica* the task of which being to work out the draft of the new code of penal law. The result of this is the draft of the penal codex passed in 1795. Until the revolution in 1848 no other new national institution was established except for the already existing ones in Szempc and in Tallós. So it happened, that the basis of the Hungarian national law enforcement institutions was established by the Austrian dictatorial government during the times of the neoabsolutism. This was only succeeded by the Hungarian campaign for prison-improvement in the first half of the century, and by the preparations of the parts of penal motions which referred to prison cases.

In the 1930s and '40s one of the key questions of the fight for social improvement in Hungary was the reform of the administration of justice. Following the attempts made on the

25 Kinga BELIZNAY: Erdély. Szabadságvesztés a feudalizmus korában. In: Börtönügyi Szemle 1995/3. p. 75.
26 Barna MEZEY: Középkori tömlöctől a modern büntetés-végrehajtási intézetekig. ELTE, Budapest, 2000., p. 16.

basis of the VIII. law passed in 1827, Ferenc Deák initiated a new penal reform in the parliament between 1832–1836. Even though his initiatives were not successful, they called attention to those 20 000 people on whom imprisonment had been carried out during that time under terrible circumstances.[27] Disorder went together with looseness, corruption and with the abuse of power. Prisoners had to arrange food for themselves. Guards often cooperated with counterfeiters and thieves. Women prisoners were defenceless against men, especially against guards. The 387th paragraph of the motion passed in 1843 contains the basic rules of law enforcement. These include, among others, orders that refer to the financial and medical support of the condemned, the tasks, wages and legal status of the staff carrying out the sentences, as well as rules referring to the institutions of law enforcement and their administration. The motion scheduled the building of municipial bridewells and prisons (in counties and towns), and that of district or national prisons. Those being under investigation or having been sentenced to captivity would have been sent to bridewell; the ones having got a sentence shorter than half a year would have gone to county prisons, while the ones with a sentence of half a year or longer would have been locked into district prisons. As a result prisons with a private system were built in the counties of Bihar, Komárom, Nógrád and Tolna.

The dictatorial government that was introduced after the suppression of the revolution in 1848–49 regarded the Hungarian public administration and the administration of justice as Austrian home affairs. This age was characterized by Austrian administration based on Austrian rules, Austrian legislation and Austrian officials, an Austrian model for administration of justice and Austrian prison regulations. The Austrian *Strafgesetz* from 1852 and its accompanying orders realized the most direct legal harmonization: Austrian penal laws came into force in Hungary.[28] Between 1854–1858 six national prisons were opened in Hungary (in Illava, in Vác, in Munkács, in Mária-Nosztra and in Nagyenyed). The great reform operations remained to be done by the second liberal generation of the settlement. The development of the civil law and order and that of the civil state-apparatus was very quick. However, previously in 1861 the Conference of Seneschals restored the power of the penal laws existing before 1848 and prohibited the differentiation between classes as well as the employment of corporal punishment. Based on the XXXIII. law passed in 1871 the legal authorities gave their prisons and their equipment up to the newly organized courts and later to the royal prosecutors. Thus, the actual development of the Hungarian central system of law enforcement can be reckoned from these times. In the same year (1871) corporal punishments were repealed. Based on the decree No. 696 from the year 1874 the Ministry of Justice became the controller of the system of law enforcement. After the preparation of this lengthy and complicated reform the 5th law passed in 1878 accepted the Penal Code which is kept in evidence by literature as the *'Csemegi Kódex'*. This codex brought about crucial changes in the structure of imprisonment as a penalty. Instead of private systems it introduced the gradual system that had already been accepted in Europe. It defined various types of imprisonment (bagnios, bridewells, prisons, state prisons, custody) and founded several new institutions (solitary confinement, prisons, mediatory and correctional institutions). A main characteristic of Csemegi's theory is that it establishes and explains the punitive system, its goals and the principles of imposing sentences. Beside the already existing prisons new prisons are built by the end of the century: the prison in Szeged (1881), the prison in Sopron (1884), The National Collective Prison in Budapest (1896) and several county court prisons.

By the turn of the century 9 national prisons, 65 court and 313 district court prisons were working in Hungary. The average number of prisoners was around 13 000 and there was space

27 György VÓKÓ: Magyar büntetés-végrehajtási jog. Dialóg-Campus, Budapest-Pécs, 2004., p. 32.

28 Barna MEZEY: Középkori tömlöctől a modern büntetés-végrehajtási intézetekig. ELTE, Budapest, 2000., p. 34.

for 17 000 convicts. This network was completed by special institutions like The National Judicial Observer and Psychiartric Institution, National Hospital for Prisoners, National Museum of Prison Cases, Criminal Anthropological Laboratory, The Tauffer Library of Prison Cases. Thus, a comprehensive development of the Hungarian prison cases basically took place after the Csemegi Codex came to power. The law concerning legal procedures passed in 1896 contained a detailed description of the internal order and trial procedures of prisons. The reception in a prison happened on the royal prosecutor's order that was usually based on a judicial decision and on the judicial announcement regarding the sentence. However, those arrested or brought in by police authorities or by the gendarmerie and those transported from other prisons had to be admitted temporarily. The "after-prison" care in Hungary was established in 1874 by the foundation of The Relief Organization for Prisoners in Budapest the purpose being to make it easier for the condemned to return to social life. They created the criminal sheet with information about the sentence and this was sent to the National Criminal Register.[29]

The modern Hungarian history of law enforcement is not very long, it only covers 150 years. This does not mean that this period did not have plenty of interesting events, reforms and changes of paradigm. On the contrary, the stagnation or improvement of prison cases was sometimes left behind and sometimes preceded the general social progress.

5. Law enforcement from the turn of the century (1900) to the change of the regime

5.1. Reform endeavours

At the end of the 19th and the beginning of the 20th century the trust put in the criminal system renewed on the basis of the principle of legality was undermined by crisis phenomena. The conflicts between the classic reform and the criminal tendencies regarding the perpetrator and his criminal act left their mark on the development of criminal theories. Laws concerning imprisonment were passed one after the other (1881 in Belgium, 1900 in Norway, 1903 in Switzerland) making the length of imprisonment undetermined and dependent on the betterment of perpetrators who in most cases were slackers, drunkards, beggars and tramps. The same kind of laws were passed against subsequent offenders in 1902 in Norway and in 1908 in England. During the turn of the century not only the theory but also the practice of the Csemegi Codex was judged by practitioners and suggestions were made regarding the modification of the punitive system. In Europe Hungary was among the first who introduced the law enforcement system against young aged criminals. The XXI. law passed in 1913 crated the safety rules to be employed in the case of dangerous tramp slackers. This was the workhouse into which the convicts were sent after having spent their sentence in prison. The world war chronologically hindered and retarded every improvement, the institutions of law enforcement had considerably decomposed. On the basis of the exceptional law applied during the war – the L. law passed in 1914 – some of the prisoners were sent to work in public institutions or for private individuals. The sentences of those capable for military service were postponed or interrupted during the war. There were no civil servants or staff in the institutions of law enforcement and suitable equipment, food, heating and lighting were also

29 György VÓKÓ: Magyar büntetés-végrehajtási jog. Dialóg-Campus, Budapest-Pécs, 2004., p. 60.

missing. During the democratic revolution that broke out in 1918 The National Council set free all political prisoners and those convicts who did not seem to represent danger to public security. With the announcement of the Hungarian Soviet Republic the administration of justice was totally transformed. The X. law passed in 1928 introduced the institution of aggravated workhouse as a uniform provision instead of imprisonment. The shortest period imposable was 3 years but the upper limit was not defined by law. The convicts could only be discharged from aggravated detention on probation. This institution worked until 1950, no such separate institutions were established until its termination, as all these were working within bridewells and prisons. The high number of imprisonment cases induced the government to reduce the severity of penalties. Thus was introduced the institution of imprisonment suspendable on probation.

5.2. Law enforcement in the interwar period

In the interwar period Hungarian penal law was characterized by three main features: the legal conclusions drawn after the events of the Forgotten Revolution and of the Hungarian Soviet Republic; the legal formulation of the reforms of the 20th century penal law; militarization and the legal bearings of wartime tensions. All these brought about serious changes in the penal law and in the code and practice of law enforcement.[30]

In the interwar period in Hungary the enforcement of sentences in prisons, bagnios, bridewells, national prisons, workhouses, aggravated workhouses was carried out in 6 national institutions: The National Collector Prison from Budapest, The National Prison and Mediatory Institution from Vác, The National Prison and Aggravated Workhouse for Men from Sopron, The National Prison from Harta,The National Prison and Aggravated Workhouse for Women from Márianosztra and The Local Prison and National Prison from Szeged. There were also 23 court prisons, 90 district courts and two workhouses working. In this period law enforcement was controlled not by rules but by lower level ministerial decrees and orders. The International Committee of Criminal Law and Prison Cases established in the 1920s minimal requirements concerning humane and social treatment of prisoners. These requirements had to be kept by all civilized countries. Both the states taking part in the committee – Hungary among them – and the League of Nations accepted the international document which was published under the title *Basic Principles concerning the Treatment of Prisoners* and which summarized the most important demands of prison cases of that time.[31]

5.3. Soviet law enforcement in Hungary

After the end of the second world war the first thing to be done was the consistent liquidation of fascist remains. Among the first measures taken by the National Goverment was the restoration of law and order and the creation of the legal conditions when calling someone to account. Thus on January 25 the decree No. 81/1945 ME was passed, a decree about calling to account war-criminals and criminals against people. Beyond bridewells and prisons, internation and forced labour were introduced. Work camps were founded for the enforcement of penal sentences that were imposed for a definite period of time or even for life. Internation

30 Barna MEZEY: Új határok között. Büntetés-végrehajtás a két világháború közötti Magyarországon. In: Börtönügyi Szemle 2000/5. p. 95.

31 György VÓKÓ: Magyar büntetés-végrehajtási jog. Dialóg-Campus, Budapest-Pécs, 2004., p. 47.

as a forced measure taken by public administration fell within the competence of the police.

Starting from 1947 the judicial government had the view that law enforcement was not to be loss-making for the state. The employement of prisoners was included in the planned economy. In 1948 the Economic Management of the Ministry of Justice was founded which worked out and enforced the detailed economic plans of prisoner employment. In the same year took place the nationalization of the companies employing prisoners. It was also ordered that these companies be separated from prisons and that prisons were to provide them a sufficient number of prisoner-workers.[32] During these times there was no change in the organization of the public prosecutors' department until the year 1953. The former operative control done by law enforcement restricted itself to formal matters, then was almost completely suspended for a few years.[33] After the II. law passed in 1950 was put into force the distorted law enforcement brought an unprecedented number of prisoners into jail. Thus there was a demand for the enlargement of the system. In comparison with former enforcement systems there no longer existed gradualness and nor did mediatory institutions. Workhouses and aggravated workhouses were no longer included in the sentences imposed, and there was no solitary confinement either. Distortions caused by personality cult could be strongly perceptible. The institutions of law enforcement came under the hand of the State Security Authorities. Not only staff carrying out legal duties were denied to enter here but also those who worked in the fields of law enforcement were forbidden to enter (unless as prisoners). The institutions followed secret orders. Political prisoners were not set free after having spent their sentence. Their internation was often longer than the sentence itself.[34] Prisoners were encouraged to greater work-performance by the method of day-remission. This meant that in case of a performance that exceeded 100% one day was remitted after every 5% or 2% in case of mining. Keeping in touch with relatives and participation at cultural programmes were also dependent on work performance. In the following years what counted in case of staff employed in law enforcement was not qualification or professional skills but political reliability. At police stations there was an inscription used as a motto saying : *Don't just guard them, but hate the prisoner.* This lead on many occasions to brutal, inhumane treatment. In 1952 the enforcement of imprisonment was taken out from under the competence of the Ministry of Justice and was placed under the authority of the Home Office. For the central direction of prisons the National Headquarter of Law Enforcement was organized while prisoner employment was controlled by the Directory of Operations of Public Interest.

The regulations concerning law enforcement passed in 1955 established the uniform enforcement system. Among its goals were education and the omission of corporal punishment and it also indicated the prisoners' duties. In the few days following 23 October, 1956 political prisoners were released as well as thousands of pheasants not being able to deliver the quota of their agricultural produce. This is when coal mines serving as places for law enforcement were shut down definitively and so were industrial enterprises serving the same purpose. Three years later there finally took place the legal examination of unregulated or not properly regulated law enforcements. This is how secondary penalties, corrective trainings and fines were introduced. In the following years there was a gradual regulation of the domain of law enforcement (law V/1961), a separation of prisons and workplaces for law enforcement. Prison cases were placed back under the authority of the Ministry of Justice (1963), then there started the legal regulation of

32 János SZÉKELY: "Rács mögött" A szabadságvesztés-büntetés történeti áttekintése – tanulmány. In: Börtönügyi Szemle 1999/5. p. 21.

33 György VÓKÓ: Magyar büntetés-végrehajtási jog. Dialóg-Campus, Budapest-Pécs, 2004., p. 49.

34 János SZÉKELY: "Rács mögött" A szabadságvesztés-büntetés történeti áttekintése – tanulmány. In: Börtönügyi Szemle 1999/5. p. 21.

the enforcement of certain penalties. The theoretical activities had a stimulating effect on the codifying work that was started in the '60s and this mirrored the increased interest shown towards the questions of content of law enforcement. The first steps on the road of placing the punitive system on new bases were taken by law decree no.20 passed in 1966. The already existing two stages of imprisonment were completed by another stage. In agreement with the idea of the four existing types of criminals the following were established: aggravated prison; prison; aggravated workplace for law enforcement; workplace for law enforcement. The increasing number of crimes resulted in impatience the result of which was a new law decree of the Penal Code passed in 1971 (law decree no.28) which restored imprisonment for a life and ordered aggravation against subsequent offenders. There was a change in the names of the stages of imprisonment as well. Thus there was bagnio, prison, aggravated prison and bridewell. In the year 1974 a considerable change from the point of view of law enforcement was brought about by the introduction of forced medical treatment for alcoholics and one year later the appearence of the law decree no.20/1975 concerning after-prison care. The latter established a differentiated system of after-prison care. As a result codifying work based on former scientific research the new Penal Code came into being in 1978. It reduced the stages of imprisonment from four to three there being left only the bagnio, the prison and the bridewell. Its characteristic was that it had a wide range of judicial provisions, it laid stress on sentences of liberty constriction, on corrective training, on fines, on the suspension of imprisonment and it employed a wide scale of possibilities concerning placing someone on probation. The Penal Code that had undergone various modifications brought about some changes like the introduction of the group for educational and curing purposes, the determination and regulation of confiscation of property, the employment of aggravated corrective training as a major sentence, the regulation of the enforcement of protective surveillance, imposition of secondary penalties, forced medical treatment and examination of provisions concerning personal freedom.

By the end of the 1980s there could be felt the effect of the current of thoughts of the European constitutional states. There started operations regarding the restriction of the punitive power of the state. Probably the most significant change in this period constituted the law XVI/1989, according to which capital punishment could no longer be a means of political settlement. In 1990 the Constitutional Court declared capital punishment to be anti-constitutional and abolished all regulations related to it.[35] The laws of amnesty that followed the change of the regime had a positive effect on the formation of prisoner population. The circumstances in prisons, the employment and educational conditions could be improved with the reduction of the number of prisoners. The legal amnesty laws in the years 1989 and 1990 had as result the release of nearly 3 000 prisoners.

6. Conclusions

With its restricted size this essay cannot undertake to present with a deserved thoroughness the history of law enforcement from the beginnings to this day. It only can outline those few significant events that fundamentally determined the direction in which Hungarian law enforcement improved.

Starting with the initial penalties of self-judgement, through terrifying brutalities of the Middle Ages and up to the enlightened ambitions of the Modern Age, I intended to present those positive traditions which helped in maintaining the operation of the system and which raised

35 György VÓKÓ: Magyar büntetés-végrehajtási jog. Dialóg-Campus, Budapest-Pécs, 2004.

Hungarian law enforcement to the forefront of the Eastern-European region. Beyond interesting and eventful penalties law enforcement itself has been existent in Hungary for nearly 150 years. The history of this period is actually caracterised by an organization of Hungarian law enforcement which started form the Austrian model and then also survived the Soviet traditions.

It is difficult to imagine punitive administration of justice without law enforcement. The penalties only causing disadvantage have become outdated. The methods of education and rehabilitation must be successful among the requirements of constitutionality. Disadvantages have to be perceived as means of education in which also the preventive power could manifest itself. In the majority of countries in the focus of the expected reforms concerning law enforcement stands the improvement of the circumstances the prisoners are kept in. There are countries (England, the USA) which intend to establish new prison-building programmes and wish to create more humane circumstances for prisoners. In Hungary, after the change of the regime, the Soviet, basically dictatorial, social system was succeded by a society which was based on bourgeois democracy accepting its set of values and normatives. As a result, joining forces with the more improved western systems, today's modern Hungarian law enforcement aims at the combination of legal and human requirements.

Zusammenfassung

Die Geschichte den Strafvollzugsanstalten

Die Strafe ist genau so alt, wie die Gesellschaft, spiegelt ihre Eigenartigkeiten, ihre herrschende Auffassung, die Mittel des gegen die Kriminalität geführten Kampfes wider. Die Strafen und deren Vollstreckung entsprachen immer der gegebenen gesellschaftlichen Zeit. Die auf Rache ruhende gemeinsam getragene Verantwortung der Urgesellschaften, die von den einander verwüstenden Selbstkriegen der Horden wurden von den auf den Kompensationen sowie von der auf dem Thalio Prinzip gebauten Rechtspflege der Staaten in der Antike und in dem früheren Mittelalter gefolgt. Für die Jahrtausende der Einrichtung der sklavenhälterischen und Feudelgesellschaft ist die Anwendung des Attributes als eine Epoche der Todes-, Körperverstümmelung, Leibbeschämung am ausdrucksvollsten aus der Hinsicht der Strafe. Die Rache hatte also eine Garantiebedeutung, seitens des verletzten Geschlechts war eine Retorsion unvermeidbar. Beim Entstehen vom Staat und Recht hat die neue Organisation der Macht ihr Strafsystem mit Anlehnung auf die Tradition der Geschlechte ausgebaut.

Heute muss im Mittelpunkt des Konzepts und Rahmens vom Strafrecht, Strafverfahren und von der Strafvollstreckung nichts anderes als Schutz und Achtung des Menschen stehen, egal ob es ein Täter oder ein Verletzte ist. Ernährend aus der Vergangenheit und Lernend aus ihren Fehlern, konzentriert sich das Fragenkreis der europäischen harmonisierten Ergebnisse des modernen Strafvollzugsrechts heute eher um die Wirksamkeit der Vorbeugung von Verbrechen.

Gegen den altertümlichen Rachefeldzug müssen heute im Laufe der Tätigkeit der Strafvollstreckung die verfassungsmäßige Grundsätze und Rechte, die internationalen menschlichen juristischen Erwartungen und Anforderungen zur Geltung kommen.

Diese Arbeit will durch ihren eng geschnittenen Umfang – ohne die verdiente Gründlichkeit – die Geschichte der Strafvollstreckung vom Beginn bis zu den heutigen Tagen vorstellen und einige bedeutende Ereignisreihen darstellen, die grundsätzlich die Entwicklungsrichtung der ungarischen Strafvollstreckung prägten.

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Actors, Interests in the Arena of Civil Aviation – and Security

Aviation was only the privilege of gods and birds for centuries – today it is an everyday reality for the whole mankind as well. Flying does not appear only in the ancient papers,[1] but it is a common phenomena in bed-time stories,[2] myths and legends,[3] too. The first construction which was really able to fly „was born" in the 18th century when the first balloons were launched. The 19th and 20th centuries marvel already at an astonishing, speedy evolution. And as human nature did not improve on a way as the above mentioned area – the same has happened as on all fields of life: crime appeared at the same time – which could keep time with technological progress…

Only 80 days after the first successful try of Montgolfier brothers, in the August of 1783 the French physicist, Charles launched a balloon filled with hydrogen. The balloon after a nearly 25 kilometer long journey landed on the field of Mars in Paris. As it was passing through above the village of Gonesse, and emerged among the low clouds, the frightened village people – who have never seen any similar monsters before – attacked it with hacks, scythes and pitchforks. As it was successfully „deactivated", the remains of the balloon were roped to the dick of a horse and dragged till it was perished.[4] It was the first documented violent act against civil aviation.

Half a year later Jean-Pierre Blanchard – who became famous as an aviator before – was preparing for his first flight, when a young man fought himself from the last lines to the front, jumped into the basket of the balloon and forced Blanchard to take him with himself. To make his request more effective he waived a sword in his hands. The attempt fell flat, because he was „deactivated" by the „ground helpers" of the „pilot" and was handed over to the guards of the king.[5]

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1 e.g. In the antiquity of Egypt, epic of Gilgamesh, the Bible

2 In the Arabic world of „Thousand nights" the protagonist is often flying to the place of his dreams with the help of a „flying carpet" in a moment.

3 The story of Ikaros symbolises the ambition – he has flown too close to the sun, so his wings – which were stuck with wax – melted which caused his death.

4 Péter MOYS: Légiközlekedési Jog, Hungarocontrol, Repülésoktatási Központ, Légiforgalmi és Repülőtéri Igazgatóság, Budapest, 2001., p. 143.

5 It can not be regarded as the first hijacking of history only because at this time balloons were uncontrollable, the wind decided about the direction of the journey. ibid p. 143.

The initial, isolated violent acts proliferated in a before unimaginable way in the 1960s and 1970s – which urged the states and other actors of civil aviation to fight. Besides hijackings blasts, hostage crisis appeared aboard of planes – whose suffering victims were the passengers itself. Not only isolated, individual, private actions fraysed the nerves, but aligned, cooperated, precisely planned terrorist acts. The fathers, brain trusts of terrorism have also discovered civil aviation for themselves, what is a perfect target and also a tool to reach their goals.

The real breakthrough in the area of aviation security was the tragedy of 11th September, 2001 – like in connection with terrorism in general. Experts mention an overture of a new age repeatedly – so there is a world before and after 11th September.

What Did „Crisis" Mean in Aviation Before the Tragic Events?

Since 11 September the concept of crisis was re-evaluated in the industry of civil aviation. Till then it was a crisis if long queues were wriggling at check-in counters. The Congress of the United States demanded the Government to act urgently – more people should fly on the most convenient, fastest way![6] Today the problems of those times seem to be nearly ridiculous. Before 11th September, the countersigns written on the flags of aviation industry were the „more passengers" and „the lowest costs". More passengers, more luggages, more flights – which follow each other on the runways as it is only physically possible. Or probably even faster... What does an industry like this care about the anyway unnecessary concepts, ideas like the security of aviation, control, checks, which make costs higher and slow down the procedures? The technological safety of aircrafts were taken seriously for the whole time, which has taken the expected favourable results: the number of accidents due to technological errors was decreasing. Contrary to this the unlawful interference in international civil aviation – which endangered the security of aviation – was not dealt with – it stayed a stepchild of experts for the whole time, as it did not match to the above mentioned arsenal of goals.[7]

Parallel with this shocking studies were came to light about the startling results of tests – examining security matters – carried out at the airports of the United States. The „American dream" lived in the skies, clouds as well. The society of the United States was the first one where everyone flew. In the America of 1980s flying was not the privilege only of the rich. „The members of the middle class or simple workers fly for vacation to Disney Land or simply to visit their relatives. Whole families fly: the toddler became as common on board as the businessman with his suitcase."[8]

The next step in the ideas of airlines about their future was the introduction of new flights for short, 200-300 mile distances and they also wanted to debauch more passengers from the highways to the skies. Of course the goal became the better service of this crowd. Finally its result was that so many people worked at airports that the security personnel was already unable to memorise the faces. If someone walked through gate firmly – especially if he was wearing uniform – who dared to

6 Gregg EASTERBROOK: The All-Too-Friendly Skies – Security As An Afterthought, In: ed. James F. HOGE, Gideon ROSE: How Did this Happen? Terrorism and the New War, Public Affairs, New York, 2001. p. 163.

7 As the former director of the American Kiwi Airlines, Robert IVERSON stated: Airlines do not care really about common good, if it is about profit". ibid p. 164.

8 ibid p. 165.

stop him or just hold him up and be inquisitive about his identity?[9] Among the security personnel the fluctuation[10] was high, they were paid badly,[11] and only had a one day long education.

Automation invaded under the aegis of speed and cost-efficiency, airlines started to sell electronic tickets. In many places the check-in process was also carried out by machines, so nobody has even taken a look at the passenger.[12] At 11th September the whole American civil aviation stood defenceless before a possible attack, it proved to be quite an easy prey. Terrorism has broken into the skies as never before.

The vulnerability was already detected by experts even before 11th September: dangerous holes yawned on the protecting umbrella of aviation security. Several reports came to light in the United States which summarized the results of „experiments" carried out at the most important airports – the outcomes were withering and disappointing.[13] On 11th September the start pistol went off and a new age has started.

Why is it a Perfect Target?

Events had special characteristics which were without any precedents. Civil aircrafts were used as weapons taking more thousand victims. This whole was crowned by a „complicated strategy, plan of campaign. There were no warnings, cautions, and no interests in negotiations."[14] It is obvious that it is not civil aviation which is in the cross-hairs of terrorism. Publicity is the magic word when choosing a civil airplane to attack. Financial loss and loss in human lives is tremendous in itself. But the publicity is the really strong weapon in the hands of terrorism. We also have to add that the number of unlawful interference in civil aviation is much less than its economic effects and the continuously floating danger that anyone who chooses aviation can be a victim in some sense.[15]

We can say it without any exaggerations that terrorist acts have serious consequences not only on the area of aviation security, but on the field of world economy, the future of airports, airlines, the prices of flight tickets as well.

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9 To underlay this the story of Frank W. ABAGNALE is a perfect one. A famous movie was also shot about his life: he worked as a pilot of the American Pan AM Airlines without any license and qualification. Nobody has discovered the cheating...

10 In average the members of security personnel spent three months in this scope of activity. ibid p. 168.

11 In the United States the security personnel is ensured by external firms, so always the cheapest offer has won – which had an unfavorable effect on the aviation security. ibid p. 165

12 United Airlines made the check-in fully in order to evade terror danger asked the following question: „Has a to You unknown person handed over a luggage to take it aboard?" It is a naive thing to think that any terrorist would sign the answer „YES". ibid p. 166.

13 In 1998-99 the chief controller of the Transportation Department order the checking of eight more important airports. The agents had the task to get secretly to the highly protected areas. 117 of 173 attempts were successful which meant a 68% success rate. It was stated that airport security personnel had not carried out their duties. The similar test accomplished by the General Accounting Office reached the same conclusion: the most serious deficiencies, problems were caused by the luggage security checks, the low salaries and the high fluctuation. The fact tells a lot, that two of the hijacked planes in 11th September was in the property of American Airlines which was fined for 99.000 USD because of security deficiencies in August of the same year. In: Mark MURRAY – Corine HEGLAND – Sydney J. Jr. FREEDBERG: The Sky War, In: National Journal, 9/15/2001, Vol. 33, Issue 37, p. 2848.

14 Speech of Rob OXWORTHY at ACAC Conference, icao.int/goto_m_atb/avseconf2002/index.html

15 Atef GHOBRIAL and Wes A. IRVIN: Combating Air Terrorism: Some Implications to the Aviation Industry, In: Journal of Air Transportation, Vol. 9. No. 3, 2004 p. 68.

The world has realised again: if there is a weak link in the chain, then the whole chain is weak. Quoting the words of a former CIA analyst: „This is what is nearly crying: There is some kind of common vulnerability: Unless we get part of the equation fixed, we will remain vulnerable."[16]

In my present article I try to introduce the most important actors of civil aviation. Looking behind the scenes their interests and most important roles will be presented. The states, ICAO, IFALPA, IATA, the Security Council, the General Assembly of the United Nations, the airports, the airlines and passengers stand in the same queue – with different moving factors and strength.

The State

The state and its economy is incapable of living without a well established infrastructural background. Nowadays flying is an inevitable element of this bases which keeps the whole national economy in motion. Though the GDP income deriving from transportation is only a small part of the whole, for the bigger part it makes possible to come into existence.[17] States have suffered extremely serious economic damage due to terrorist attacks, economic crisis have increased at a fearful rate...

Besides it is an elementary duty of the state to ensure the appropriate legal background, signing international agreements and guarantee the safety of its citizens – in this framework to fight against terrorism. Though because of the special characteristics of state it is sometimes the state itself which is the obstacle of this struggle.[18]

In several cases the causes, roots of terrorist acts should be looked for in one of its crucial element, its sovereignty. Terrorist acts are often carried out by groups which are discontent with the state – sometimes because of their dissatisfaction with the political status-quo. Besides sovereignty can be exploited especially in non-democratic states, and policies can be supported which are definitely, obviously rejected inside the country and by other countries as well.

On the other hand the state can bar the efficiency of „anti terrorist counter steps" with its resistance. It is obvious that only common, uniform reaction can take any results in the fight against terrorism, without this the struggles are redundant, unnecessary and senseless. This way a small group of states can set back any results through not joining international agreements and rejecting cooperation – insisting on their sovereignty till „ad infinitum". They can even offer safe heaven for terrorists who can hide there safely – circumventing the punishing power of states which chase them.

We can not forget about another side of state sovereignty, either. Since it is the states' task to maintain stability, security and order on their territories – and they even take action against phenomena endangering their security – they also tends to profit from the possibilities deriving from that. States use the fight against terrorism happily as a gimmick to strengthen the trust of citizens in the power of state and to prove that the control of the situation is in their hands. It is not a single case that states make advantage from this increasing control over citizens

16 MURRAY – HEGLAND – FREEDBERG 2848. o., 2p, 2bw

17 In the United States the 15-20 % of the GDP income comes from transportation, this part of economy makes possible to come into being the other parts. In: Paul Stephen DEMPSEY: Aviation Security: the Role of Law in the War Against Terrorism, In: Columbia Journal of Transnational Law, 41, 2003, Vol. 2:427 p. 654.

18 Christopher HARDING: The Concept of Terrorism and Responses to Global Terrorism: Coming to Terms with the Empty Sky, In: September 11, 2001: A Turning Point in International and Domestic Law? ed. Thérése O'DONNELL, 2005, Transnational Publishers, p. 174-177.

with observations decreasing civil liberties, human rights – with the countersigns „everything for security".

ICAO,[19] the Centre of the Ring

One of the most important actors on the international arena of civil aviation is International Civil Aviation Organization. Aviation demands high level expertise, besides uniform rules are required relating to qualification, aeronautic rules, safety and security. In the 37 Article of the Chicago Convention the Contracting States obligate themselves to cooperate.[20] For this intention a special agency, the ICAO[21] was established in the framework of the United Nations by the Chicago Convention, 1944.[22] It is the engine and soul of civil aviation, the central institution of regulation. It also possesses all expertise and knowledge which is needed on a special field like this.

The aims of ICAO are enumerated in the Article 41 – a complicated, complex picture is shown. Besides the frequent, secure improvement of civil aviation – which embraces the planning and operation of civil aeroplanes, the development of flying routes, airports and flying devices – it also has the task to suffice the demand on aviation, to suit the requirements of efficiency and to help to ensure the security and safety. These postulates must be fulfilled without any discrimination among states.

So ICAO was „clothed" by the obligation to regulate several technical aspects of international civil aviation. It determines standards in connection with registry of aeroplanes, certificates, international principles, communication devices.[23]

Standards and recommended practises[24] are accepted which appear as the Annexes[25] of Chicago Convention[26] – without them the whole civil aviation „would fall into a total

19 International Civil Aviation Organization Further: ICAO

20 Convention for the Suppression on International Civil Aviation, Dec 7 Article 37., Further: Chicago Convention

21 State which joins the agreement automatically becomes a member of ICAO. In: Wilfried TEUCHTERT – Klaus-Dieter GÜNTHER – Günther DAMM: Luftrecht, Staatsverlag der DDR, Berlin, 1987. p. 57.

22 ibid Article 43.

23 Article 37 of Chicago Convention lists all fields in its a)-k) points, which are regulated in uniform rules by ICAO working out standards: e.g. „communication systems, air navigation aids, ground marking, rules of the air and air traffic control devices, licencing of operating and mechanical personnel, airworthiness of aircraft, collection and exchange of meteorological information, aeronautical maps and charts, customs and immigration procedures, aircraft in distress and investigation of accidents and any matters concerned with safety, regularity and efficiency of air navigation as may from time to time appear appropriate."

24 In literature these standards are called ,,SARPS".

25 The execution rules of these Annexes are determined by Technical Instructions.

26 At present the Chicago Convention has 18 Annexes: there is a separate one about the security of civil aviation with the title: Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference. The other Annexes are the following ones: Annex 1: Personnel Licensing, Annex 2: Rules of the Air, Annex 3 : Meteorological Service for International Air Navigation, Annex 4: Aeronautical Charts, Annex 5: Units of Measurement to be Used in Air and Ground Operations, Annex 6: Operation of Aircraft Annex 7: Aircraft Nationality and Registration Marks, Annex 8 Airworthiness of Aircraft, Annex 9: Facilitation, Annex 10 Aeronautical Telecommunications, Annex 11: Air Traffic Services, Annex 12: Search and Rescue Annex 13: Aircraft Accident and Incident Investigation, Annex 14: Aerodromes, Annex 15: Aeronautical Information Services, Annex 16: Environmental Protection, Annex 18: The Safe Transport of Dangerous Goods by Air. In: http://www.icao.int/

chaos".[27] States obligate themselves to cooperate with each other, though they are not obligated to harmonize their own regulations with these standards. If the state can not does not intend to introduce the regulation into his own system, – has to give immediate notification to the ICAO about the differences between its own rules and the ones established by the standards. In case of modification of standards the notice has to be given about the above mentioned differences in sixty days to the Council of ICAO.[28]

Besides Procedures for Air Navigation Services[29] and Supplementary Procedures[30] can also be issued.

In general it can be stated that the main purpose of ICAO is to establish safety and security. In both cases the goal is to protect the crew, passengers, air cargo and post aboard. The difference is only that while in the first case the aim is to prevent the cause of non – intentional damage, in the second one there is an intentional unlawful interference.[31]

So ICAO is an international organization with *„quasi legislative power"*, besides it is also mentioned as a *„quasi judicial organ"*. If disagreement between states about the interpretation of the Chicago Convention and its Annexes can not be settled by negotiations, „it shall … be decided by the Council"[32]

ICAO consists of Assembly, Council, Secretariat and other organs which become necessary. The Assembly is the „parliamentary" body of ICAO, where all member States represent themselves. It meets at least every three years, its session is convened by the Council. Its task is to elect the members of the Council, to study its reports and to accept the budget of the organization. Further it may decide in all matters which are not referred to the Council.

The Council consists of 33 members who are elected by the Assembly for a three year term. The Council also has mandatory and optional roles. The circle of mandatory functions are listed in Article 54 of the Chicago Convention: submits annual reports to the Assembly, executes its orders, collects, analyses and publishes it data about the improvement of aviation and the operation of air services. It also reports to the member states if the Convention is infracted or the standards, procedures, recommendations of the Council are not followed – these are also reported to the Assembly as well, if the state does not make steps to comply with rules in a reasonable time. The Council also adopts Standards and Recommended Practices and incorporates them as Annexes to the Chicago Convention.

The establishment of air transport commissions on regional or any other grounds, inquiring in matters of international significance on the field of aviation belong to the optional functions of the Council. It may conduct research in all aspects of the system of civil aviation, communicate the results to the member states and can examine every situation which can hide obstacles to the improvement.[33] More working bodies help the work of the Council.[34]

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27 Eugene SOCHOR: From the DC-3 to Hypersonic Flight: ICAO in a Changing Environment, In: Journal of Air Law and Commerce, 1989/1990. Vol. 55. p. 409.

28 Article 38 of the Chicago Convention

29 ,,PANS" (Procedures for Air Navigation Services)

30 ,,SUPPS" (Supplementary Procedures)

31 http://www.icao.org/cgi/goto.pl?icao/en/pub/memo.htm

32 Paul Stephen DEMPSEY: Aviation Security: the Role of Law in the War Against Terrorism, Columbia Journal of Transnational Law, 41, 2003, Vol. 2:427 p. 657.

33 Article 84 of the Chicago Convention

34 Article 55 of the Chicago Convention

Secretariat is the main executing organ. It has different administrative and organizational functions – it assists the labour of the Council and the Assembly. It collects the data regarding to aviation and keeps connection with other international organizations.[35] The distribution of ICAO documents lays also on the shoulders of the Secretariat.

It is headed by a Secretary General, and it is divided into five main divisions.[36] Besides seven regional offices give a helping hand for the states of the region in realising the so called „Regional Plans".[37]

Nevertheless the legal possibilities of ICAO are quite limited in connection with unlawful interference in civil aviation, it still has a significant role in this fight. On one hand in countries where the fight against this phenomena is in its infancy, the security measures detailed in Annex 17 have a significant role by all means – since they constitute minimum standards for all states. It is obvious that the level of security demanded by them is not sufficient in our world, where the terrorist threats are the constant, everyday actors of our life.

The organization does not have any coercive means even in executing its own standards – a part of them is not even compulsory, can not use „sanctions" against states breaching their obligations. Besides all contracting states of the Chicago Convention are members of ICAO automatically, so states which support terrorism stand also in this queue. ICAO can do nothing against states which give financial support, basis, asylum, safe heaven for terrorists. What is more: anti terrorist strategies also have to be sent to these states as well. Several (anti terrorist) international agreements about the suppression of unlawful interference of civil aviation were created under the aegis if ICAO.

ICAO is a successful international organization. It adopted to the technically, legally extremely fast changing environment – what is quite unusual from a specialised agency. *„The experience of ICAO shows that the statute of an international organization is able to develop as a domestic constitution. This development – should it happen in national or international framework – presumes a certain institutional maturity which is on the basis of a broad consensus in connection with the essential means and functions of the certain constitutional system. ICAO has reached a high level institutional stability building this consensus – which enabled it to create and apply legal rules. It supported the realisation of the long term objectives of the organization."*[38]

It happened despite the fact – goes on Buergenthal –, that ICAO avoids formal legal solutions since they can be unacceptable for states because of political or economic reasons. The above mentioned institutional stability has its roots in the trust of the contracting states.

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35 „The Council is assisted by the Air Navigation Commission in technical matters, the Air Transport Committee in economic matters, the Committee on Joint Support of Air Navigation Services and the Finance Committee." In: http://www.icao.int/cgi/goto_m.pl?icao/en/howworks.htm

36 It works in close cooperation with the other specialised agencies of the United Nations, intergovernmental organizations and other organs as well. It collaborates with the following organizations: e.g. FAO, UNESCO, World Bank, WHO, ECAC, EUROCONTROL, ESA, INTERPOL, JAA. In: Eszter MOLNÁR: A légtér használatának nemzetközi jogi kérdései. Rendortiszti Foiskola, In: Rendvédelmi Füzetek, 1999/18. Budapest, p. 22.

37 Air Navigation Bureau, the Air Transport Bureau, the Technical Co-operation Bureau, the Legal Bureau, and the Bureau of Administration and Services.

38 The seven regional offices are the following ones together with their codes: European and North Atlantic (EUR/NAT) Office – seat: Paris, Asia and Pacific (APAC) Office – seat: Bangkok, Eastern and Southern African (ESAF) Office – seat: Nairobi, Middle East Office – seat: Cairo, North American, Central American and Caribbean Office (NACC) – seat: Mexico, South American (SAM) Office, – seat: Lima, Western and Central African (WACAF) Office – seat: Dakar.

It could build in a legal framework which does not force rather encourages to reach compromise. It created and maintained a legal order ingeniously which is appropriate for an organization which has a lot of functions – without significant competence.[39]

Security Council and General Assembly of the United Nations – and Security of Aviation?

The General Assembly and Security Council of the United Nations have also role in special cases in connection with the security of civil aviation. Both organs issued reports either relating to concrete cases (Article 51 of the Charter of the United Nations ensures the rights of individual and collective defence)[40] or in general when it became inevitable to attract the attention of international community to „multiplying"acts which can endanger international peace and security.

In several cases resolutions were accepted in this field, but their political significance is much higher than their binding force. Besides they are "out of breath" in accepting quite general phrasing resolutions.

We should not forget about the fact that a specialised agency, the ICAO works already on this field – which has the necessary expertise. It would not be too *"elegant, if these two organs would try to monopolize a special field which belongs to the special competence of this specialised agency – at least till this organization does not express its incapacity or does not tend to act."*[41]

IATA,[42] the Club of Airlines

IATA was established for the second time in Havana in 1945.[43] It is a private organization whose members are the most important airlines of the world irrespectively of their ownership: it does not matter if they are private or state owned. The active members of this organization can be any airlines which operate international scheduled air services.[44] IATA established a

39 Thomas BUERGENTHAL: Law-Making in the International Civil Aviation Organization, Syracuse University Press, New York, 1969. p 229.

40 ibid p. 229-230.

41 "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." Article 51, Charter of the United Nations

42 Edward McWHINNEY, Q.C.: Aerial Piracy and International Terrorism, The Illegal Diversion of Aircraft and International Law, 2nd revised edition, Martinus Nijhoff Publishers, Dordrecht/Boston/Lancester, 1987. p. 20.

43 International Air Transport Association, further "IATA"

44 For the first time it was set up in 1919 with the name of ,,International Air Traffic Association", the present organization is the successor of this organ.

whole network of bilateral aviation agreements. In these treaties there is always a reference to the organization itself – as to the machinery through which the tariffs, fares are determined.

The most significant organ of the organism is the Annual General Assembly which chooses its president, the members if the Executing and Constant Committees and accepts the budget. Among its task is providing high level service – the passenger always remaining in the center –, elaborating on cost-effective, environment friendly standards, finding a solution to the key problems of civil aviation and improving the connection between airports and air navigation.[45]

IATA is based on two pillars: *Trade Association* – which deals with legal, technical and economic questions, – the other leg is *Tariff Coordination,* which determines the fares, tariffs.[46] Its elementary functions are assisted by four constant committees. Besides the above mentioned areas the special conferences have an extreme significance – among these ones the most important is the Traffic Conference). It creates resolutions in which tariffs, porterage, other fares and different regulations are determined relating to air services. All settlements are agreed on by a unanimous vote. In practice it means that all airlines are guaranteed veto power irrespectively of its size, significance, or the state in which it is operated.[47]

IATA fills in a vacuum when it governs intergovernmental control in the system established by the Chicago Convention. This way ICAO and IATA function independently from each other, but they are parts of the same mechanism, they complement each others' activity. IATA – contrary to the ICAO – is a private association. It is also common in the two organizations that both of them have limited powers relating to "sanctions".

In connection with the security of aviation its activity in one hand extends to accepting resolutions – in which it calls upon states to act in the "fight against unlawful interference in civil aviation", and to do all possible to prevent such acts, on the other hand it realizes information sharing among airlines and initiates certain research projects. Besides its special psychological and economic tools were used when it pressurized airlines which assisted terrorism.[48]

In summarizing it can be stated that partly a similar phenomena can be observed like related to the Security Council and the General Assembly. It is obvious that the leader officials of ICAO rejects all unlawful interference in civil aviation, BUT…

- On one hand because of selfish interests there is no severe action against states which support delinquent groups, persons and states. (Generally these airlines are in state ownership and represent a strong potential.)
- On the other hand they do not wish to overextend their own competence limiting their activities only to their own fields: what is the determination of tariffs and fares.[49]

45 Its seat is in Geneva and Montreal, besides it possesses local offices in more big cities of the world.

46 MOYS, p. 137.

47 In Trade Association active and associated members can also take part, while Tariff Coordination can only be joined by active members Active members are airlines which operate international air service, while associated members operate exclusively domestic flights. In: MOYS, p 137.

48 Sometimes you have the feeling that IATA functions as a cartel, and in connection with the routes which bring more profit – higher fees are determined than the cost accountings would justify." McWHINNEY, p. 24.

49 This included the threat of expulsion from the membership and the complicated determination of tariffs and fares by the Traffic Conference as well, which could have a very unfavorable result in connection with these kind of states.

IFALPA[50] – the Association of Pilots

IFALPA pools thousands of airline pilots throughout the whole world – with the help of their national organizations. In connection with the security of aviation the "society of pilots" was the group which fought the most pugnaciously, was the most active on settlements and initiated an own action as well.

Their activity can be understood, they are the persons who sit aboard on their every single workdays, and they are the most vulnerable to the actions of hijackers and terrorists. While diplomats, officials of the General Assembly, Security Council, ICAO and IFALPA fly in average in only some occasions monthly – the situation is totally different with the pilots.

The members of ICAO, who are exposed to every day to the tragedy of shooting, exploding, hijacking their plane – they can not meditate patiently about how to make a balance between the categories of hijackings and political asylum. Or about the Human Rights, civil liberties of hijackers... And their attitude is comprehensible and understandable... So ICAO was the first organization which threatened for the first time a state with boycott which ensured safe heaven for hijackers.[51] It was promised that all members of IFALPA rejects uniformly operating air service from and to Algeria. The threatening was successful. But after this action IFALPA has never employed any similar threats.[52]

Even if not applying more serious tools, resolutions were issued by IFALPA as well on this field. One resolution was created in 1969 with the title: "Freedom of Transit – Hijacking of Civil Aircraft" with the aim to draw the attention of public opinion to the most urgent, "burning" problems of the security of civil aviation.[53]

The Airlines – Profit or/and? Security

The essential interest of airlines is efficient operating, to get more and more profit. Simplifying the formula its primary condition is the appropriate capacity utilization, passenger number, the for them optimal legal environment and ensuring undisturbed operation without unlawful interferences.

Events happened on 11th September, 2001 had severe impact on the whole aviation industry. They were struggling with more and more serious financial crisis even before. The acts on 11th the September just gave the final push falling into the cave.

The increased taxes built in the flight tickets, the stagnant economies of states, the declining interest in flying caused severe loss for airlines. Airlines already felt the effects of the stagnating economy. It is no exaggeration to say that aviation industry is the first to feel

50 McWHINNEY, p. 26.

51 International Federation of Airline Pilots Associations

52 In June, 1968 a Boeing 707 flight – which was operated by ELAL Israeli an airline – was hijacked by Arabic terrorists on its way from Rome to Tel Aviv in Italian airspace and was diverted to Algeria. Algerian authorities set non Israelian passengers free promptly, some days later all women and children as well. After IFALPA announced the possibility of boycott against all flights flying to and from Algeria, after six weeks authorities set all Israelian passengers free to Rome on an Alitalia flight with French crew. In: McWHINNEY, p. 27.

53 This could have more reasons: It is possible that they did not dare to threaten airlines because of the pressure on them coming from airlines which feared for losing their revenues, or because of the possibility of breaching their contractual obligations with the airlines employing them.

the negative effects of an unfavorable economy and the last one where the positive effects spills over.

Before 11th September several airlines have accumulated serious loss, more of them even have gone bankrupt.[54] The cost of insurance has also risen to the skies. "Before" insurance relating to terrorism was included in the normal price – for today it has changed: an extra fee is added with this title.[55] Besides a new tax was introduced by the Federal Government of the United States – which made the situation even worse.

The easiest solution would have been to "burden" these extra costs to the passengers, but there were no passengers who would have tolerated this. The drastic decline in the number of passengers painted an even more dramatic picture. Nowadays the constant growing of the number of passengers can be experienced which makes the situation more hopeful.

Besides the airport fees also rose, not even speaking about the explosive growth of fuel prices. In this line air marshals must be mentioned whose presence aboard is only the tip of the iceberg. They take up first class seats which could be sold for higher prices. But big firms have also changed their policies: more businessmen choose low-cost air carriers. The carry of cargo which has to be delivered fast is one of the most important revenue of airlines – security measures "loaded" on them also led to the production of losses.[56]

Airports: Need for a Re-Design?

For the airports besides efficient operating the guarantee of passenger convenience stands n the centre. When designing their outlook only one aspect was taken into consideration: to make the serving of passengers more comfortable, to orient to their interests. Taxis, buses could – with a little exaggeration – drive into nearly the territory of airports, the only one aim of big areas was to prevent congestion at check-in counters.

Though from the 1970s in several cases airports were attacked, the real mile stone was in their life also 11th September. A new priority has come to the front: the magic word of security. airports had to be re-examined from an absolutely new point of view: where, which parts and how can become a victim of a terrorist attack. New explosive detecting, luggage controlling systems had to be built in – which meant an extra cost of more billion dollars. Parallel with this the interest in civil aviation has declined on the millennium, airlines have ceased their less used flights, cutting down the revenues of the airports gradually.[57]

Besides thanks to the newly introduced security measures they had to face long queues, the before never seen crowd. So airports have to be rebuilt, reorganize, re plan in the spirit of security.

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54 McWHINNEY, p. 28.

55 e.g. In the United States Delta Air Lines reported about a loss of 466 million USD only in the first quarter of 200. In: ibid, p. 70.

56 The amount of insurance has risen from 2 million USD to 150 million USD in the United States annually. ibid, p. 70.

57 "Before" airlines could transport passengers and cargo on the same flight which was cost effective. It had significance especially on routes where there were only a few passengers – delivering cargo compensated for the loss. In the United States a regulation prohibited for airlines carrying passengers to deliver consignments and post which weighs more than 16 ounce. This order caused) % decline for Delta Airlines in their revenue deriving from transit.

Do You Have to Forget (a Little) about Your Human Rights When Being a Passenger?

When mapping the „special legal community of the air", we tend to forget about passengers. Though the high level officials of ICAO, IFALPA sometimes are forced to „play this role". An essential difference between the two qualities is that while they function as officials, a whole system stands behind them with its own power, as they appear as simple passengers, their tools decrease significantly.

What can a simple passenger do? He can stands in long queues before luggage control, then bears it smiling while his hand luggage is checked, if it is necessary, he is searched – of course he cooperates through the whole process happily. If it is needed, he takes off his shoes, and wanders through the security gate barefoot. Since a simple private individual *„either does not know about „majestic" Constitutional Law references and even if he knows he comes to the conclusion that they must be subordinated to the security interest of the plane, its crew, the passengers and of himself."*[58]

If he becomes a victim of a terrorist act, and survives, he can sue the airline for damages by virtues of the rules about the liability of airline carriers on the ground that the airline did not comply with its contractual obligations – since he has not carried the passenger safely to the destination. Of course the success of an action like this can have several obstacles. The airline carrier can allude to „vis maior" with success. Though in practice it is extremely expensive to sue a big company and its outcome is also very doubtful. Against this in practice compensation is paid to individuals in more and more instances because of becoming a victim of a terrorist act.[59]

As a direct effect of the events of 11th September you also have to tolerate often embarrassing questions. In the United States already the second generation of „Passenger Profiling System" was introduced with the aim to classify passengers according to the danger they represent against the security of aviation.

The whole world is loud of the infringement of Human Rights as well. Serious doubts emerge in connection with privacy, data protection and racial discrimination.

Security as a Common Interest

The actors of the community of international civil aviation have different interests which predestinate their activity in regulating the whole system. But it is not a question that the security of aviation, to prevent unlawful interference is a common concern. Without security the members of the „special legal community of the air"[60] are not able to fulfil their obligations. As an accomplishment let me quote the words of Dr. Assad Kotaite, the former President of the Council of the International Civil Aviation Organization:

58 It is true that the revenues of airports deriving from tariffs, fees have declined, but the demand on services of airports have grown constantly – e.g. restaurant services, selling of refreshments, soft drinks – since passengers have to spend much more time at the airports.

59 Edward McWHINNEY, Q.C., Aerial Piracy and International Terrorism, The Illegal Diversion of Aircraft and International Law, 2nd revised edition, Martinus Nijhoff Publishers, Dordrecht/Boston/Lancester, 1987., p. 29.

60 In the Lockerbie case the Lybian Government paid 10 million USD compensation for each families of the victims.

„It is crucial that we succeed, for air transport has evolved into such an integral and vital part of our global society. It is a driver of economic development, a catalyst for business and tourism, and a vehicle for social and cultural development worldwide. Thanks to its unique ability to bring people together over vast distances, quickly and safely, it is immensely valuable to our growth as individuals and as citizens of a shrinking planet. As always in demanding times, I am again inspired by the Preamble to the Convention on International Civil Aviation, particularly the following excerpt: „Whereas the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world...to promote that cooperation between nations and peoples upon which the peace of the world depends… „In the present context, these words carry a special meaning. Civil aviation can help us build a better world for all mankind to the extent that we appreciate and nurture the universality of air travel, that we create the conditions for international civil aviation to develop in a safe and orderly manner.“[61]

Zusammenfassung

Der 11. September 2001. Ereignisse haben ein neues Kapitel in der Geschichte in der Sicherheit des Zivilluftfahrts geöffnet. Es kann man ohne Extremitäte bestätigen, dass Terrorangriffe schwere Folge nicht nur an die Weltwirtschaft, sondern auch an viele andere Bereiche haben. Die wichtigste „Darsteller“ des Zivilluftfahrtes sind die Staaten, ICAO (Internationale Zivilluftfahrt-Organisation), IFALPA (Weltverband der Verkehrspiloten), IATA (Internationalen Linienluftverkehrs), Flughäfen, Fluggesellschaften und Fahrgäste. Obwohl ihre Interesse fundamental unterschiedlich sind, ihr Belang zur Sicherheit des Zivilluftfahrts ist gemein.

61 Edward McWHINNEY, Q.C

62 PI0 18/01, Attachment, Year-end Message from the President of the Council of the International Civil Aviation Organization, Dr. Assad KOTAITE, December 2001, www.icao.int/icao/en/nr/2001/pio200118_e.pdf

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Models and Methodologies of Temporary Work Agencies (TWA) in Hungary[1]

I. Development of temporary work agency in Hungary

1. First steps of the temporary agency work (TAW) in Hungary

1.1. Preliminary challenges

The social-economic changes occurring at the beginning of the 90s generated new needs on the market of Hungarian labour exchange as well. Participants in the labour market had to face new, previously not experienced challenges, in consequence of the transition to market economy, the process of transformation accompanying privatization and the new management approach arising simultaneously with the appearance of multinational companies in Hungary.

The employees found it more difficult to orientate themselves on the more differentiated market, and similarly, the employers had to devote greater energy, costs and expenditure to finding the most suitable employee with direct search. Therefore an increasing demand was manifested for a mediating link in Hungary, too. Thus labour exchange was gradually incorporated into the human resource management of companies and became part of labour recruiting.

Thus the „key words" of the 90s, that is low costs and flexibility, play a decisive role on the Hungarian market as well. This need is particularly enhanced in Hungary as employers have to meet very high payment obligations. In addition, multinational companies in Hungary wish to satisfy their manpower demand according to their current needs, in a more flexible way than previously experienced in Hungary. These two demands can be satisfied simultaneously if the temporary manpower demands are ordered through the services of a placement agency. Periodic, temporary manpower demands and supplies are primarily encountered in private labour exchange agencies, which – having recognized its business topicality – also included placement among their services. In this sphere the typical areas of placement include: unskilled work, semi-skilled work, warehousing, technician tasks, office

1 The manuscript completed in 12 December, 2006.

administration, accounting and financial areas, assistant and receptionist work, etc. Programs of placement, part-time work and distant work allow flexible labour (staff) management, thereby making the organisation capable of reacting to faster environmental challenges and gaining advantage over the competitors.[2]

1.2. The first legislations

Placement is a relatively new solution to find proper vacant employees in Hungary. The first legislation concerning placement was enacted in 2001 and it was incorporated into the Hungarian Labour Code. The 2001 legislation is based on the so-called triangle principle, i.e. the temporary work agency signs a contract with the employee on the basis of a special sort of employment relationship (it must be indicated in the contract that its purpose is to fulfil temporary agency assignments), while there is a civil-law contract (under the Hungarian Civil Code) between the agency and the user enterprise on the assignment. However, there is no employment contract (relationship) between the employee and user enterprise, even though some employer's right is exercised by the user enterprise.[3]

During the period of this special employment relationship, the employer's rights and duties are shared between the agency and the user company. The employer's main functions, however, are fulfilled by the agency, such as hiring, termination of the employment relationship, paying the wage, informing the employee about working conditions and reporting to different authorities. At the same time, the user enterprise's regulations apply to work schedules (including working time, rest time and paid holidays) and to instructions on how the actual work is to be performed.

Temporary agency workers may be employed on both open-ended and fixed-term contracts, but a probation period is not allowed in either case. Furthermore, an earlier normal employment relationship may not be converted into a temporary employment contract. A few other stipulations of the law provide agency workers some security: the user enterprise cannot order them to work for another employer; rights of employees granted by the Labour Code or other legal regulations may not be restricted or denied; agreements not permitting the agency worker to enter into an employment contract with the user enterprise when the temporary employment contract expires – or requiring the worker to pay a certain fee to do so – must be considered null and void. At the same time, the law provides the employer with greater flexibility by suspending the stipulations of the Labour Code on termination of employment, successive fixed-term contracts, further training and some other issues. The statutory notice period for an open-ended temporary agency employment contract is 15 or 30 days depending on the length of service, while that of a fixed-term contract lasts up to the date of expiry.

As to social security contributions, agencies and their employees pay the same mandatory social security contributions as other employers/workers in ordinary employment contract.[4]

Legal requirements for an Agency. Another novelty of the 2001 legislation is the compulsory registration/licensing of temporary work agencies, the details of which are regulated by a government decree (118/2001. [VI. 30.]). The application for registration is to

2 János KÖLLŐ – Beáta NACSA: Rugalmasság és Biztonság a Munkaerőpiacon Magyarországi Tapasztalatok, Flexicurity Paper 2004/02 pp. 44-58

3 A rugalmas foglalkoztatási formák elterjesztésének lehetőségei, IFM Humán Erőforrás Háttértanulmányok, Integrációs és Fejlesztéspolitikai Munkacsoport, Szociálpolitikai Szakmai Munkacsoport, Budapest, 2004. március, p. 37-38.

4 László NEUMANN: Temporary agency work (TAW) in Hungary http://www.eiro.eurofound.eu.int /2005/06/word/hu0506106t.doc

be submitted to the competent employment centre – in practice to the county office of the Public Employment Service (Állami Foglalkoztatási Szolgálat). Apart from professional requirements (at least one employee with the necessary competencies, appropriate permanent office), applicants must have a modest collateral (approximately EUR 4,000).

Basically, the use of TAW is not limited by the law: they can be used in all sectors, provided the user enterprise has the necessary legal permission to perform the activity concerned. There are no special conditions of using temporary agency work, and renewing workers' assignments with the same user enterprise is not limited either.

As far as foreign-based agencies are concerned, the same restrictions apply as to other forms of posted workers. In practice, based on the reciprocity principle, Hungary does not limit taking up jobs by citizens of those EU Member States which pursue a similar policy towards Hungarian citizens. Following the EU enlargement in May 2004, the appearance of agencies from Slovakia was a new phenomenon in the Hungarian labour market in the border region.

As it was mentioned above, Act XVI of 2001 amended the Labour Code (Act XXII of 1992) in order to harmonise it with many EU Directives; among a number of major changes it included a new regulation on temporary agency work. Since then, a 2003 amendment of the Act on Labour Inspection has brought minor changes in the regulation of TAW, clarifying that the Hungarian Labour Inspectorate (Országos Munkabiztonsági és Munkaügyi Felügyelet) is entitled to investigate both the agencies and the user companies to check on unlawful practices. Act XX of 2004 amended both the Labour Code and Act IV of 1991 on Employment Promotion and envisaged state subsidies for the re-employment of the unemployed through temporary work agencies, provided that the agencies opt for a special status, the so-called public benefit company. According to the Act IV of 1991 on Job Assistance and Unemployment Benefits: „Support may be provided to any non-profit company: … that enters into employment relationships within the framework of an agreement with the employment center with job-seeker(s) for their placement as specified in specific other legislation."

1.3. New legislation proposed on temporary agency work

In September 2005, the Hungarian government submitted a draft amendment of the Labour Code to the tripartite National Interest Reconciliation Council (OÉT). The proposal changed the law on temporary agency work, with the aim of curbing undeclared work and defining explicit rules on equal pay for agency workers.

In early 2005, four sectoral social dialogue committees (in metalworking, engineering, chemicals and hotels/catering) jointly proposed examining the practices of companies that do not adhere to the legal regulations on temporary agency work, and then to amend these regulations via either legislation or collective agreements. The social partners involved were particularly critical of temporary work agencies that use undeclared labour, and of abuses by user companies, especially using agency workers on a permanent basis and setting up subsidiary companies specialised in providing the parent company with agency workers. Sectoral trade unions envisaged: certain restrictions on the use of temporary agency work, for instance on the length or number of contracts between the same agencies and user companies; the establishment of criteria for the cases in which temporary agency workers may be used; or a complete ban on using temporary agency work in the core activities of certain industries.[5] Legal experts working for the sectoral social dialogue committees proposed legislative changes in the following fields: equal treatment of agency workers and regular employees; ways to prevent abuses; the relationship between collective agreements and temporary work agencies;

5 http://www.iies.su.se/~tonin/mirco_files/MircoToninEPLIndicatorsPaper.pdf

and possibilities to enhance the enforcement of the law on the collective representation of workers.

Furthermore, the Hungarian Federation of Personnel Management Advisors (Személyzeti Tanácsadók Magyarországi Szövetsége), a newly established professional organisation not yet qualifying as employers' association, demanded in a letter addressed to the Minister of Employment and Labour consultations on issues including cracking down on illegal (unregistered) temporary work agencies.

These various proposals received a new impetus from the government's April 2005 „100 Steps" reform programme (it was the official program of the Hungarian Government), which includes the objective of „amending the rules of temporary agency work so that there remain no loopholes to evade paying public levies" When drafting new legislation on the issue, the government made use of the expertise and proposals of the Labour Inspectorate (Országos Munkabiztonsági és Munkaügyi Felügyelet). A draft amendment of the Labour Code was submitted to the National Interest Reconciliation Council (Országos Érdekegyeztető Tanács, OÉT) in early September 2005, in tandem with a new law on increased powers for labour inspectors, with special provisions on temporary agency work.[6]

Main points of the amendment

The most important provisions of the Labour Code amendment are designed to crack down on undeclared work. According to the amendment, a temporary work agency will be required to provide a user company with proof of the agency worker's lawful employment – such as employment contracts (including the agreed wages), the relevant enquiry to the Unified Labour Database (Egységes Magyar Munkaügyi Adatbázis) or registration of the agency. The law stipulates that if an agency fails to meet the legal criteria or there is no appropriate employment contract, it will be assumed that an employment relationship with the user enterprise is established from the date the agency worker starts work for the period specified in the contract between the agency and the user enterprise. This rule is imported from the German and Austrian legal systems and aims to make the user enterprise responsible for the lawful employment of agency workers: potentially backed by fines imposed by labour inspectors, it should act as an incentive for user enterprises to force agencies to adhere to the law.

As far as the remuneration of agency workers and „permanent" employees at the user enterprise is concerned, the amendment stipulated that equal wages and pecuniary bonuses should be paid if the duration of employment at the user enterprise is longer than six months. For equal benefits in kind to apply, at least two years' continuous employment at the user enterprise is required in the case of fixed-term employment, while only one year is required for workers with an indefinite (open-ended) contract. In order to ensure that wages and bonuses are in line with collective agreements or company rules on wage tariff systems, the agency should inform the user enterprise about the qualification and work experience of agency workers. The draft legislation prohibits any kind of ownership ties between the agency and the user enterprise - thus companies will be banned from setting up their own in-house agencies, which has been a common source of wage inequalities within workplaces. It is also prohibited to deploy someone as an agency worker who was dismissed from the user enterprise in the previous six-month period.[7]

In sum: In early 2005 four Sectoral Social Dialogue Committees of manufacturing branches proposed to study the practices of companies not adhering to the legal regulations

6 László NEUMANN: New legislation proposed on temporary agency work http://www.eiro.eurofound.eu.int /2005/11/feature/hu0511102f.html

7 http://www.fn.hu/cikk/00110000/117932/valtoznak_munkaero_kolcsonzes_szabalyai.php

and then to amend the regulations either via legislation or collective agreements. This includes the following objectives:

a) no loopholes to evade paying public levies,
b) equal treatment of agency workers and regular employees,
c) ways to prevent abuses;
d) the relationship between collective agreements and TAW;
e) possibilities to enhance the enforcement of the law on the collective representation of workers.
f) to crack down illegal (unregistered) temporary work agencies.

The draft included several minor changes in order to remedy perceived shortcomings of the regulation. It introduced a probation period for agency workers, who have been excluded from this provision. The draft also changed the terms of termination of fixed-term contracts: as a rule, the notice period for termination will be two-thirds of the remaining contract period, instead of the former requirement of paying full wages until the expiry of the contract.

The new stipulations were aiming to improve adherence to employment law seem more effective, provided that labour inspectors make use of their powers.[8]

2. Role of the social partners

a) Debates at tripartite forum: OÉT (National Interest Conciliation Board). Several rounds of consultation on temporary agency work were held at OÉT, both at the plenary session and in its Labour Law Committee (Munkajogi Bizottság). Employers' associations basically view TAW as an important flexibility tool, and therefore opposed the planned changes. They argued that the government proposal simply presumes temporary agency work to be a source of abuses. They argued that the new regulations would impose an unbearable administrative burden on user enterprises and would be an obstacle to flexible work organisation.

Although trade unions initially wanted to introduce more radical measures, they were content with the draft legislation and proposed only minor changes, for instance a shorter waiting period for the application of the equal pay rules.

At the plenary session of OÉT, the employers' representatives quoted an earlier promise by the government that it would initiate legislative changes only on the basis of tripartite consensus (paradoxically, the preamble of the bill included a statement that the proposed amendment is endorsed by OÉT). Nonetheless, the Minister of Employment and Labour made it clear that he is determined to pursue this direction of legislation even without the consent of the employers. As he explained, the government insists on achieving the four following objectives of the new legislation even without consensus in OÉT: strengthening labour inspection; cracking down on undeclared work; eliminating abuses of temporary agency work; and introducing a new national minimum wage system.[9]

Temporary agencies do not qualify as a separate sector. There is an established organisation, the Hungarian Federation of Personnel Management Advisors (Személyzeti Tanácsadók Magyarországi Szövetsége, hereinafter: HFPMA), which has a section specialised for the representation of the temporary work agencies. HFPMA has elaborated a code of conduct for its member organisations including temporary work agencies.

8 László NEUMANN: New legislation proposed on temporary agency work http://www.eiro.eurofound.eu.int /2005/11/feature/hu0511102f.html

9 László NEUMANN: New legislation proposed on temporary agency work http://www.eiro.eurofound.eu.int /2005/11/feature/hu0511102f.html

In Hungary, regulation through collective agreements is missing. Consequently, as a rule, trade unions have neither a say on the extent of the use of agencies, nor on the working conditions of agency workers. Thus wages are completely set by individual bargaining, though the national minimum wage is enforceable in the case of agency workers, too.

As to the role of employee representatives, the law only requires the user enterprise to inform its works council and trade unions regularly, at least once in a year, on the number of temporary workers used. According to the Labour Code, during strikes companies may not use temporary agency workers.

b) Trade union. While trade unions fiercely oppose the use of temporary agency workers, in practice they are not able to block these company practices.[10] Although employee representatives should be informed about the number of agency workers, in practice decision-making on this issue remains a management prerogative. The unions' position is quite understandable: the agencies have no collective agreements and the user company's collective agreement generally does not cover agency workers, thus they cannot be organised. Moreover, in certain cases it has been the company's deliberate policy to cut wage costs, especially the non-wage provisions stipulated by the user company's collective agreement, by continuously employing large numbers of agency workers (these cases have been reported in manufacturing, where the majority of agency workers are used; trade union views from other sectors are unknown.).[11]

c) Employers' associations basically view TAW as an important flexibility tool, sometimes as a possible means of saving labour costs through paying lower wages. On the other hand, employers (both agencies and user companies) often complain about the perceived overcomplicated procedures required by the law and see some stipulations as obstacles (for instance, ruling out the probation period for agency workers).

d) Collective bargaining and collective agreement. As the company is the dominant level of collective bargaining in Hungary, the few sectoral agreements have no significant impacts on the wages and the working conditions of agency workers. Sectoral agreements are especially rare in those manufacturing branches where most of the temporary agency workers are used. As for company-level bargaining, case studies have found that there are practically no collective agreements at the agencies. Despite the legal regulation, which requires the user enterprise to inform trade unions on TAW assignments, collective agreements in user enterprises generally do not include any stipulations on agency work.[12]

3. Trends in private TWA business in Hungary

Nowadays, placement is increasing dynamically in Hungary. Construction industry and IT technology have to face considerable shortage of labour in Hungary, and there are few engineers available on the labour market – so in these jobs it is worth employing employees from abroad. Some multinational work agencies operating in Hungary offer not only temporary and permanent placement services for their clients but also on-site management and international labour recruiting as well.[13]

Currently TWA and private job brokerage companies are estimated to operate with a net

10 http://www.mszosz.hu/dokumentumok/mszosz5.htm

11 http://www.noc.mtapti.hu/2003ar.pdf

12 László NEUMANN: Temporary agency work (TAW) in Hungary http://www.eiro.eurofound.eu.int /2005/06/word/hu0506106t.doc

13 http://www.bankestozsde.hu/online/cikk.html?aid=1000287

profit of 3-5% in Hungary. This low profit is explained partly by the fact that companies operating illegally force prices down.

The largest participant on the Hungarian TWA market is Adecco, which had a price income of over HUF 5.8 billion last year, but other large international participants such as ManPower, Grafton and Randstad are also present. The total annual turnover of the Hungarian market is estimated to be HUF 20 billion. The growth potential is very great as, in contrast with 2-3 % of the employees working in this form in Western Europe, in Hungary this figure comes only to 0.2 % at present.

The appearance of large multinational TWA companies indicates that placement is on the increase in Hungary. The two-digit annual turnover increase is explained partly by the settling of manufacturing companies in Hungary and partly by the fact that companies already present in Hungary are increasingly willing to employ workers in this flexible form, with special respect to those companies which are characterised by high seasonality. With a turnover of EUR 112 million in 2004 on this market, the situation is stable and the number of entirely domestic companies is remarkably high. Large Hungarian companies seem to have become accustomed to this new labour model.

Types of placement. In Hungary the following types of placement are known. 1. Short-term placement, 2. Long-term placement, 3. Outsourcing and 4. Try&Hire. However, the first type of placement (short-term placement) is better applied in the practice.

3.1. Placement as a temporary solution

Placement may offer a solution for labour replacement in the case of a longer period of leave or sickness, for the period of Child Home Care Allowance, for filling vacant posts, in the case of freezing the number of staff (stop to hire new staff) or for fulfilling a greater number of tasks in a given period, for implementing a certain project, and it is also more and more frequently used when new employees cannot be employed for reasons of cost reduction. Instead of a probation period, placement is also a commonly used practice for testing the would-be employees, who may later be employed by the user enterprise itself. The period of placement is not limited by law, the duration of this legal relationship may range from one day to even several years.

Due to the mass holiday-making in July and in August, most of the employers in the Hungarian labour market try to weather this period by carrying out maintenance work or by partial or complete closing down, but an increasing number of companies use placement in order to ensure their production or service capacity. Temporary work agencies experience a noticeably greater demand for administrative, reception and light physical work from the beginning of July until the end of August.

In spite of the fact that there is no guarantee for the efficiency of placement work and it is difficult to assess the returns because of the short interval of placement, it frequently happens that workers under placement prove themselves so well that when the holiday-making is over, they are asked to stay on with the company.

A frequent unlawful practice is that the employer establishes another company for employing its own workers according to the rules of placement, and it acts as a placement agency for the original employer (that is for itself). However, placement is statutorily forbidden if the worker was the employee of the user enterprise previously (within the period of half a year), or if the two companies are in proprietary relationship with each other. However, some of the companies still take the risk and opt for the placement of their workers dismissed.

3.2. Advantages of the TWA for employers

The reason for this is that companies are beginning to realize the advantages associated with placement: as – being employed by the placement agency – hired-out workers need not be put on the payroll, the time consumed by administration and payroll accounting becomes shorter, there is no hiring and termination process and burden. A further advantage is that in the case of payment by the hour only the hours worked have to be paid for, consequently the cost input and the time consumed can be calculated and assessed in advance and can be controlled subsequently; moreover the service may be requested for any period of time or for any number of staff.

3.3. Advantages of the TWA for employees

According to the Hungarian experience, this form of employment is ideal mainly for students learning in evening courses, for persons wishing to obtain work experience and for those who have no permanent jobs but need money. Furthermore, it also gives persons with primary school education the possibility to work, even on the long run. Blue collar workers may possibly change from job to job.

White collar workers opt for this type of short-term employment because they are between two jobs or have no jobs at all, or because they wish to obtain short-term experience at several companies.

Nowadays placement is typical in unskilled and semi-skilled jobs, but an increasing need for placement can be observed in office work, and the placement of white collar workers for a longer term, that is for a period of more than 6 months is also becoming more and more frequent.

Earnings are lower than for internal workers

The period of placement varies considerably depending on the needs of the user enterprise, it may range from one day to even several years. Although the wage rate for hired-out workers should be similar to that of the "internal' employees – discrimination is strictly forbidden by relevant rules of law – the wages for workers hired-out for a short term are usually lower than the wages paid to the workers on the enterprise's own payroll. A similar sum is paid in the case of long-term placement, exceeding six (6) months. In blue collar jobs hourly wages are usually paid, but occasionally monthly payment may also occur.

No placement for levels of middle management

For the time being placement is characteristic of lower posts, it is rarely seen on levels of middle management, and if so, mainly manufacturing companies are looking for labour for a period of 3-6 months for controlling the production line.

It is used primarily by industrial and commercial companies. As regards the profile of companies using this service, companies in the field of electronics, food industry, chemical industry, commerce as well as financial institutions and mobile service providers request placement. Fields of medicine, medicine-assistance and informatics are typically areas with a low occurrence of placement. In public servant jobs placement is out of the question.

II. The legislation in force

1. Source of law

Chapter XI of the Hungarian Labour Code (hereinafter: HLC) and 118/2001 (VI. 30.) Government Decree on registration and conditions of placement and private labour exchange activity and the Act IV of 1991 on Job Assistance and Unemployment Benefits contain regulations on Hiring-out of Workers.

Furthermore, Decree No. 30/2000. (15. Sept.) of the Ministry of Economy gives a summary of human services to be offered by PES or by private service providers. The decree specifies the following types of employment services:

– Recruitment, placement,
– Employment/career information provision,
– Employment and career counselling,
– Job-seekers' Club,
– Work/career counselling for handicapped persons,
– Regional employment consulting for employers or local public/civil bodies

2. Definitions

With many private labour market agencies extending their services as early as at the beginning of Hungary's economic and political transition period, temporary work agencies began to proliferate in the 1990s, but before the amendment of the Labour Code in 2001 legal regulations lagged behind company practices. This law added a new Title to HLC, which provides the essential definitions as part of the regulatory framework.[14] This Title of the Labour Code reads in Hungarian Munkaerőkölcsönzés – Employee Leasing in literal translation. Thus the law appears to focus on the civil law relationship between the agency and the user enterprise while fails to provide an explicit definition of the agency worker. In this language the definitions of Article 193/C are as follows:

a) *„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 (hereinafter referred to as „placement"), provided there is an employment relationship between the worker and the temporary employment company or the placement agency;
b) *„temporary employment company or placement 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 (hereinafter referred to as „placement agency")
c) *„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.[15]

3. General principles

According to Section 193/B of HLC for employment relationships with temporary employment companies or placement agencies the provisions of the HLC shall be applied subject to the exceptions set out in HLC Chapter XI.

The placement agency, the user enterprise and the employee are obliged to cooperate in the course of exercising rights and fulfilling obligations. The agreement between the placement

14 http://www.e-tudomany.hu/uploaded_files/20040203.pdf
15 Tamás GYULAVÁRI: Speciális foglalkoztatási formák, in. A munkajog nagy kézikönyve, Complex Kiadó, Budapest, 2006., p. 249.

agency and the user enterprise shall not contain any clause by which to restrict or exclude the rights to which the employee is entitled pursuant to the HLC and other legal regulations.

Furthermore, the employment centre and the placement agency shall co-operate during their activities, particularly through the following means:

a) regular professional contact,
b) exchange of information concerning the labour market,
c) exchange of data related to jobs which can be advertised and are available for employment as specified in the Ministry of Economy Decree No. 30/2000. (IX. 15.),
d) joint training possibilities for the staff,
e) agreements to improve the labour market situation.[16]

4. General and administrative provisions of TWA

4.1. The condition of launch TWA

According to Section 193/D of HLC, a placement agency must satisfy the following pre-conditions:

1) a limited liability business association or a non-profit company, or a cooperative in respect of employees other than its members,
2) it is domiciled in Hungary,
3) it must satisfy the requirements prescribed in HLC and in other legal regulations, as general background legal source, and
4) must be registered by the employment centre responsible for the place where the placement agency is established (hereinafter referred to as „employment centre").[17]

4.2. Registration of placement agency

According to Article 4 of the 118/2001 Government Decree, the placement agency will be registered by the employment centre competent according to its headquarters if

1.) it has been registered in the trade register or – if the prerequisite to operation is registration by the court or authority – in the prescribed register, and if its deed of association, deed of foundation or by-law includes the pursuit of placement activity,
2.) the applicant or at least one person employed by the applicant has *suitable* qualifications and practice as specified in Annex 1 of the Decree,
3.) the applicant has an office suitable for the pursuit of the activity, moreover
4.) the deposit of collateral is certified in the cases prescribed by the Decree.

If the applicant has several business domiciles for the pursuit of its activity, the conditions specified in the above b)-c) points shall be met in all of them.

The application for registration shall be submitted on the form used for this purpose, and the following documents shall be attached for the certification of the conditions required in the above points 1-3:

a) a certificate of incorporation not older than three months, or the final court decision on being registered in the court register, the authentic copy of the private entrepreneurial certificate,

16 József CSÉFFÁN: A munka törvénykönyve és magyarázata, 2006 Szegedi Rendezvényszervező Kft., Szeged, 2006 p. 550-551

17 József CSÉFFÁN (2006) p. 551

b) the authentic copy of the certificate of qualification specified in point 2 above, or the certification of practice acquired in the special field prescribed by the Decree, with special respect to the certification of operation issued by the employer,
c) the original deed of trust concluded with the financial institution according to point 4 above.

The office is to be regarded as suitable for the pursuit of the activity if it is equipped as indicated in the application, has a fixed line telephone and if the applicant can certify the right of use of the office.

In accordance with Annex 1 mentioned in point 2 above, the following qualifications can be accepted for the pursuit of the activity:

a) professional higher education qualification, and within this a degree obtained in
   - the university faculty of economic sciences or economics,
   - the university faculty of law,
   - the university faculty of arts, majors of psychology and sociology,
   - the university or college majors of public administration, economics, human resources management, personnel management, personnel organisation, administration organisation, social administration, work and career counselling, and
   - with respect to holders of other degrees of higher education, the certificate obtained in a special course of personnel management of higher education, or

b) higher education qualification and practice for a minimum period of two years in the following fields of human policy:
   - planning of human resource management,
   - determination of job specifications,
   - planning of the qualitative and quantitative characteristics of labour demand,
   - selection of labour force,
   - labour exchange,
   - employment of labour,
   - planning of internal supply,
   - planning and supervision of the adaptation process,
   - development of performance- incentive systems, within this:
   - development of waging principles,
   - development and introduction of efficient waging and incentive systems,
   - development and introduction of systems for performance assessment,
   - setting up of training and further training systems at the workplace,
   - systematisation and keeping of personnel and labour records,
   - examination of working conditions; or

c) secondary education and practice for a minimum period of five years in the fields of human policy listed in point b); or
d) qualification of labour market administrator or labour market manager specified in the National Qualifications Register issued as the Annex of the Ministry of Labour Decree 7/1993. (XII. 30.).[18]

4.3. Property collateral

According to Article 6 of the 118/2001 Government Decree, property collateral is the condition of placement activities if placement is aimed at finding employment abroad. Placement activities aimed at finding employment abroad may be pursued if a collateral of HUF 1,000,000

18 Tamás GYULAVÁRI (2006) p. 251-252.

has been deposited. The collateral shall be a cash deposit tied up and separated by the applicant in a credit institution or a financial undertaking (hereinafter: financial institution).

Only deeds of trust containing the following provisions shall be considered as property collateral:

a) the deposit may be used only for paying off a claim for damages arising on the employee's or job seeker's part in the course of placement,
b) the employee or job seeker shall be paid damages pursuant to point a) by the financial institution, debited against the deposit, on the basis of a final court decision ascertaining the placement agency's liability for damages or on the basis of the parties' agreement on damages,
c) in the case of the cancellation of the deposit for any reason, the financial institution shall notify in writing the employment centre which registered the placement agency as well as the placement agency of the sum and date of the payment within three working days thereof.

In practice private labour exchange agencies may also engage in placement activities. In such cases the sum of the collateral shall be deposited separately. Claims for damages associated with different activities shall be met to the extent of the collateral deposited for placement and private labour exchange activities separately.

The placement agency shall replace the collateral used within 30 days of payment. The fulfilment of this obligation shall be certified by the placement agency to the employment centre on the last day of the deadline for replacement at the latest.

If the placement agency is removed from the register by the employment centre, the deed of trust may be terminated not earlier than six months after the decision on removal has become final. If a court procedure is in process against the placement agency initiated by the employee or job seeker for awarding damages, the deposit may be cancelled only after the court procedure has become final. The financial institution is informed of the possibility of the cancellation of the deposit by the employment centre.

If the private labour exchange agency is engaged in placement activities as well, in the event of the termination of any of its activities only the collateral deposited for the purpose of the given activity may be cancelled.[19]

4.4. Register by the employment centre

According to Article 8 of Government Decree 118/2001, the employment centre shall keep a separate register about placement agencies with continuous serial numbers.

If the placement agency carries out its activity under business domiciles in the area of competence of several employment centres, the employment centre competent to register the placement agency shall inform the employment centre according to the business domicile of the registration, of the change in the registered data and of removal from the register.

In the event of any changes after registration, the employment centre shall decide, based on the changed circumstances, on the modification of the data registered earlier or on the removal of the placement agency from the register.

If the above change concerns the relocation of the headquarters of the placement agency to the area of competence of another employment centre, the declaration thereof shall be made to the employment centre competent according to the previous headquarters. Based on the documents transferred according to competence, the employment centre competent in the area of the new headquarters shall decide on the registration of the placement agency or private labour exchange agency.

19 Tamás GYULAVÁRI (2006) p. 253-254.

The register kept by the employment centre shall include the following data of the placement agency registered:

a) the number and the date of the resolution on registration,
b) the placement agency's name, form of organisation, headquarters and business domicile,
c) the names and titles of the persons entitled to represent the agency,
d) the sum of the property collateral,
e) whether the placement activity is aimed at finding employment in Hungary or abroad,
f) the number and the date of the resolution on removal from the register and the reason therefor.

The employment centre shall notify the Employment Office of the data in its registration every three months. The manner and content of data supply are determined by the Employment Office. The register kept by the employment centre and by the Employment Office is available to anybody for inspection and for making a copy – with the observance of the provisions of Act LXIII of 1992 on the protection of personal data and the publicity of data of public interest.[20]

4.5. Pursuit of placement and private labour exchange activities

The placement agency may start its activity after the resolution on its registration has become final. The placement agency shall use the number of the resolution on its registration continuously in its business relationships, advertisement and correspondence, and the resolution on registration shall be placed visibly in its office.

The placement agency shall report any changes in its headquarters or in the conditions of operation necessary for the pursuit of its activity, or the termination of its activity to the employment centre responsible for registration within 8 days.

The placement agency shall supply information about its activity in any given year until 31 January the following year, using the form issued by the employment centre responsible for keeping the register, which information shall pertain to the employees employed in the form of placement – in an unidentifiable manner – broken down into age groups, sexes, jobs (skilled worker, semi-skilled worker, unskilled worker, white collar worker), FEOR (Unified Classification System of Occupations) main groups, school qualifications and the user enterprise's sectoral classification (TEÁOR 4, Unified Sectoral Classification System of Activities), about the following data:

a) the number of employees employed in the form of placement according to the fixed-term or open-ended types of the employment relationship established for the purpose of placement;
b) the monthly average earnings paid to the employees;
c) the number of domestic and foreign user enterprises, and the number of working hours by the employees employed by the user enterprise in the form of placement.

The exact period of fixed-term employment relationship shall also be given.

The number of foreign user enterprises shall be given per country.[21]

4.6. Restriction to placement

Forbidden to hiring. According to the HLC it is forbidden to hire out employees:

a) for any unlawful work;
b) at any place of business of the user enterprise where there is a strike in progress from the time when pre-strike negotiations are initiated until the strike is called-off; or

20 Tamás GYULAVÁRI (2006) p. 254-255.
21 www.afsz.hu

c) if the user enterprise has terminated the employment relationship of the employee in question within six months by way of ordinary dismissal or during the trial period with immediate effect for reasons in connection with the employer's operations.

The user enterprise shall not have the right to order a hired-out employee to work at another employer.

Legal restrictions. According to Section 193/E of HLC an agreement between the employee and the placement agency shall be null and void, if

a) it contains a clause to ban or restrict any relationship with the user enterprise following termination of the employment relationship on any grounds;
b) it contains a clause to stipulate the payment of a fee by the employee to the placement agency (placement fee) if he/she wishes to enter into a relationship with the user enterprise. [22]

4.7. Inspection of the activity of the placement agency and private labour exchange agency and removal from registration

The employment centre competent according to the headquarters or business domicile of the placement agency shall carry out official inspection with respect to the existence of the conditions of placement and private labour exchange activities as specified in the decree and with respect to the pursuit of private labour exchange activities.

The placement agency shall be *removed* from the register by the employment centre if

a) it has announced the termination of its activity, or
b) it does not have the conditions prescribed in rules of law, or
c) it has failed to replace the property collateral in the time limit prescribed, or
d) it conducts its activity by repeatedly violating the rules of the Labour Code or Government Decree 118/2001.

The employment centre *may remove* the placement agency from the register if it fails to satisfy its statutory obligation to supply data, or if the data supplied on demand do not have the required content.

If the reason for removal from the register is the absence of property collateral or failure to replace it within the deadline set, the placement agency may be registered again only six months after the resolution on removal has become final at the earliest.

The Registry Court registering the partnership engaged in placement activities, the court registering other legal entities, the organ issuing the entrepreneurial certificate and the financial institution managing the deposit shall be notified of the removal by the employment centre.[23]

4.8. Restriction to apply of several Provisions of the HLC

As regards the placement of employees several provisions of HLC shall not apply. Instead of the original HLC provisions, the special provisions relating to placement activity (Chapter XI of the HLC) must be applied, if there are that kind of rule(s).[24] These sections are as follow:

a) The agreement to protect the economic interests of the employer when the employment relations is over. (Subsection (6) of Section 3, Subsections (5)-(8) of Section 76),
b) The specification of the job details (place of employment, job profile etc.) in the employment contract. (HLC Section 76/B),

22 József CSÉFFÁN (2006) p. 550-551
23 www.afsz.hu
24 Section 193/P. of the HLC.

c) The writing form about the changes of the job details. (HLC Subsections (4) and (5) of Section 79),
d) The rule of converting a fixed-duration employment to an indefinate duration employment. The 5 years limit in the fixed duration employment. (HLC Sections 86/A-96),
e) To transfer the employment relationship to a public-service or a civil-service relation and the details of that process. Termination of an Employment Relationship termination of fixed-term employment. The rules of ordinary dismissal and the notice time. Legal provisions of the collective redundancy and the employer obligations about the procedure. Rules of entitlement for severance pay. The regulations of the extraordinary dismissal. Procedure in the Event of Termination of an Employment Relationship. (HLC Subsection (2) of Section 97),
f) Unlawful Termination of an Employment Relationship and its Legal Ramifications. (HLC Section 100),
g) The regulations of the temporary assignment. (HLC Section 106),
h) Employers liability for employees participating in education within the organised education. (HLC Sections 115-116),
i) The rules about appropriation of vacation time. (HLC Subsections (1)-(2) and (5)-(6) of Section 134),
j) The agreement between employers when an employee required to work at another employer. (HLC Subsection (1) of Section 150),
k) The rule about the wage if the employment is for less than one month. (HLC, second sentence of Subsection (1) of Section 155),
l) The rules of liability which connecting with the collective agreement. (HLC Subsections (2)-(3) of Section 167) and
m) The special regulations pertaining to employees in executive positions. Some rules in connection to enforce claims in legal disputes. (HLC Chapter X of Part Three, and Paragraphs *c)-d)* of Section 202).[25]

5. Content of the employment relationship between employee and placement agency

5.1. The employment contract between employee and placement agency

As it has been mentioned, there is an employment agreement between the placement agency and employee. According to Section 193/H of HLC in the employment contract the parties shall stipulate:

a) that the employment contract, whether for teleworking or otherwise, is entered into for the purpose of placement,
b) the employee's personal basic wage,
c) a brief specification or description of the work.

The employment contract shall contain the names of the parties, the placement agency's registration number, and relevant data of the employee and the placement agency.

If the employment contract does not contain the information specified below the employer shall provide such information to the employee within two weeks from the date of signing the employment contract:

25 Tamás GYULAVÁRI (2006) p. 257-258.

a) the place of work,
b) the normal course of work at the user enterprise,
c) other components of the remuneration,
d) the date of payment of wages,
e) the date when employment is to commence,
f) the amount of paid leave and the procedures for allocating and determining such leave, and
g) the provisions on the termination of employment,
h) the rules by which to determine the period of notice to be observed by the placement agency and the employee,
i) the rules of communication of the statement for the termination of employment relationship, and
j) whether the placement agency is subject to any collective agreement.

The information referring to remuneration, payment of wages, amount of paid leave, rules of notice period, the amount of fringe benefits in cash or in kind and the currency of remuneration and other payment may also be given in the form of a reference to the laws or collective agreements – which applies to the placement agency – governing the points in question.

Any change in the name or other aspects of the placement agency, or in relevant details of its activity shall be documented in writing and thus conveyed by the placement agency to the employee within one month of the date of entry into effect of the change in question.

Over and above the mentioned issues, the placement agency shall inform the employee in writing before the commencement of employment of the following:

a) the name, registered address, place of business and corporate registration number of the user enterprise, or if any other form of registration is prescribed by law, this number;
b) the name of the department or person of the user enterprise designated to exercise employer's rights;
c) aspects of commuting, accommodation and meals;
d) the rules concerning the normal course of work, working time and resting time;
e) the employment conditions pertaining to the work in question.

If for the duration of employment the placement agency is unable to arrange continuous work for the employee, the employee – unless otherwise agreed – shall be informed of the following at least forty-eight hours prior to the commencement of the next work assignment:

a) the place of next employment,
b) the date of commencement and its projected duration, and
c) the employee's obligations in terms of reporting to work.

In respect of employment abroad all permits required by the law of the country of employment must be obtained before departure.

Under the duration of placement the provisions of Section 142/A (equal pay for equal valued work principle) shall apply *mutatis mutandis* for workers employed by the user enterprise under contract and for hired-out workers as regards personal basic wage, shift supplements, remuneration for special work, and payment for stand-by or on-call duty, if:

a) continuous employment at the user enterprise is in excess of six months; or
b) the hired-out worker has worked under arrangement by a placement agency at the user enterprise a total of not less than six months within the two-year period before commencing work at the user enterprise. If the aggregate duration of employment at the user enterprise under arrangement by a placement agency reaches the six-month threshold during a subsequent placement, the above provision shall apply as of the date when the six-month threshold is reached.

By way of derogation from what is mentioned in previous paragraph, the provisions of Section 142/A shall apply as regards the benefits referred to in Subsection (3) of Section 142/A for

workers employed by the user enterprise under contract and for hired-out workers, if:

a) continuous employment at the user enterprise under a fixed-term placement arrangement is in excess of two years; or
b) continuous employment at the user enterprise under an unfixed-term placement arrangement is in excess of one year.

However, the above mentioned provisions shall not apply to a hired-out worker if his/her employment relationship is subject to more favourable conditions at the user enterprise. According to the HLC no deviation from the provisions shall be considered valid.[26]

5.2. Employer's right

The exercising of employer's right can be divided into three groups: a) commonly exercised employer's right by placement agency and user enterprise; b) exercised exclusively by placement agency and c) exercised exclusively by user company.

a) In the course of the employment of a hired-out worker employer's rights and obligations shall be exercised jointly by the placement agency and the user enterprise as agreed.
b) However, employment may only be terminated by the placement agency. The employee shall be required to communicate his/her intention to terminate the employment relationship to the placement agency in writing.
c) Hired-out employees shall be subject to the rules of the user enterprise in terms of work schedule, working time and resting time.

There are some special cases of exercising employer's right. Even though the below mentioned employment activities are very similar to placement, the legal basis of the work and the holder of the employer's right is completely different. Therefore in such cases the user enterprise shall be deemed employer:

a) *Reassignment* (the employee – for reasons in connection with the employer's operations – is ordered by the employer to temporarily work in another position in lieu of or in addition to his/her original position) [Section 83/A of HLC]
b) *Own employment relationship* (in case of the user enterprise's own employees, when the user enterprise is the employer according to the relevant provision of HLC) [Subsections (1)-(3) of Section 102 of HLC]
c) *Posting* (for economic reasons the employer may oblige its employee to work temporarily at places other than the normal place of work on condition that the posted employee continues to work under the employer's direction and instructions. [Section 105 of HLC]

In respect of any work performed at a user enterprise, for the purposes of working time and rest periods [Sections 117-129/A of HLC] the user enterprise shall be deemed employer.

For the purposes of Sections 106/A-106/B of the HLC, the placement agency and the user enterprise shall *both* be deemed employer. Section 106/A states that 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, such employee 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,
d) conditions of the hiring-out of workers,
e) occupational safety,

26 József CSÉFFÁN (2006) p. 555

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.

As regards employers engaged in construction work that involves the building, remodelling, maintenance, alteration or demolition of buildings, thus particularly excavating, earthwork, actual building work, the assembly and dismantling of prefabricated components, fitting and installations, renovation, restoration, dismantling, demolition, maintenance, upkeep, painting, cleaning works and improvements, in terms of the requirements, specified above, the workers employed for these activities shall be subject to collective agreements covering the entire industry or an entire sector instead of legal regulation, provided the given collective agreement provides more favourable conditions concerning the entitlement in question.

There are some *exceptions* from the above mentioned main provisions: the above mentioned rules need not be applied if the employee posted (assigned, hired out) is subject to more favourable regulations in terms of the above mentioned a)-g) requirements by virtue of the relevant labour law or the parties' agreement to the contrary.[27]

5.3. Allocation of paid leave

For the duration of employment by placement, unless otherwise agreed, paid leave shall be allocated by the user enterprise or by the placement agency. The date when paid leave is to commence shall be communicated to the employee at least three (3) days in advance following consultation with the employee. The placement agency shall be allowed to change this date only under exceptional circumstances and shall compensate the employee for any damage or expenses incurred thereby.

At least one-fourth of the annual paid leave shall be allocated at the time requested by the employee, with the exception of the first three months of employment. The employee shall notify the employer of such request at least fifteen (15) days in advance.[28]

5.4. Responsibilities of placement agency

Whether the user enterprise has paid any fees to the placement agency as due shall have no effect on the wage payment obligation of the placement agency. All obligations related to tax returns, data disclosure, deductions and payments in connection with an employment relationship shall be the responsibility of the placement agency.[29]

5.5. Equal treatment

Although the law does not suspend the general equal pay principle for temporary agency workers, in practice neither the same wages nor the same conditions of employment are guaranteed as for comparable employees at the user enterprise. The only stipulation providing temporary workers with a certain degree of income security is that the agency is responsible for paying wages in the event that the user enterprise fails to pay the agreed fee in due time.

As the law does not stipulate explicitly that agency workers must be paid the same wages as employees in comparable jobs at the user enterprise, unsurprisingly case studies have found that agency workers earn 10-20% less than permanent workers in the same jobs at the same

27 József CSÉFFÁN (2006) p. 557.
28 Section 193/N of HLC.
29 Section 193/F of HLC.

workplaces, and the difference is even greater in terms of the non-wage elements of compensation. Agency workers' income and job security is further weakened by the common practice of agencies that they terminate the contract once there is no further assignment for the worker.

Since agencies and their employees pay the same taxes and statutory social security contributions as other employers/workers, mandatory benefits for which the agency workers are entitled are the same too. However, there is a difference in the contributions and rights to voluntary insurance policies (pension, health and accident), which are generally based on collective agreements or on the decision of the employer. Such policies at the user enterprise often do not cover agency workers, and the agencies are not keen to provide their workers these benefits either.[30]

5.6. Termination of Employment

Any employment relationship (between employee and placement agency) established for the purpose of placement can be terminated by

a) mutual agreement,
b) ordinary notice,
c) immediate discharge.
d) immediate effect during the trial period.

Any statement for the termination of employment must be made in writing.

Among the above mentioned ways of termination of employment contract between employee and placement agency, only the *ordinary notice* and the *immediate discharge* will be discussed here.[31]

5.6.1. Termination by ordinary notice

An open-ended employment relationship might be terminated by notice by both the placement agency and the employee. The placement agency shall attach an explanation with its notice of discharge with the reasons clearly stated. In the event of dispute the placement agency is required to evidence the authenticity of and the justification for discharge.

The placement agency may terminate the employment relationship by notice if:

a) the employee's performance is inadequate,
b) the employee is unable to perform the tasks required,
c) the placement agency was unable to arrange suitable employment for the employee within thirty (30) days, or
d) justified by technical reasons in connection with the placement agency's operation.[32]

The notice period shall be fifteen (15) days. If the employment relationship exists for at least three hundred and sixty-five (365) days, the notice period shall increase to thirty (30) days. *Cumulation rule*. If a placement agency and an employee have had several employment relationships within two years preceding the date when notice of termination is communicated, the duration of such relationships shall be accounted on the aggregate.

If termination is effected by the placement agency the employee shall be relieved from work duty during the notice period unless otherwise agreed by the parties in writing. For this period the employee shall be entitled to his/her average wages.

30 Section 193/A of HLC.
31 Section 193/I of HLC.
32 Section 193/J of HLC.

5.6.2. Termination by immediate discharge

Any employment relationship, whether for a fixed or indefinite duration, may be terminated with immediate effect by both the placement agency and the employee.

The employee may terminate the employment relationship with immediate effect in the event of any serious breach of employment-related regulations or of the agreement on the part of the placement agency or on the part of the user enterprise.

The placement agency may terminate the employment relationship with immediate effect in the event of the employee's violation of any obligation in connection with his/her employment.

If removed from the register, the placement agency shall – following the ruling for removal becoming legally binding – terminate the employment relationships of employees with immediate effect, with the reason stated, within sixty (60) days of receipt. If the placement agency fails to terminate an employment relationship within the above-specified deadline it shall be deemed terminated on the sixtieth day.

With the exception of the above mentioned removal from the register, any entitlement for termination with immediate effect shall remain valid for fifteen (15) days from the date of receipt of notice of the reason, or for a maximum period of sixty (60) days from the date when the reason occurred. Based on a reason communicated by the user enterprise, termination with immediate effect may take place if the user enterprise notifies the placement agency of the employee's breach of conduct within five (5) working days from the date of receiving notice thereof. In this case the fifteen-day deadline for termination with immediate effect shall be reckoned from the date of receipt of said written notification.

When the placement agency terminates an employment relationship with immediate effect on the grounds that it was removed from the register, or if terminated by the employee with immediate effect, the placement agency shall be required to pay the employee's average wages for the duration defined in Subsection (4) of Section 193/J of HLC (notice period).

However, the provisions of termination by notice shall not apply to termination with immediate effect.

Following termination of an employment relationship by either party, the placement agency shall pay the employee's wages as due [the remuneration defined in Subsection (6) of Section 193/J and in Subsection (7) of Section 193/K of HLC] and all other benefits, and shall provide the certificates defined under provisions pertaining to labour relations and by legal regulations within five (5) days from the last day of employment or, if the employee did not work before the notice of termination was communicated, or before the date of any agreement for termination by mutual consent or before the reason for the termination of the relationship occurred, from the date when the employment relationship was terminated.[33]

5.7. Unlawful Termination of Employment

If an employment relationship was unlawfully terminated by the placement agency shall be deemed terminated on the day when the court ruling declaring it unlawful becomes binding, unless the fixed-duration relationship would have been terminated without such unlawful action before the court ruling.[34]

In connection with an employment relationship that was terminated unlawfully, upon the employee's request, the placement agency may be obliged by court order to pay minimum one

33 Section 193/K of HLC.
34 Section 193/M of HLC.

month or maximum six months of average wages to the employee depending on the severity of the unlawful action and its consequences.

When employment is terminated unlawfully, the employee shall be compensated for any lost wages, other benefits and for damages. No compensation for wages, benefits and for damages shall be paid if it is recovered elsewhere.

If an employment relationship is terminated not by notice, in addition to what is mentioned above the employee shall be entitled to his/her average wages due for the period when relieved from work duty.

When a fixed-duration employment is terminated unlawfully, upon the employee's request, the placement agency may be obliged by court order to pay any wages due for the remaining period of employment at the time of termination, or maximum six months of average wages.[35]

6. The civil law contract between the placement agency and the user enterprise

6.1. The type and content of the contract

As it was already mentioned there is a civil law contract (employment leasing) between the placement agency and user enterprise. According to Section 193/G. of HLC the agreement between the *placement agency* and the *user enterprise* shall be made in writing, and it must contain, among others:

a) the duration of placement,
b) the place of employment,
c) the nature of work involved.

In addition to the above mentioned contents of the agreement, the user enterprise shall be required to inform the placement agency in writing:

a) of its normal course of work,
b) of the name of the person in charge of exercising employer's rights,
c) of the manner and the timeframe within which to supply the information necessary for the payment of wages,
d) of the employment conditions pertaining to the work in question, furthermore
e) of all aspects that are considered significant in terms of the employment of the worker in question.[36]

6.2. Employment-related expenses

Unless otherwise agreed, the placement agency shall be required to cover all employment-related expenses specified by legal regulation, such as the a) employee's commuting expenses and b) the costs of medical examination if one is required for employment. When requested by the user enterprise, the placement agency shall, before the first day of employment, supply to the user enterprise:

a) a certificate issued by the body operating the Central Employment Register on notification, or – if actual employment has commenced before the certificate was

35 József CSÉFFÁN (2006) p. 561-564
36 Tamás GYULAVÁRI (2006) p. 254-255.

delivered – a copy of the employment contract with salary information excluded; and
b) a copy of the document in proof of being admitted into the register of placement agencies in accordance with specific other legislation.

6.3. Information supply

The user enterprise shall supply all information to the placement agency by the fifth (5) day of the month following the subject month for the payment of wages by the tenth (10) day of the month following the subject month. If employment is terminated during the month, the user enterprise shall convey the above-specified information to the placement agency within three (3) working days from the last day in employment.

For the duration of placement the user enterprise shall be deemed employer in terms of the regulations on:

a) occupational safety,
b) the employment of women, young people and workers with any degree of incapacity,
c) the principle of equal treatment,
d) working conditions,
e) job transfer,
f) working time and resting time, and for the records of these.

The placement agency shall – upon the prior consent of the hired-out worker – inform the user enterprise concerning the qualifications and experience of the employee.

6.4. Prohibition of self-placement

Self-placement means that a placement agency is established by the user company only for the placement of employees to the user company. This was the practice for couple years, mainly at big companies. The legislators changed the above mentioned rule. Therefore, an agreement between the placement agency and the user enterprise shall be null and void if the parties are affiliated by way of ownership, which means there is no consideration of any kind of involvement 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.

Exceptional establishment of employment relationship between leased employees and user company. If by the time of commencement of work at the user enterprise:

a) the placement agency fails to comply with the requirements set out in HLC and in other legislation, such as 118/2001 Government Decree; or
b) the placement agency fails to enter into an employment contract as specified in Subsection (1) of Section 193/H of HLC, the employment relationship shall be considered concluded between the user enterprise and the employee effective as on the day of commencement of work, for the duration of placement.

6.5. Obligation to provide information to employee's representatives

For the sake of the protection of the interest of employees who are engaged in employment relationship with the user enterprise, the latter one shall inform its local (user enterprise's) workers' council and the local trade union branch of the number of workers employed by placement and of the employment conditions on a regular basis, or at least once in a six-month period.

III. Critical remarks on Hungarian TWA

1. Curbing illegal work

In Hungary 18% of the GDP is produced by illegal work (Figure from 2003). Moreover, a well-known fact is that approximately 800,000 citizens of active age do not have detectable income, they are provided for by their families and/or have income from "black" work. In our opinion this situation will not change considerably unless contributions on the wages are decreased significantly.

Figures show that in the European Union the index of total wages costs/net wages is the second highest in Hungary, Sweden being the first. The success of the introduction of the simplified entrepreneurial tax (EVA) shows that the citizens' willingness to pay taxes increases radically, beyond expectation, if tax burdens are decreased to an acceptable level.

2. Illegal work in placement

Statistical data reveal that 584 companies were engaged in placement activities in Hungary in 2005. The majority of these companies do not report workers, or report them only partly. It is estimated that 30-40% of the placement market is covered by companies with only partly lawful operation, 10-15% by companies which operate absolutely illegally.[37]

Illegal work presents considerable difficulties for placement agencies complying with law.

User enterprises expect small placement agencies lacking seriousness to hire out hundreds of workers below the realistic market price-level, thereby completely saving the payment of contributions or paying them only after the minimum wages.[38]

The fine imposed on placement agencies is frequently negligible compared to the amount saved on contributions, therefore the agency concerned will continue its manipulations. In most of the cases these agencies do not operate in their registered headquarters, thus the inspectors give up searching for them. For this reason the supervision of agencies is insignificant in the country in spite of the fact that the hiring out of up to 500-1,000 persons for a partner company is typical mostly in the country.

The unpaid contributions and taxes amount to a loss of billions of HUF (Hungarian Forints) in the treasury.

We are convinced that in the background of this high rate of illegal placement one can find the user enterprises' attempt to evade the obligation of large contribution payment, and the risk of illegal employment is "organised out" to placement agencies. Several large multi-national companies employ workers illegally, through placement agencies.

It may also happen that local employment centres turn a blind eye to these irregularities as the large company in question is a decisive employer in the given region. A central labour inspection group ("commando") should be set to carry out unexpected, surprise inspections independently of the local organs, on the basis of real market information (information received from various organizations, reports by dialling the "green number").

37 This is an estimation by the author, based on various daily newspaper's information.
38 http://www.vd.hu/cikk.php?cikk=1942&szid=0

3. School co-operatives

School co-operatives, which represent a special placement activity, significantly hinder participants legally operating on the placement market.

School co-operatives cover approximately 23% of the Hungarian placement market – in other countries this proportion is about 5%. Last year Hungarian student co-operatives had about 90,000 members and were in contractual relationship with 3,300 companies.

The net sales of the 8 largest student co-operatives, covering 85-90 % of the sector, amounted to HUF 5.75 billion in 2003.[39]

The state is deprived of billions of Forints as these co-operatives, claiming to employ students, do not pay either taxes or contributions. Although student co-operatives are not entitled to perform placement according to law, a placement agency hiring out adult manpower is often operated in addition to the student co-operative.

The user enterprise benefits from the lower costs of placement, and as it cannot be punished, it has no interests in employing adult, legally hired manpower. This results in unfair market practice.[40]

IV. Statistical Data Relating to TWA in Hungary

Despite the steep growth, the extent of temporary agency work in Hungary is less than 1% of the labour force, and is mainly concentrated in low-skilled jobs of certain sub-branches of manufacturing. The Government and the social partners jointly aim to re-regulate TWA to prevent loopholes and abuses.

Table 1: Data of the temporary work agencies in December 31, 2005

Area (capital/county)	Temporary Work Agency		Index:
	Number (piece)	Pattern of number %	2004=100%
Budapest	217	37,2	124,0
Baranya	13	2,2	144,4
Bács-Kiskun	18	3,1	128,6
Békés	13	2,2	86,7
Borsod-Abaúj-Z.	35	6,0	89,7
Csongrád	7	1,2	87,5
Fejér	29	5,0	120,8
Győr-Moson Sopron	24	4,1	109,1
Hajdú-Bihar	9	1,5	100,0
Heves	5	0,9	62,5
Jász-nagykun-Sz.	33	5,7	94,3
Komárom-esztergom	54	9,2	114,9
Nógrád	19	3,3	105,6
Pest	52	8,9	148,6
Somogy	4	0,7	100,0
Szabolcs-Szatmár-B.	11	1,9	91,7

39 Source: Világgazdaság, MTI.

40 http://www.vezetoitudas.hu/pages/getpage.aspx?id=A8682E76-DC15-4C76-8614-042EF2BFBB1A

Area (capital/county)	Temporary Work Agency		Index:
	Number (piece)	Pattern of number %	2004=100%
Tolna	7	1,2	100,0
Vas	14	2,4	175,0
Veszprém	10	1,7	100,0
Zala	10	1,7	166,7
Total:	584	100,0	115,6

Source: http://www.afsz.hu/engine.aspx?page=stat_osszefogl_munkaero-kolcson_tevekeny

Parallel to the above mentioned compulsory registration, a government decree (No. 189/2001. [X. 19.]) ordered the compulsory data collection on temporary work agencies as of 2002. According to the data of ÁFSZ, registered agencies concluded contracts with a total of 39,083 employees in 2003, and 52,684 in 2004. While these figures showed a dynamic growth (it was a 30% increase from the previous year in 2003 and 35% in 2004) temporary workers still made up less than 1% of the employed population (3.9 million). Full time equivalents are not available, however a similar estimation can be made based on the registered working days. In 2004 temporary workers did 5.5 million working days, which approximately accounted for 0.6% of the working days of the total employed population, assuming 8 hour working days on the average.

According to ÁFSZ statistics, there were 282 registered agencies in late 2002, 339 in 2003, 505 in 2004 and 584 in 2005.[41]

As to the sectoral distribution of the user enterprises, only the shares of agency assignments are available. The biggest users were manufacturing (58%), sport, cultural and other services (14%), transport, post and telecommunication (8%), commerce (7%) and construction (5%). Other industries absorbed less than 4% of the assignments each. The pattern of white-collar agency workers is different, their main users are financial and heath care institutions.

In 2004 the total of 52,684 temporary agency worker did 65,029 assignments. Less than half (40%) of the agency workers had fixed-term contracts, and 60% of them worked on open-ended contracts. Most workers with fixed-term contract (75%) had only one assignment during the year. The average period of the contracts was 84 days; however, open-ended contracts tended to be the longer ones (108 days) while fixed-term contracts the shorter (60 days) ones.

In 2004 52.2% of agency workers were men 47.8% were women. Most of the agency workers (52%) belong to the 21-35 years old age group, 21% are aged 36 to 45 and 14% 46 to 55. Interestingly, the share of the elder generations is higher among women.

As to the occupational variables of temporary agency workers, the vast majority (89%) of them were manual workers, of whom only 22% were skilled, 58% semi-skilled and 10% unskilled in 2004. Most of the agency workers had a low educational attainment; 36 attended only (8 grades or less of) primary school, 27 finished vocational training, 13% completed grammar school and only 5% had a higher education degree.

Although there is no statistical data available on wages, all the abovementioned data confirm the hypothesis that manufacturing companies employ the vast majority of agency workers, and primarily in low-skill and low-wage jobs.

41 www.afsz.hu

Appendix

Table 2: The number of the employers that use temporary work agencies in different sectors (2005)

	Agriculture	Mining	Processing industry	Electricity, gas and water supply	Building industry	Trade
	Number of employers in the sector (piece)					
Budapest	10	-	248	25	104	263
Baranya	-	-	16	2	3	3
Bács-Kiskun	-	-	9	2	10	3
Békés	3	-	16	1	-	-
Borsod-Abaúj-Z.	3	1	41	2	11	5
Csongrád	-	-	13	1	2	1
Fejér	-	1	57	2	6	5
Győr-Moson-Sopron	-	-	93	2	7	3
Hajdú-Bihar	6	-	19	-	2	2
Heves	-	-	4	-	2	-
Jász-Nagykun-Szolnok	1	-	87	1	6	-
Komárom-Esztergom	1	-	68	-	3	5
Nógrád	-	-	15	1	1	1
Pest	3	1	28	-	3	24
Somogy	20	-	127	162	-	1
Szabolcs	-	-	8	-	2	1
Tolna	-	-	12	2	1	1
Vas	-	-	19	-	1	1
Veszprém		-	34	-	-	-
Zala	5	-	13	5	3	7
Total:	52	3	927	208	167	326

Source: http://www.afsz.hu/engine.aspx?page=stat_osszefogl_munkaero-kolcson_tevekeny

Table 3: The number of the employers that use temporary work agencies in different sectors (2005) (continued)

	Hospitality	Transport, storage	Finances	Education	Health Care	Sport, cultural and another services
	Number of employers in the sector (piece)					
Budapest	73	119	69	8	41	149
Baranya	-	1	-	-	1	3
Bács-Kiskun	-	1	1	-	-	16
Békés	-	-	-	-	1	-
Borsod-Abaúj-Z.	-	1	2	-	1	2
Csongrád	-	1	-	-	-	1
Fejér	-	4	1	2	1	16
Győr-Moson-Sopron	-	2	-	-	-	14
Hajdú-Bihar	3	5	-	-	-	5
Heves	-	-	-	-	-	4
Jász-Nagykun-Szolnok	-	-	-	-	1	3
Komárom-Esztergom	-	1	-	-	-	6
Nógrád	-	-	1	-	-	1
Pest	13	6	6	-	-	6
Somogy	-	1	-	-	-	1
Szabolcs	-	-	-	-	1	-
Tolna	-	-	-	-	-	-
Vas	1	-	-	-	-	1
Veszprém	-	-	-	-	-	5
Zala	2	2	-	1	-	4
Total:	92	144	11	47	167	237

Source: http://www.afsz.hu/engine.aspx?page=stat_osszefogl_munkaero-kolcson_tevekeny

Table 4: The employees connected with the temporary work agencies – pattern of age and education in 2005

According to age	Under 20	21-25	26-35	36-45	46-55	Over 50	Total
				Year			
				Number of employees/person			
Males							
Skilled labour	5,4	18,7	32,0	21,3	17,2	5,3	100,0
Person with on-the-job training	9,9	25,4	29,5	18,2	13,0	3,9	100,0
Unskilled labour	10,1	21,0	24,7	20,7	14,8	8,6	100,0
Blue collar	8,6	22,9	29,7	19,4	14,5	4,8	100,0
White collar	3,2	36,5	37,7	13,9	6,0	2,8	100,0
Total:	*7,9*	*30,7*	*30,7*	*18,8*	*13,5*	*4,6*	*100,0*
Female							
Skilled labour	5,1	34,1	38,6	14,7	5,8	1,7	100,0
Person with on-the-job training	7,9	22,6	29,4	20,9	15,2	4,0	100,0
Unskilled labour	5,0	16,8	22,6	18,3	19,1	17,3	100,0
Blue collar	7,1	23,9	30,2	19,7	14,0	5,0	100,0
White collar	5,7	39,4	34,3	10,2	7,9	2,6	100,0
Total:	*6,9*	*26,9*	*31,0*	*17,8*	*12,8*	*4,6*	*100,0*
Together							
Skilled labour	5,3	24,0	34,3	19,1	13,3	4,1	100,0
Person with on-the-job training	8,8	23,9	29,5	19,7	14,2	4,0	100,0
Unskilled labour	7,6	19,0	23,7	20	16,9	12,8	100,0
Blue collar	7,9	23,4	30	19,6	14,3	4,9	100,0
White collar	4,8	38,4	35,5	11,5	7,2	2,6	100,0
Total:	*7,4*	*25,7*	*30,8*	*18,3*	*12,8*	*4,6*	*100,0*

According to the Education of the Employees

Gender/ School	Elementary school	Vocational training secondary school	On the job vocational training	High school	University	Total
Pattern, percent						
Male	31,1	40,6	15,4	8,9	4,1	100
Female	32,4	33,2	12,6	15,1	6,8	100
Together	*31,8*	*36,8*	*14,0*	*12,0*	*5,5*	*100*

Source: http://www.afsz.hu/engine.aspx?page=stat_osszefogl_munkaero-kolcson_tevekeny

Table 5: Employees and the temporary work agencies legal relations in 2005.

Training background	Indefinite Duration	Fixed-	Together	Among the indefinite duration contracts that Once	Twice	Three times	More
	Number of employees			Make a contract in 2005			
Male							
Skilled labour	7945	2001	9946	1693	186	64	58
Person with on-the-job training	11808	7508	19316	5743	855	227	683
Unskilled labour	2043	1477	3520	1175	153	93	56
Blue collar	21796	10986	32782	8611	1194	384	797
White collar	3425	890	4315	688	86	84	32
Total	*25221*	*11876*	*37097*	*9299*	*1280*	*468*	*829*
Female							
Skilled labour	4480	686	5166	515	144	19	8
Person with on-the-job training	13801	9203	23004	7314	1233	297	359
Unskilled labour	2163	1150	3313	988	99	60	3
Blue collar	20444	11039	31483	8817	1476	376	370
White collar	5443	21639	7604	1816	194	73	78
Total	*25887*	*13200*	*39087*	*10633*	*1670*	*449*	*448*
Together							
Skilled labour	12425	2687	15112	2208	330	83	66
Person with on-the-job training	25609	16771	42320	13057	2088	534	1042
Unskilled labour	4206	2627	6833	2163	252	153	59
Blue collar	42240	22025	64265	17428	2670	760	1167
White collar	8868	3051	11919	2504	280	157	110
Total	*51108*	*25076*	*76184*	*19932*	*2950*	*917*	*1277*

Source: http://www.afsz.hu/engine.aspx?page=stat_osszefogl_munkaero-kolcson_tevekeny

Table 6: Distribution of the employees and the temporary work agencies legal relations in 2005.

Training background	Indefinite Duration	Fixed-	Together	Among the indefinite duration contracts that Once	Twice	Three times	More
	Number of employees			Make a contract in 2005			
Male							
Skilled labour	79,9	20,1	100,0	84,6	9,3	3,2	2,9
Person with on-the-job training	61,1	38,9	100,0	76,5	11,4	3,0	9,1
Unskilled labour	58,0	42,0	100,0	79,6	10,4	6,3	3,8
Blue collar	66,5	33,5	100,0	78,4	10,9	3,5	7,3
White collar	79,4	20,6	100,0	77,3	9,7	9,4	3,6
Total	68,0	32,0	100,0	78,3	10,8	3,9	7,0
Female							
Skilled labour	86,7	13,3	100,0	75,1	21,0	2,8	1,2
Person with on-the-job training	60,0	40,4	100,0	79,5	13,4	3,2	3,9
Unskilled labour	65,3	34,7	100,0	85,9	8,6	5,2	0,3
Blue collar	64,9	35,1	100,0	79,9	13,4	3,4	3,4
White collar	71,6	28,4	100,0	84,0	9,0	3,4	3,6
Total	66,2	33,8	100,0	80,6	12,7	3,4	3,4
Together							
Skilled labour	82,2	17,8	100,0	82,2	12,3	3,1	2,5
Person with on-the-job training	60,5	39,5	100,0	78,1	12,5	3,1	6,2
Unskilled labour	61,6	38,4	100,0	82,3	9,6	5,8	2,2
Blue collar	65,7	34,3	100,0	79,1	12,1	3,5	5,3
White collar	74,4	25,6	100,0	82,1	9,2	5,1	3,6
Total	67,1	32,9	100,0	79,5	11,8	3,7	5,1

Source: http://www.afsz.hu/engine.aspx?page=stat_osszefogl_munkaero-kolcson_tevekeny

Table 7: The employers and employees who has contracts with temporary work agencies in 2005

Sector	Number of employers	Number of hireing	The number of hireing training background					
			Skilled labour	Person with on-the-job training	Unskilled labour	Blue collar	White Collar	Total:
Agriculture	52	1988	307	768	888	1963	25	1988
Mining	3	104	22	76	5	103	1	104
Processing industry	927	49895	6751	36731	4774	48256	1639	49895
Elecrtycit, gas and water supply	208	3073	722	1004	57	1783	1290	3073
Building industry	167	3109	1932	557	495	2984	125	3109
Trade	326	8482	3048	2606	1078	6732	1750	8482
Hospitality	92	3842	2635	743	213	3591	251	3842
Transport, post, telecommunication	144	6683	1289	1883	323	3495	3188	6683
Finances	80	2594	15	213	1	229	2365	2594
Education	11	604	1	359	201	561	43	604
Health care	47	299	39	76	8	123	176	299
Sport, cultural and another service	237	11416	1208	7519	182	8909	2507	11416
Total	*2294*	*92089*	*17969*	*52535*	*8225*	*78729*	*13360*	*92089*

Source: http://www.afsz.hu/engine.aspx?page=stat_osszefogl_munkaero-kolcson_tevekeny

Table 8: The distribution of employers and employees who has contracts with temporary work agencies in 2005

Sector	Number of employers	Number of hireing	The number of hireing training background					
			Skilled labour	Person with on-the-job training	Unskilled labour	Blue collar	White Collar	Total:
Agriculture	2,3	2,2	15,4	38,6	44,7	98,7	1,3	100,0
Mining	0,1	0,1	21,2	73,1	4,8	99,0	1,0	100,0
Processing industry	40,4	54,2	13,5	73,6	9,6	96,7	3,3	100,0
Electricity, gas and water supply	9,1	3,3	23,5	32,7	1,9	58,0	42,0	100,0
Building industry	7,3	3,4	62,1	17,9	15,9	96,0	4,0	100,0
Trade	14,2	9,2	35,9	30,7	12,7	79,4	20,6	100,0
Hospitality	4,0	4,2	68,6	19,3	5,5	93,5	6,5	100,0
Transport, post, telecommunication	6,3	7,3	19,3	28,2	4,8	52,3	47,7	100,0
Finances	3,5	2,8	0,6	8,2	0,0	8,8	91,2	100,0
Education	0,5	0,7	0,2	59,4	33,3	92,9	7,1	100,0
Health care	2,0	0,3	13,0	25,4	2,7	41,1	58,9	100,0
Sport, cultural and another service	10,3	12,4	10,6	65,9	1,6	78,0	22,0	100,0
Total	100,0	100,0	19,5	57,0	8,9	85,5	14,5	100,0

Source: http://www.afsz.hu/engine.aspx?page=stat_osszefogl_munkaero-kolcson_tevekeny

Zusammenfassung

Die sich auf die ungarische Gestellung vom Personal beziehenden Modelle, Methoden und Rechtsregel

In Ungarn- verfolgend das Beispiel der meisten europäischen Mitgliedsstaate- wurde die Gestellung vom Personal arbeitsrechtlich nur geregelt, wenn diese Beschäftigungsform bereits in der Praxis funktionierte. In den meisten europäischen Ländern erfolgt die Regelung bezüglich der Gestellung vom Personal in einer getrennten Rechtsregel. In Ungarn beschäftigt sich ein getrennter Abschnitt des Arbeitsgesetzes (Abschnitt XI.) und das Beschäftigungsgesetz mit der Gestellung vom Personal. Aufgrund der beiden Gesetze fasst die 118/2001. (VI. 30.) Regierungsverordnung die sich auf die Gestellung vom Personal und die private Arbeitsvermittlungstätigkeit beziehungsweise deren Registrierung beziehenden Regeln zusammen.

Die Studie stellt vor allem den Verlauf der Entstehung der sich auf die Gründung der privaten Gestellung vom Personal und deren Funktion beziehenden rechtlichen Regelung und die einschlägige wirksame rechtliche Regelung vor. Sie lässt sich auf vier gut abtrennbare Teile aufteilen: 1) Die Entwicklung der Gestellung vom Personal in Ungarn, 2) Die sich auf die Gestellung vom Personal beziehenden wirksamen ungarischen Regeln 3) Einige kritische Bemerkungen über die Tätigkeit der in Ungarn funktionierenden Gestellungsfirmen vom Personal 4) Vorstellung der sich auf die Verleiher vom Personal beziehenden ungarischen statistischen Daten.

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Römisches Recht und Kodifikation des Privatrechts in Rußland und in der Sowjetunion

I. Die russischen Fürstentümer (Rußland bis 1918)

1. In die russischen Fürstentümer bzw. Stadtstaaten (russische „*poleis*") konnte das römische Recht (*ius Romanum*) bzw. das byzantinisch-römische Recht (*ius Graeco-Romanum*) einerseits durch die Handelsbeziehungen zu Byzanz, andererseits unter Vermittlung der orthodoxen Kirche eindringen. Auf dem Gebiet des Großfürstentums Kiew wurden etliche Elemente des byzantinisch-römischen Rechts mit Hilfe des *Zakon sudnij ljug'em* bekannt. Außer der überaus wichtigen *Synagógé* von Ióhannés Scholastikos wurde lange Zeit kein weiteres juristisches Werk aus Byzanz ins Russische übersetzt. Der *Nomokanon* des Pseudo-Phótios, welcher auch das *Procheiron* und die *Eklogé* beinhaltet, wurde während der auf den Mongoleneinfall folgenden Zeit der Zersplitterung auf der Synode in Vladimir im Jahre 1272 verkündet. Die russische Übersetzung des *Nomos geórgikos* erschien erst am Anfang des 14. Jahrhunderts. Es ist jedoch ziemlich wahrscheinlich, daß diese byzantinischen Rechtsquellen ausschließlich von der orthodoxen Kirche angewandt wurden.

2. Auf völkerrechtlicher Ebene wurde der Zarentitel zum ersten Male im Jahre 1473 von Ivan III. (1462–1505) verwendet, nachdem er – *per procurationem* (durch Stellvertreter) – als Großfürst von Moskau durch Papst Sixtus IV. im Jahre 1472 mit der Nichte des letzten byzantinischen Kaisers Konstantinos XI., Sophia Palaiologa in Rom vermählt wurde. Die Idee, Moskau als rechtmäßigen Erben von Byzanz anzusehen, wurde von dem aus Pskov (auf Deutsch: Pleskau) stammenden Mönch (*Starez*) Filofej (Philotheos) zu Anfang des 16. Jahrhunderts konzipiert. Auf der Grundlage der Novelle (*novella*) VI des Kaisers Justinian I. adaptierte Filofej den Gedanken der Einheit (*symphónia*, lateinisch *consonantia*) von geistlicher Macht (*hierosyné,* auf Lateinisch *sacerdotium*) und weltlicher Macht (*basileia,* auf Lateinisch *imperium*) in seinem Sendschreiben an den Zaren Wassilij III. auf Rußland. Unter dieser (heiligen) Einheit (auf Russisch *svjastsennaja sugubica*) verstand er letztlich die Unterwerfung der orthodoxen Kirche vor dem vom Zaren repräsentierten Staat. Auf diese Weise ist die russische Form der Doktrin des *Caesaropapismus* entstanden, welche ganz bis zum Jahre 1917 das Verfassungssystem im zaristischen Rußland kennzeichnete.

Die Anerkennung des Zarentitels hing sowohl von der weltlichen als auch von der geistlichen Autorität ab. Seitens des Heiligen Römischen Reiches (*Sacrum Romanum Imperium*), das nach der Eroberung Konstantinopels im Jahre 1453 das einzige bestehende Kaiserreich war, wurde der Zarentitel während der Herrschaft von Wassilij III. (1505–1533) von Kaiser Maximilian I. (1493–1519) anerkannt. Da es sich bei Rußland um ein Kaiserreich mit orthodoxer Tradition handelte, oblag die Bestätigung des Zarentitels durch die geistliche Macht nach der im Jahre 1054 erfolgten Kirchenspaltung zunächst dem Patriarchen von Konstantinopel. Die Anerkennung des Zarentitels war seitens des Patriarchen von Konstantinopel an eine Krönungszeremonie nach byzantinischem Ritual gebunden.[1] Der Großfürst und später Zar Ivan IV. (1533–1584) wurde im Jahre 1547 in Moskau als erster Zar nach einer solchen Zeremonie gekrönt. Dagegen wurde der Zarentitel von Rom erst viel später gebilligt.

3. Mit dem Gerichtsbuch (*Sudebnik – sud* heißt auf Russisch Gericht) des Zaren Ivan III. vom Jahre 1497 fängt in Rußland im mehr oder weniger technischen Sinne die Epoche der Gesetzgebung an. Im Hinblick auf das Zustandekommen des *Sudebnik* vom Jahre 1497 stehen immer noch eher wenige Daten zur Verfügung. Es ist lediglich bekannt, daß diese Rechtsquelle von Vladimir Gussev zusammengestellt und von dem Rat der Bojaren gebilligt bzw. gutgeheißen wurde. Das *Sudebnik* kann nicht als eine Kodifikation im technischen Sinne betrachtet werden. Es ist eher eine Zusammenfassung, d.h. Kompilation, des in einzelnen Rechtsquellen (*fontes iuris*) niedergelegten Rechts. Die juristische Technik und Struktur des *Sudebnik* sind qualitativ nicht von hohem Wert. Die Bedeutung des Gerichtsbuches vom Jahre 1497 liegt in erster Linie darin, daß dessen Verfasser der Rechtszerplittertheit ein Ende zu setzen und die Gerichtsbarkeit im Lande zentralistisch zu gestalten beabsichtigte. Das Gerichtsbuch ist mit seinen 49 Artikeln äußerst kurz und enthält überwiegend auf das Prozeßrecht bezogene Normen. Es ist aber zu betonen, daß im *Sudebnik* auch Normen zu finden sind, die das Privatrecht (Zivil- und Handelsrecht), das Strafrecht und das Verwaltungsrecht regeln. Erstaunlicherweise finden wir in dem Gerichtsbuch keine Bestimmungen, die das Staatsrecht bzw. die rechtlichen Grundlagen des russischen Staates regeln würden. Im Jahre 1550 wurde eine zweite, erweiterte Fassung des *Sudebnik* veröffentlicht.

4. Das byzantinisch-römische Recht (*ius Graeco-Romanum*) lebte auf dem Gebiet des russischen Zarenreiches fort. Bereits Ivan IV. erteilte den Auftrag, den *Codex Iustinianus* ins

1 In der Hauptstadt Moskau fand auf dem Konzil der russischen Geistlichkeit im Jahre 1448 zum ersten Male die Wahl eines russischen Metropoliten statt. Durch die Wahl des Metropoliten wurde die Autonomie der Russischen Kirche geschaffen. Die Errichtung des Patriarchats während der Herrschaft des Zaren Fjodor Iwanowitsch (1584–1598) im Jahre 1589 erhob Moskau zum Zentrum einer autokephalen orthodoxen Kirche. Die Eigenständigkeit des Moskauer Patriarchats erfolgte de facto nach der Unterzeichnung der Konstitutionellen Charta (Gramota Ulozennaja), die auf der aus diesem Anlaß in Moskau abgehaltenen Synode angenommen und von dem dort anwesenden byzantinischen Patriarchen unterzeichnet wurde. Trotzdem wurde dieses fünfte Patriarchat der orthodoxen Kirche seitens des byzantinischen Patriarchats de iure erst im Jahre 1593 anerkannt.
Moskau betrachtete sich als „Drittes Rom", und zwar als Erben von Byzanz, des „neuen Roms". Es ist immerhin darauf hinzuweisen, daß die europäischen Mächte und das Papsttum die Rechtmäßigkeit des Übergangs des byzantinischen Erbes an Rußland (translatio imperii) lange Zeit nicht anerkannt haben. Nichtsdestoweniger hatte die Idee des „Dritten Roms" für das russische öffentlich-rechtliche und politische Denken bis zum Jahre 1917 herausragende Bedeutung. Zur Idee des „Dritten Roms" siehe aus der umfangreichen Literatur: H. SCHAEDER: Moskau das dritte Rom. In: Osteuropäische Studien Bd. I. Hamburg, 1929.; N. ZERNOW: Moscow the Third Rome. London, 1944.; D. STRÉMOOUKHOFF: Moscow the Third Rome. Sources of the Doctrine. Speculum 28 (1953) und W. GOEZ: Translatio imperii. Tübingen, 1958.

Russische zu übersetzen. Das Gesetzbuch *Sobornoje Ulozhenije* des Zaren Aleksij Mihajlovic (1649–1676) vom Jahre 1649 beinhaltet neben Werken der Kirchenväter und zahlreichen Verordnungen der Zaren (*ukasy*) auch byzantinisches d.h. byzantisch-römisches Recht. Dies erklärt sich dadurch, daß der Redaktor des *Sobornoje Ulozhenije*, Nikita Odolevskij, damit beauftragt worden war, die bedeutendsten Gesetze der byzantinischen Kaiser aus dem privatrechtlichen Bereich auszuwählen und die heimischen russischen Gesetze auf deren Grundlage zu revidieren.

Diese Gesetzessammlung nährt sich jedoch maßgeblich vom russischen Gewohnheitsrecht und vom III. Litauischen Statut des Jahres 1588. Da das *Sobornoje Ulozhenije* grundlegend öffentliches Recht (*ius publicum*) bzw. Strafrecht (*ius criminale,* auf Russisch: *ugolovnoje pravo*) enthält, ist in ihm folglich byzantinisch-römisches Privatrecht (*ius Graeco-Romanum privatum*) eher in bescheidenem Maße vorhanden.

5. Ab Ende des 18. Jahrhunderts wurden mehrere Rechtsgelehrte mit der Konsolidation des russischen Rechts beauftragt. Zu diesen Rechtsgelehrten gehörten B. G. A. von Rosenkampf (1764–1832), M. M. Speranskij (1772–1839) und Mihály Balugyánszky (Michail Balugianski, 1769–1847), der ursprünglich Professor der Rechtsakademie von Nagyvárad (Großwardein, heute Oradea in Rumänien) war. Hier erwähnen wir, daß Balugyánszky, der auch in den russischen Adelsstand erhoben wurde, der erste Rektor der Universität von Sankt Petersburg war. Die ausgearbeiteten Entwürfe fanden jedoch nicht das Gefallen des Zaren Alexander I. und seines Nachfolgers Nikolaus I (1825–1855).

Die Idee der Kodifikation stieß auch sonst auf lebhaften Widerstand. Der namhafte konservative Reichshofhistoriker Mihailovits Nikolai Karamsin (1766–1826) äußerte seine Kritik in der Denkschrift „Über das alte und neue Rußland", in der er die Entwürfe als schlichte Übersetzung des französischen *Code civil* qualifizierte. Statt dessen empfahl er die organische Weiterentwicklung des alten russischen Rechts. Die lebhafte Diskussion über die Privatrechtskodifikation in Rußland erinnert gewissermaßen an den Kodifikationsstreit zwischen Anton Friedrich Justus Thibaut (1772–1840) und Friedrich Carl von Savigny (1779–1861) in Deutschland.

Als Ergebnis der Konsolidationsarbeit entstand im Jahre 1832 immerhin eine systematische Zusammenfassung sämtlicher bis dahin verabschiedeter Gesetze (*zakony*) bzw. Verordnungen (*ukasy*), die fünfzehnbändige Gesetzessammlung *Svod Zakonov*. Diese Gesetzessammlung trat am 1. Januar 1835 in Kraft. In den privatrechtlichen Teil (Buch X) des *Svod Zakonov* wurden mehrere Rechtsinstitute bzw. Konstruktionen auf der Grundlage des französischen *Code civil* aufgenommen. Außerdem nimmt der *Svod Zakonov* unter anderem auf Robert Joseph Pothiers (1699–1772) Werke Bezug. Im Bereich des Sachenrechts ist der Einfluß des österreichischen Allgemeinen Bürgerlichen Gesetzbuches und der deutschen Privatrechtswissenschaft ersichtlich. Der byzantinische Einfluß beschränkt sich vor allem auf das Ehe- und Familienrecht. Das Handelsrecht wird gesondert in Buch XI geregelt.

6. In Rußland kann man den Einfluß der Pandektistik ab den 1820-er Jahren bemerken. Ab diesem Zeitpunkt nämlich wurden die Vorlesungen von Thibaut, Savigny und Georg Friedrich Puchta (1798–1846) von den jungen russischen Studenten an den deutschen Universitäten – vor allem in Berlin, Leipzig und Heidelberg – besucht.

An der juristischen Fakultät der Friedrich-Wilhelms-Universität in Berlin gab es ab dem Jahre 1887 fast ein Jahrzehnt lang auch das Russische Zaristische Römischrechtliche Seminar (Institut) unter der Leitung von Heinrich Dernburg (1829–1907), Alfred Pernice (1841–1901) und Ernst Eck (1838–1901). Unter den Studenten dieses Seminars (Instituts) wiesen sich besonders D. D. Grimm und I. A. Pokrovskij (beide später Professoren für römisches Recht), L. Petrazhickij (der spätere Professor für Rechtsphilosophie) und W. von Seeler (später Professor für Privatrecht) aus. Ihren Reihen entstammen auch die meisten Übersetzer der deutschen Pandektenlehrbücher ins Russische.

Die russischen Anhänger der pandektistischen Schule sahen das römische Recht als Einführung ins Privatrecht an. P. Sokolovskij betonte sogar die außerordentliche Bedeutung des römischen Rechts für eine Modernisierung des russischen Privatrechts. Von den Schriften der russischen Romanisten sind folgende hervorzuheben: einerseits das Lehrbuch für römische Rechtsgeschichte von Pokrovskij (1913) und andererseits das Lehrbuch für römisches Privatrecht von V. Hvostov (1906), welche gleichermaßen die Betrachtungsweise der deutschen Privatrechtswissenschaft widerspiegeln. Die jurististische Denkweise von Rudolf von Jhering (1818–1892) wurde von Sergej Andreeviæ Muromcev (1850–1910), der auch der Begründer der Rechtssoziologie in Rußland war, weiterentwickelt.

7. Im Jahre 1882 stellte Zar Alexander III. (1881–1894) eine Kommission zur Kodifikation des Rechts auf, welche in den Jahren 1899 bzw. 1903 ihren Entwurf für das russische Bürgerliche Gesetzbuch (*Grazhdanskoje Ulozhenije*) vorstellte. Der auf der Grundlage des Pandektensystems redigierte, in seiner letzten Fassung aus 2640 Paragraphen bestehende Entwurf spiegelt in seiner Struktur (Allgemeiner Teil, Familien-, Sachen-, Erb- und Schuldrecht) weitgehend den Einfluß des deutschen BGB wider.

Für den schuldrechtlichen Teil nahmen sich die Redaktoren aber hauptsächlich das schweizerische Obligationenrecht vom Jahre 1881 und später dessen revidierte Fassung vom Jahre 1911 zum Modell: Der schuldrechtliche Teil befindet sich nämlich am Ende des Gesetzbuches als Fünftes Buch (*Pjataja Kniga*) und beinhaltet auch große Teile des Handelsrechts. Die politische Situation erlaubte die Verkündung eines einheitlichen Gesetzbuches nicht, so daß später der Gedanke an eine Teilkodifikation in den Vordergrund geriet. Der Entwurf des schuldrechtlichen Teiles vom Jahre 1913 regelte vor allem unter Vermittlung des deutschen BGB etliche, dem römischen Recht entnommene Rechtsinstitute, welche in Rußland bis dahin völlig unbekannt waren (wie z.B. die ungerechtfertigte Bereicherung, Geschäftsführung ohne Auftrag).

Der Ausbruch des Ersten Weltkriegs vereitelte jedoch die Verabschiedung der Teilentwürfe bzw. des Gesamttextes des *Grazhdanskoje Ulozhenije* durch das russische gesetzgebende Organ, der Staatsduma.

8. Den Einfluß der Pandektistik zeigt auch das im Jahre 1922 von Alexij Grigorievic Gojkbarg (1883–1962) redigierte Zivilgesetzbuch (*Grazhdanskij Kodeks*) von Sowjetrußland, welches im Grunde genommen eine gekürzte Fassung der früheren Entwürfe für ein russisches Zivilgesetzbuch ist. Gleichermaßen verhält es sich hinsichtlich der pandektistischen Prägung sowohl mit den im Jahre 1961 in der Sowjetunion auf föderaler Ebene verabschiedeten Grundlagen der zivilrechtlichen Gesetzgebung als auch mit den auf deren Basis von den 15 Unionsrepubliken verabschiedeten Zivilgesetzbüchern. Das Zivilgesetzbuch der Russischen Sozialistischen Sowjetrepublik vom Jahre 1964 stützt sich nicht nur hinsichtlich seines Aufbaus auf das Pandektensystem; auch seine Institute und Rechtsgrundsätze wurzeln *de facto* zu einem beträchtlichen Teil in der römischrechtlichen Tradition.

Gemäß den im Jahre 1991 verabschiedeten neuen Grundlagen der zivilrechtlichen Gesetzgebung der damals noch bestehenden Sowjetunion verloren die mit der Marktwirtschaft im Widerspruch stehenden Normen des Zivilgesetzbuchs der Russischen Sowjetrepublik vom Jahre 1964 ihre Gültigkeit. Auf die Redaktion des schrittweise in Kraft tretenden neuen Zivilgesetzbuchs der Russischen Föderation übt neben dem deutschen BGB bzw. der deutschen Zivilrechtswissenschaft unter anderem das neue, noch nicht vollständig in Kraft getretene neue niederländische Bürgerliche Gesetzbuch (*Nieuwe Burgerlijk Wetboek*) beträchtliche Wirkung aus.

II. Sowjetunion

9. Die Sowjetunion wurde erst im Dezember 1922 gegründet bzw. proklamiert. Vorher existierte nämlich die Russische Sozialistische Föderative Sowjetrepublik (RSFSR), genannt auch Sowjetrußland. Es entstand ein Staatenbund, der sich aus Sowjetrußland, der Ukraine, Weißrußland und der Nordkaukasischen Föderativen Sowjetrepublik (bestehend aus Georgien, Armenien und Aserbaidschan) zusammensetzte. Erst im Jahre 1922 wurde die Union der Sowjetischen Sozialistischen Republiken gegründet. Die im Jahre 1918 promulgierte Verfassung galt demnach nur in Sowjetrußland. Nach der Ausrufung der Sowjetunion (UdSSR) fing man an, eine Verfassung für diesen föderalen Staat auszuarbeiten. Im Jahre 1923 wurde die Bundesverfassung der Sowjetunion angenommen, die am 1. Januar 1924 in Kraft trat.

Die zweite Verfassung wurde im Jahre 1936 verabschiedet und noch im gleichen Jahre in Kraft gesetzt. Die dritte Verfassung wurde im Jahre 1977 verabschiedet und trat im Jahre 1978 in Kraft. Die drei Verfassungen wurden mehrmals modifiziert. Die weitgehendsten Modifizierungen fanden unter Michail Gorbatschow statt. Im Jahre 1988 wurde die Sowjetunion eine Präsidialrepublik. Mit den Reformen ging auch der stufenweise verfassungsrechtliche Abbau des totalitären wirtschaftlichen und politischen Systems einher. Sowohl die verschiedenen Verfassungen, als auch ihre Modifizierungen beeinflußten maßgeblich etliche Bereiche des Privatrechts.

10. In Sowjetrußland wurde im November 1922 das *Zivilgesetzbuch der Russischen Sozialistischen Föderativen Sowjetrepublik* (*Grazhdanskij Kodeks*) promulgiert. Das am 1. Januar 1923 in Kraft getretene Gesetzbuch sollte im Einklang mit der im Jahre 1921 eingeführten Neuen Ökonomischen Politik *(Novaja Ekonomicheskaja Polityka* – NEP, 1921–1928), die das Wirtschaftssystem des Kriegskommunismus (*vojennij kommun'ism*) abgelöst hatte, stehen. Für die Erstellung des *Grazhdanskij Kodeks* standen der Kodifikationskommission, die von dem namhaften Familienrechtler Aleksej Grigorjevich Gojkbarg (1883–1962) geleitet wurde, nur wenige Wochen zur Verfügung.

Das sowjetrussische Zivilgesetzbuch bestand aus lediglich 435 Paragraphen und ist im Grunde genommen eine stark abgekürzte Fassung des Entwurfes des *Grazhdanskoje Ulozhenije* des Zarenreiches. Darauf ist es zurückzuführen, daß sowohl die Struktur als auch eine Anzahl von Rechtsinstituten so viel Ähnlichkeit mit dem Entwurf des *Grazhdanskoje Ulozhenije* aufweisen. Dies zeigt sich insbesondere im Bereich des Schuldrechts. Der Kodex hat die folgende Gliederung: Einleitende Bestimmungen (§§ 1–9), Allgemeiner Teil (§§ 10–51), Sachenrecht (§§ 52–105), Schuldrecht (§§ 106–415) und Erbrecht (§§ 416–435).

11. Der Kodex bedient sich öfters einfacher Konstruktionen und einer „volksnahen" Sprache. Grundlegend ist dieses Gesetzeswerk von der marxistischen Ideologie geprägt. Dies kommt z.B. in der Regelung der Eigentumsverhältnisse zum Vorschein. Die dinglichen Rechte werden in den Hintergrund gedrängt und werden z.T. ganz ausgelassen. Das sowjetrussische BGB kennt nur drei Institute des Sachenrechts: Eigentum, Baurecht und Pfandrecht. Andere sachenrechtliche Institute wie z.B. Besitz, Dienstbarkeiten (*servitutes*) und das Nachbarrecht sind nicht geregelt.

Seiner obengenannten Struktur nach zeugt es neben dem Einfluß des schweizerischen ZGB und des OR auch von der Wirkung der Spätpandektistik und des deutschen Bürgerlichen Gesetzbuches. Der Einfluß der Spätpandektistik ist besonders deutlich an der im Allgemeinen Teil geregelten Rechtsgeschäftslehre ersichtlich.

Dem marxistisch ausgerichteten Konzept des Rechts Rechnung tragend wurden das Familienrecht, das Arbeitsrecht und das Agrarrecht aus dem traditionellen Bereich des Privatrechts abgesondert und in eigenständigen Codices geregelt. Das Arbeitsrecht wurde

bereits im November 1918 in einem autonomen Kodex geregelt.[2] Am 30. Oktober 1922 wurde ein neues Gesetz über das Arbeitsrecht angenommen, und noch am gleichen Tage wurde ein Gesetz über das Agrarrecht verabschiedet. Das erste Gesetz über das Ehe-, Familie- und Vormundschaftsrecht wurde bereits im Jahre 1918 angenommen, welches dann 1926 von einem neuen, aus 143 Paragraphen bestehenden Gesetz abgelöst wurde. Auch diese im weiten Sinne privatrechtlichen Gesetze wurzeln hinsichtlich ihrer Terminologie zum Teil in der Tradition der deutschen Pandektistik bzw. Pandektenwissenschaft.

12. Das neu entstehende sowjetische „bürgerliche" Recht war demnach äußerst zersplittert. Zusammendfassend läßt sich feststellen, daß folgende vier Codices der RSFSR das herkömmliche Material des bürgerlichen Rechts behandelten: 1. Zivilgesetzbuch vom Jahre 1922 (in Kraft seit dem 1. Januar 1923); 2. Gesetzbücher über das Ehe-, Familien- und. Vormundschaftsrecht zunächst vom Jahre 1918 bzw. 1926; 3. Arbeitsgesetzbücher vom Jahre 1918 bzw. 1922; 4. Agrargesetzbuch vom Jahre 1922.

Diese Codices bildeten gleichzeitig das Vorbild für die Gesetzgebung in den Unionsrepubliken außerhalb Sowjetrußlands nach Entstehung der Sowjetunion.

Gegen Ende der NEP-Periode kam die Idee auf, die in der Sowjetunion promulgierten Gesetze in ein einheitliches System zu fassen. Dieses Projekt, das in den Jahren 1927–1930 verwirklicht werden sollte, steht historisch gesehen in gewissem Maße in der Tradition des von Speranskij und Balugianskij erstellten *Svod Zakonov*. Diese Konsolidation wurde jedoch erst viel später, in den Jahren 1975–1986 unter dem Namen *Svod Zakonov SSSR* verwirklicht.

13. Die am 8. Dezember 1961 verabschiedeten *Grundlagen der Zivilgesetzgebung der Union der SSR und der Unionsrepubliken* bildeten die Basis für die später von sämtlichen 15 Unionsrepubliken verabschiedeten Zivilgesetzbücher. Die Grundlagen hatten normativen Charakter, d.h. sie galten nicht nur als allgemeine Rechtsprinzipien. Das Zivilgesetzbuch der Russischen Sozialistischen Sowjetrepublik vom Jahre 1964 besteht aus 8 Teilen (Büchern): Allgemeiner Teil, Eigentumsrecht (mit Sachenrecht), allgemeines Schuldrecht, einzelne Verträge bzw. Obligationen, Urheberrecht, Erfinderrecht, Erbrecht und das internationale Privatrecht. Es stützt sich hinsichtlich seines Aufbaus auf das Pandektensystem. Seine Institute und Rechtsgrundsätze wurzeln *de facto* zu einem beträchtlichen Teil in der römischrechtlichen Tradition.

Nach den im Juni 1968 verabschiedeten föderalen *Grundlagen der Gesetzgebung der Union der SSR und der Unionsrepubliken über die Ehe und die Familie* kam es in den

2 Erwähnung verdient, daß das Arbeitsgesetzbuch vom Jahre 1922 von dem ungarischen Rechtsgelehrten Péter ÁGOSTON (1874–1925) redigiert wurde. Péter ÁGOSTON habilitierte sich im Jahre 1904 in Kolozsvár (Klausenburg, heute Cluj-Napoca in Rumänien). Er war zunächst Professor für Privatrecht bzw. Rechtstheorie an der Rechtsakademie von Nagyvárad (Großwardein, heute Oradea in Rumänien) und ab dem 1. Januar 1919 für kürzere Zeit Professor an der Budapester Universität. Als Sozialdemokrat nahm er in Ungarn auch hohe politische Ämter wahr: Ab dem 20. Feburuar bis zum 20. März 1919 war er Staatssekretär im Innenministerium der Berinkey-Regierung. Ab 21. März 1919 (Ausrufung der Räterepublik in Ungarn) bis zum 4. April 1919 war er stellvertretender Volkskomissar für Auswärtige Angelegenheiten; ab 4. April bis zum 24. Juni 1919 nahm Ágoston das Amt des Volkskommissars für Auswärtige Angelegenheiten wahr. Zwischen dem 24. Juni und dem 1. August 1919 wirkte er als Volkskommissar für Justiz. Nach Ende der Räteregierung wurde er Mitglied der Peidl-Regierung, die nur 6 Tage lang dauerte. In dieser Regierung war er Außenminister und wurde gleichzeitig provisorisch mit dem Amt des Justizministers beauftragt. Nach dem Fall der Peidl-Regierung wurde ÁGOSTON wegen seiner Tätigkeit in der Räterepublik angeklagt und zum Tode verurteilt. Das Urteil wurde jedoch nicht vollstreckt, sondern ÁGOSTON durfte laut einer Vereinbarung zwischen Ungarn und Sowjetrußland nach Moskau gehen. Ab dem 20. Februar 1922 wirkte er in Moskau im Volkskommissariat für Arbeitswesen. In dieser Eigenschaft kodifizierte er das sowjetrussische Arbeitsgesetzbuch vom Jahre 1922. Im Jahre 1924 zog er nach London. Ab 1925 lebte er bis zu seinem Tode in Paris.

Unionsrepubliken zur Promulgation von Gesetzen über die Ehe und die Familie. Die Russische Sozialistische Föderative Sowjetrepublik verabschiedete im Einklang mit diesen Grundlagen im Jahre 1969 die Gesetze über Ehe bzw. Familie.

Im Jahre 1968 wurden daneben auf föderaler Ebene auch die *Grundlagen der agrarrechtlichen Gesetzgebung* beschlossen, die für die Gesetze der einzelnen Sowjetrepubliken richtungsweisend waren. Der Agrarkodex der Russischen Sozialistischen Föderativen Sowjetrepublik stammt aus dem Jahre 1970.

Auf dem Gebiet des Familienrechts und des Agrarrechts ist der Einfluß der Terminologie, der Rechtsinstitute und Konstruktionen der deutschen Pandektistik sowohl in den föderalen *Grundlagen*, als auch in den Kodifikationen der 15 Sowjetrepubliken klar erkennbar.

Die *Grundlagen der arbeitsrechtlichen Gesetzgebung* wurden im Dezember 1970 beschlossen, auf deren Basis im Jahre 1971 das *Arbeitsgesetzbuch der Russischen Sozialistischen Föderativen Sowjetrepublik* promulgiert wurde.

Um das geltende Recht zu konsolidieren, wurde in den Jahren 1976–1985 der *Svod Zakonov SSSR* herausgegeben, der die verschiedenen *Grundlagen* und Gesetzbücher der Sowjetrepubliken zu Konsolidationszwecken zusammenfaßte.

14. Im sowjetischen Recht wurde das „bürgerliche" Handelsrecht mit Rücksicht auf die Abschaffung der Marktwirtschaft nicht als Rechtszweig anerkannt. Stattdessen wurde ein „Handelsrecht" sozialistischer Art, das sog. ökonomische Recht (*economicheskoje pravo*) entwickelt. Die Rechtsverhältnisse zwischen sozialistischen Wirtschaftseinheiten (vor allem staatlichen Unternehmen) gründeten weder auf der Willensautonomie noch der Vertragsfreiheit der vertragschließenden Parteien, sondern wurden durch Weisungen bzw. Direktiven der zentral gelenkten Planwirtschaft begründet. Daher wurden diese „Verträge" Planverträge bzw. Wirtschaftsverträge (*economicheskije kontrakty)* genannt. Diese Vertragsverhältnisse unterlagen nicht dem Zivilgesetzbuch, sondern anderen Gesetzen bzw. Regeln. Diese Regelungsweise stand im Einklang mit dem Konzept des „Zweisektorenrechts" (*dvuhsektornoje pravo)*. Gleichwohl wurde in der Sowjetunion – im Gegensatz zur Tschechoslowakei – kein Gesetzbuch über das sozialistische „Wirtschaftsrecht" verabschiedet. In der Doktrin wurde aber die Existenz des sozialistischen „Wirtschaftsrechts" als selbständiger Rechtszweig anerkannt. Dies wurde auch dadurch deutlich, daß es Gerichte bzw. Schiedskommissionen zur Beilegung der Rechtsstreitigkeiten zwischen den staatlichen Unternehmen gab (Arbitrage-Gerichte).

Allein für den Seehandel wurde im Jahre 1929 ein eigenständiges Gesetz verabschiedet, das gewisse Charakterzüge eines Handelsgesetzbuches im herkömmlichen Sinne trägt.

III. Rußland nach 1991

15. Der Oberste Sowjet der Russischen Föderation nahm am 31. Mai 1991 die aus 170 Paragraphen bestehenden *Neuen Grundlagen der Zivilgesetzgebung* (*Osnovy Grazhdanskogo Zakonodat'elstva*) an. Diese *Grundlagen* ersetzten die *Grundlagen* aus dem Jahre 1961. Sie sollten eigentlich am 1. Januar 1992 in Kraft treten, dazu konnte es aber wegen der Auflösung der Sowjetunion nicht mehr kommen.

Das gesetzgeberische Organ der Russischen Föderation, der Oberste Sowjet, beschloß am 14. Juli 1992, daß die *Grundlagen*, die ursprünglich – wie auch ihr Vorgänger vom Jahre 1961 – normative Kraft haben sollten, in Rußland angewandt werden. Gemäß den *Neuen Grundlagen der zivilrechtlichen Gesetzgebung* wurden die nicht mit der Marktwirtschaft im Einklang stehenden Normen des sowjetrussischen Zivilgesetzbuchs vom Jahre 1964 außer

Kraft gesetzt. Diese Bestimmung steht im Einklang mit dem Prinzip des *razgosudarstvlen'ije* (Verringerung der Teilnahme des Staates am Wirtschaftsleben).

Die Vorarbeiten zum Bürgerlichen Gesetzbuch der Russischen Föderation begannen bereits im November 1991. Damit wurde beauftragt das privatrechtliche Forschungszentrum in Moskau, dessen Leiter S. S. Aleksejev war. Der Leiter der Gesetzesvorlagenkommission war A. L. Makovskij.

16. Der Interparlamentarische der GUS (Gemeinschaft Unabhängiger Staaten, auf Russisch: *Sotrudn'ic'estvo Nesavisimich Gosudartsv*) verabschiedete im Jahre 1994 einen Beschluß, wonach für alle GUS-Staaten ein Modellgesetzbuch vorbereitet werden soll. Mit der Koordinierung dieses Vorhabens wurde das Forschungszentrum für Privatrecht in Moskau beauftragt. Der erste Teil des Modellgesetzbuches wurde am 29. Oktober 1994 verabschiedet. (*Grazhdanskij Kodeks. C'astj pervaja. Model rekomandat'elnij zakonodat'elnij akt Sodrusestva Nesavisimych Gosudarstv.*) Die weiteren Teile des Modell-BGB-Entwurfes wurden stufenweise, zwischen 1994 und 1995, angenommen. Obwohl dieses Modellgesetzbuch nicht als servile Variante des Entwurfes des russischen Zivilgesetzbuches betrachtet werden kann, stellt der Entwurf des russischen BGB ohne Zweifel die Hauptquelle für den GUS-Modellkodex dar. Bei der Redaktion des Modellkodex nahmen auch die Zivilrechtler sämtlicher GUS-Staaten teil.

Ähnlich zum neuen niederländischen Bürgerlichen Gesetzbuch trat das neue russische Bürgerliche Gesetzbuch stufenweise in Kraft. Neben dem deutschen BGB wird es auch vom neuen niederländischen *Burgerlijk Wetboek* beeinflußt. Durch die Wirkung der deutschen Pandektistik und des deutschen BGB besitzt es einen umfangreichen Allgemeinen Teil.

17. Die Kodifikatoren berücksichtigten auch die von der Lando-Kommission ausgearbeiteten europäischen Vertragsprinzipien sowie die von UNIDROIT verabschiedeten Prinzipien der Internationalen Handelsverträge (*Principles of International Commercial Contracts*) vom Jahre 1994. Daneben wurden auch das vom Interparlamentarischen Rat der Gemeinschaft Unabhängiger Staaten (GUS) angenommene Modell eines Bürgerlichen Gesetzbuches vom Jahre 1994, das US-amerikanische *Uniform Commercial Code (UCC)* bzw. der *Louisiana Civil Code* sowie das *Wiener Kaufrechtsabkommen* miteinbezogen.

Der erste Teil des aus drei Teilen bestehenden russischen Bürgerlichen Gesetzbuches (§§ 1–453) trat am 1. Januar 1995 in Kraft, nachdem es im Oktober 1994 von der Staatsduma angenommen worden war. Das vierte Kapitel des ersten Teils über die juristischen Personen, einschließlich der Handelsgesellschaften, (§§ 48–123) trat bereits früher, am 5. Dezember 1994, in Kraft. Der erste, aus 29 Kapiteln bestehende Teil beinhaltet einen – entscheidend dem deutschen BGB nachgebildeten – Allgemeinen Teil (§§ 1–208), das Eigentumsrecht (§§ 209–306), das Allgemeine Schuldrecht (§§ 307–419) und die Allgemeinen Bestimmungen über Verträge (§§ 420–453).

Der zweite Teil des russischen Zivilkodex wurde im Januar 1996 promulgiert und am 1. März 1996 in Kraft gesetzt. Er regelt die einzelnen Verträge. Eine Tendenz der Vereinheitlichung der zivilrechtlichen und handelsrechtlichen Verträge kennzeichnet diesen Teil des russischen BGB.

Der dritte Teil des russischen Bürgerlichen Gesetzbuches ist am 1. März 2002 in Kraft getreten. Es beinhaltet das Erbrecht und das internationale Privatrecht.

Ein Charakteristikum des russischen BGB im Vergleich zu den Zivilcodices der anderen Reformländer ist der Umstand, daß in ihm das Familienrecht nicht geregelt wird. Im Jahre 1995 wurde das Familiengesetzbuch der Russischen Föderation verabschiedet.

18. Das russische Bürgerliche Gesetzbuch kennt mehrere Formen des Eigentums. Neben dem klassischen Privateigentum werden die im römischen Recht als *iura in re aliena* bekannten Rechtsinstitute (wie Nießbrauch, Erbpacht (*emphytheusis*) und sogar Dienstbarkeiten) als autonome Formen des Eigentums betrachtet. Dies läßt sich nicht zuletzt darauf

zurückführen, daß das russische BGB das Privateigentum am Boden nicht anerkennt.

Römischrechtlicher Einfluß läßt sich auch im Bereich des *trust*-Eigentums *(doverit'elnaja sobstvennost'*) erkennen, das unter der Vermittlung des *Louisiana Civil Law Trust* (der keinen Unterschied zwischen *legal title* und *equitable title* kennt) Eingang vor allem in das russische Bankrecht gefunden hat. Das *trust*-Eigentum wurde aber beschränkt, nämlich im Bereich der Finanztransaktionen durch Dekrete des Staatspräsidenten eingeführt.

Das 17. Kapitel des 1. Teils des russischen BGB über das Bodeneigentum (§§ 260–287) wurde erst im April 2001 in Kraft gesetzt. Die zeitliche Verzögerung des Inkraftsetzens dieses Kapitels läßt sich auf eine politische Diskussion zurückführen. Das im November 1990 verabschiedete Gesetz über die Bodenreform und das im April 1991 verkündete Bodengesetz haben nämlich das Privateigentum am Boden bedeutend limitiert. Artikel 36 der im Dezember 1993 verabschiedeten Verfassung der Föderativen Republik von Rußland ermöglichte aber das Privateigentum sowohl für die Staatsbürger als auch für ihre Vereinigungen. Die Vollstreckung dieses Verfassungsartikels konnte aber in Ermangelung einer entsprechenden gesetzlichen Regelung nicht verwirklicht werden. Das im Oktober 2001 verkündete Bodengesetz regelt das Bodeneigentum detailliert und im Einklang mit dem 17. Kapitel des russischen BGB.

19. Das russische Bürgerliche Gesetzbuch regelt, grundsätzlich dem monistischen Konzept entsprechend, auch die Handelsgesellschaften unter den juristischen Personen, im 1. Teil des BGB. Dies ist ein wesentlicher Unterschied z.B. zur Regelungsweise der Handelsgesellschaften im neuen niederländischen *Burgerlijk Wetboek*, das als *code unique* auch das Handelsrecht regelt. Eine detaillierte Regelung der Handelsgesellschaften befindet sich in Sondergesetzen. Das erste, mit den Erfordernissen der Marktwirtschaft und der *razgosudarstvlen'ije* im Einklang stehende Gesetz über die Handelsgesellschaften wurde bereits am 25. Dezember 1990 verabschiedet. Seitdem wurde dieser Kodex mehrfach modifiziert. Das russische föderale Aktiengesetz wurde im Jahre 1995 verabschiedet, das Gesetz über die Gesellschaft mit beschränkter Haftung stammt aus dem Jahre 1998.

Es stellt sich derzeit die Frage, ob Rußland neben dem Bürgerlichen Gesetzbuch auch ein Handelsgesetzbuch haben wird. In der Rechtswissenschaft und in der Rechtspraxis gehen die Meinungen darüber auseinander, ob das Handelsrecht als autonomer „Rechtszweig" in einem Handelsgesetzbuch im herkömmlichen (wie etwa in Deutschland) Regelung finden soll.

In Bezug auf das Arbeitsrecht besteht die folgende Rechtslage: Die Grundlagen der Arbeitsgesetzgebung der Sowjetunion wurden im Dezember 1970 verabschiedet. Auf der Basis dieser Grundlagen wurde im Jahre 1971 in der russischen Föderation der Sowjetunion das Arbeitsgesetzbuch verabschiedet. Dieses Gesetzbuch wurde am 1. Februar 2002 durch ein neues Arbeitsgesetzbuch, das aus 14 Teilen und 217 Paragraphen besteht, ersetzt. Kritik wird an diesem neuen Arbeitsgesetzt aus dem Grunde geübt, weil es inhaltlich größtenteils immer noch im Arbeitsgesetzbuch vom Jahre 1971 wurzelt.

SUMMARY

Roman Law and Codification of Private (Civil) Law in Russia and in the Soviet Union

Under Duke Vladimir, about A. D. 1000, the Russians accepted Christianity from the Greek missionaries coming from Constantinople. The Greek alphabet was now adapted by the

missionaries to the language of the Slavs, who had no books and no alphabet of their own but only a few crude runes, or word-symbols; and henceforward the Greco-Roman religion, morals, and law dominates in Russian life.

The first traditional lawgiver is Yaroslav the Just, son of Vladimir; he lived about A. D. 1015–1050; but the oldest extant text of his code dates actually from his successors, about A. D. 1200. This Code of Yaroslav was called „Russian Truth" („Pravda Russkaya"); and it was really drafted or inspired by the Greek ecclesiastics, for the information of the church courts. It represents a mixture of Germanic, Slavic, and Roman-Greek elements. It was modeled on the Roman-Greek law-books of Constantinople; and the Greek church had already for three centuries been modifying the native Slav customs in family and property relations.

It was partly due to the commercial relations with Byzantium that Roman law reached Russia. The other factor was the activity of the Orthodox Church. In the Grand Dutchy of Kiev elements of Byzantine Roman law became known primarily through the *Zakon sudni ludem*. Still there were no translations of Byzantine legal literature with the exception of Ióannés Scholastikos's comprehensive *Synagógé*. Phótios's *Nomokanón* containing both the *Procheiron* and the *Eklogé* was promulgated at a synod held at Vladimir in 1272, at the time of disunity following the Mongol invasion. The Russian translation of the *Nomos geórgikos* was issued in the early 14th century. It is, however, probable that these Byzantine sources of law were applied only by ecclesiastical courts.

The title of the Tsar of Russia was first used in international relations by Ivan III (1462–1505) in 1473 after he married in 1472 Sophia Palaiologa, niece of Constantine XI, the last Byzantine emperor. The man who outlined the idea of Moscow being the successor of Byzantium was a monk called Philotheos (Filofej) of Pskov in the early 16th century. On the basis of Justinian's Novel (*novella*) VI he worked out the principle of caesaropapism, the unity (*symphónia* or *sviashchennaya sugubitsa*) of the ecclesiastical (*sacerdotium* or *hierosyné*) and political power (*imperium* or *basileia*) that involved the subordination of the Church to the monarch. The title of tsar was recognized already by Holy Roman Emperor Maximilian I during the reign of Vasily III (1505–1533), but the patriarch of Byzantium made the Byzantine-type crowning of Ivan IV, the Terrible (1533–1584) the precondition of his approval. This took place in 1547.

Byzantine Roman law made its impact felt also in the Russian tsardom. Ivan IV ordered the Russian translation of the *Codex Iustinianus*. The law-book of Tsar Alexis Mihailovich (1649–1676) of 1649 titled *Sobornoe Ulozhenie* contained texts by the Fathers of the Church, the orders (*ukazy*) of the tsars, and Byzantine law, as compiler Nikita Odolevski had been ordered to select the most suitable provisions of private law issued by Byzantine emperors and review the Russian law accordingly. The law-book is largely based on Russian customary law and the Third Lithanian Statute of 1588. The impact of Byzantine Roman law can be felt only in criminal law and even there only vaguely.

In the late eighteenth century and in the early nineteenth century several legal scholars (such as G.A. von Rosenkampff [1764–1832], M.M. Speranski [1772–1839], and Mihály Balugyánszky (Michael Balugianski)[1769–1847], professor at the Nagyvárad (now Oradea, Rumenia) Academy of Law) were entrusted with the consolidation, i.e. summarization of Russian law, but their drafts did not satisfy the tsar.

But the day of a real 1ega1 system arrived for Russia fifty years later. The fourth period of Russian lega1 history opens under the wise and conscientious Emperor Alexander I. (1801–1825). He was inspired by his chancellor, Michael Speransky. Speransky had started as a professor of mathematics; he ended as one of the greatest legislative geniuses of the nineteenth century. It was his ambition to create a comp1ete legal system for Russia; and though he suffered long delays, and even exi1e, he triumphed finally. In 1826 the new Emperor

Nicholas (1825–1855) authorized him to assemble a commission of jurists. They first spent four years in collecting and printing all the materials since Alexis' Code of 1649, in chronological order, – making forty-seven volumes, thirty-one thousand laws (decrees, enactments) in all.

By 1832 a systematized revision of previous law was prepared and issued in fifteen volumes under the title *Svod Zakonov* (Collection of Laws). Several legal institutions of its private law section (vol. X) were based on the French *Code civil* and Pothier's ideas. Regarding the law of things the influence of German jurisprudence could be felt. Byzantine law survived only in marital and family law.

Also from the viewpoint of civil (private) law was of substantial significance the peasant reform of 1861 under the reign of tzar Alexander II (1855–1881) which abolished the peasants' serfdom in relation to their landlords also significantly changed the status and functions of the Russian land community. Russian peasants, who still in the first half of the 19th century could be said jointly with the land, on which they were settled, were now declared personally *free* citizens and their legal status was substantially changed. They became a new, fourth estate, while they simultaneously formed their own special corporative organizations with special self-government. The law-givers in 1861 used self-government of state peasants (*sel' skoye obshtchestvo I volost'*) as a basic form of peasant community which had already been tested in practice and elaborated in detail under the Minister Kiselev reforms.

The Pandectist School made its impact felt in Russia from the 1820s when Russian law students began to study at German universities by Thibaut, Savigny, and Puchta. There was a Russian Seminar of Roman Law for a decade from 1887 at the Faculty of Law at the University of Berlin, led by Heinrich Dernburg. From among its students D.D. Grimm and I.A. Pokrovski became professors of Roman law, L. Petrazhitski that of legal philosophy, and W. von Seeler that of private law in Russia. Some of them translated the German textbooks on Pandect law into Russian. The Russian representatives of *Pandektistik* considered Roman law as an introduction to private law. P. Sokolovski stressed the outstanding importance of Roman law from the point of view of the modernization of Russian law. The contribution of Russian Romanists to the literature of the subject is noteworthy. Let us only mention Pokrovski's History of Roman law (1913) and V. Hvostov's *Roman private law* (1906). Both followed the traditions of German jurisprudence. Jhering's trend of Jurisprudence of interests (*Interessen-jurisprudenz*) was developed further by S. A. Muromtsev (1850–1910), the founder of Russian legal sociology.

In 1882 Tsar Alexander III (1881–1894) established a committee of codification that published drafts of the Russian civil code in 1899 and 1903 (*Grazhdanskoe Ulozhenie*). In most parts these codes reflected the impact of the German BGB. The structure of the draft code (its general part and its parts referring to family law, the law of obligation, succession, and the law of things) is based on Pandect law. Its part dealing with obligations contained also much of the commercial law, similarly to the Swiss code of obligation. Due to the political situation in the country the unified code was not accepted, only partial codification could be considered. The draft of the law of obligations of 1913 both relied on the BGB and the Swiss code of obligations and regulated insitutions that date back to Roman law (e.g., unjust enrichment, and management) and had been unknown in Russia before.

The impact of the Pandectist School could also be felt in A.G. Gojkbarg's (1883–1962) Soviet-Russian civil code of 1922. It was basically a shortened version of the draft of 1905. The same is true of The Fundamentals of Civil Jurisdiction, issued in 1961 and accepted as valid for the whole Soviet Union that served as a basis for the codes of the union republics. So the Soviet-Russian civil code of 1964 relied on the system of Pandects not only in its structure but also in most of its institutions and legal principles. The New Fundamentals of Civil

Jurisdiction issued in the Russian Federation in 1991 invalidated previous regulations that were contrary to the principles of a market economy. The new Russian civil code (1995–2002) was put gradually into force and shows the impact not only of the German BGB but also of the new Dutch civil code.

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Feasibility of European Quality Labels for Marriage Bureaux to Prevent Trafficking in Human Beings

1. Introduction

In the framework of the project JLS/2005/AGIS/063 between the European Commission and Ghent University, Institute for Legal Studies of the Hungarian Academy of Sciences conducted *qualitative research* in Hungary on development of European quality standards and quality labels for marriage bureaux to prevent trafficking in human beings and sexual exploitation.

1.1. Concept of the relevant sector

Traditional marriage bureaux usually put someone in touch with someone else to facilitate marriages or any type of (non-official) cohabitation with emotional links. It is the bureaux which choose the appropriate partner(s) by taking into account the requirements specified by the customer and the prospects of the relationship. These types of bureaux organize community events (holidays, trips, parties) for their members.

On the internet a second type of marriage bureaux has been evolved. It is only a data base on an internet site which contains the relevant data (e.g. age, gender, phone number and email address) of the customers. In this system it is the customers who choose the appropriate partner(s) using the facilities of these marriage bureaux and contact other customers via phone or email. This second type hereinafter will be referred as an *internet-based marriage bureau.*

1.2. Groups to be interviewed

Participants of the interviews (hereinafter referred altogether as respondents) were recruited among the following groups of people:

1. employers, chief executives,
2. employees and agents,
3. clients and would-be clients,

4. non-profit bodies (e.g. chambers of commerce)

of marriage bureaux.

Marriage bureaux were selected randomly from a list compiled on the basis of related internet sites, advertisements and phone registers. The research was not limited to firms located in Budapest, but the employers and employees of marriage bureaux in other cities of Hungary were also interviewed.

Clients were asked to participate in the research by the help of co-operative employers and employees of marriage bureaux. A forum was also started on the greatest Hungarian social networking site (www.iwiw.hu) under the title „one of the worst experiences related to match-making: sexual exploitation".

It should be noted, moreover, that due to the complete structural reorganization of the Hungarian government *no supervising authority* for marriage bureaux could have been discovered. It can be the Ministry for Economy and Transport, but its officials denied that marriage bureaux are under their competence.

1.3. Methodology

The qualitative research encompassed *in-depth interviews* with employers, employees and clients of marriage bureaux. It was not problematical to organize interviews with the employees and employers of marriage bureaux working in legality. A considerable number of suspicious firms, however, refused to talk about the topic via phone or windows messenger. We tried to send a survey to their addresses, but unsurprisingly no response was received (yet).

The qualitative research method of survey was also used in the course of research activity. It was designed to reach the clients in this sector who required complete anonymity considering their "sensitive" status. The anonymous surveys were collected by the employees of co-operative marriage bureaux. We also provoked group discussions in internet forums about the experiences of clients concerning marriage bureaux and sexual exploitation.

The *willingness to co-operate* was not so high, even amongst traditional marriage bureaux. Every fifth marriage bureau felt inclined to participate in the research and one from ten internet-based marriage bureaux responded to our emails. Those who refused to be interviewed pleaded lack of time, especially the employers of marriage bureaux. Some employees refused to be interviewed without the permission of the employer. The permission sometimes was refused considering the „bad reputation resulting from such a campaign".

The research conducted in the framework of the project differed from ordinary (namely business-related) qualitative research in some respect. The representatives of the relevant actors *did not want to be named,* although they were assured that their data are administered confidentially. Moreover, some participants *did not authorize me to record the conversation.* In this case during the interview only the most relevant pieces of information were written down, but some details were reconstructed subsequently. These differences can be traced back to the fact that the topic of the research is *disquieting* not only for employees and employers of marriage bureaux, but *especially for clients.*

2. Regulation of Marriage Bureaux

Marriage bureaux are *less regulated* than e.g. the travel sector. They are, therefore, more vulnerable to be misused for trafficking in human beings and sexual exploitation.

2.1. Legal provisions

It was usually accepted by the participants that traditional marriage bureaux are subjected to different legal regulations than internet-based ones.

Traditional marriage bureaux are regulated by codes on the service sector in general. There are no ministerial decrees regulating specifically the activity of marriage bureaux. The necessary elements of the relevant contracts are not specified, only the general rules of the Civil Code of Hungary could be applied in this respect. Neither qualification nor a considerable initial capital is required to open a marriage bureau in Hungary.

Internet-based marriage bureaux are subject to the growing number of acts and ministerial decrees controlling the activities of internet service and content providers. There is no legal regulation which is aimed to prevent that malicious marriage bureaux seriously violate the customers' human rights and fundamental freedoms.

It was widely accepted by the respondents that introducing quality labels on top of this *"leaky net" of legislation* has an added value to prevent trafficking in human beings and sexual exploitation.

2.2. Quality management systems

Marriage bureaux have not adopted quality management systems. They are intact from international trends and requirements, and the tradition of self-regulation has not been so widespread in Hungary as in Western European countries. Nevertheless, most employers and executives were of the opinion that certain *quality management systems should be introduced* for marriage bureaux. These should be designed to protect the interest of clients from fraudulent marriage bureaux providing no service at a charge of fee. The respondents usually claimed that the role of self-regulation, and especially quality management systems are crucial with regard to marriage bureaux, since trust is an essential prerequisite for co-operation.

3. A QUALITY MANAGEMENT SYSTEM TO PREVENT TRAFFICKING HUMAN BEINGS

The overwhelming majority of respondents *endorsed the plan* that a *European quality management system* is to be introduced for marriage bureaux to prevent sexual exploitation. None of the respondents argued that the problem of trafficking in human beings and sexual exploitation is unimportant in the sector of marriage bureaux. On the contrary, they were of the opinion that sexual exploitation is deeply connected to the business of marriage bureaux. It was alleged that many clients are dangerous, violent or soulless. It is usual that they want to satisfy their extreme sexual desires involving physical violation or humiliation of human dignity. According to the respondents some other marriage bureaux are on the edge of legality and are deeply involved in certain forms of sexual exploitation or facilitate domestic slavery.

The wast majority of participants felt inclined to participate in a quality label system designed to prevent trafficking in human beings. All respondents argued that it is the interest of honest marriage bureaux to introduce a quality label system to *clean the market from malicious firms.* It was argued that traditional marriage bureaux with a quality label can easily gain advantages in the competition, because trust is of essential importance in this market.

Some respondents were prepared to be involved in a quality label system to prevent trafficking in human beings and sexual exploitation, since they feel compassion for the victims of sexual exploitation (especially for children).

It was argued by a minority of employees and clients that there is no need for a quality management system in respect of internet-based marriage bureaux. The majority argued, however, that obscenity, vulgarity, pornography and offensive, threatening, harassing, hateful, unlawful language should be prevented even in these virtual community places.

It was pointed out by employers, however, that the success of using the label depends upon its acknowledgment. Therefore it was argued that *public awareness raising and advertising* are of crucial importance.

4. Certain requirements of the quality management system

In this part of the study comments, opinions and proposals of the participants are summarized with regard to certain possible requirements of a quality management system to prevent sexual exploitation in the sector of marriage bureaux.

There are several requirements in the list which can not be accomplished by internet-based marriage bureaux. These are especially the following: „keeping track of marriages", "ensuring that the users of the service are obliged to identify themselves", "appropriate visa policy". It was argued, therefore, that a *separate list of requirements* should be introduced with regard to internet-based marriage bureaux.

4.1. Declarations, vague concepts

Most participants alleged that vague declarations (e.g. "ethical policy"„marriages with respect for fundamental human rights as recognized in international law", „sound advertising policy") are unnecessary in the list of requirements, since they have no specific meaning which can contribute to the prevention of trafficking in human beings and sexual exploitation. They pointed out that these propositions (without any normative force) should not be included as elements into the list of standards, but could be only theoretical foundations thereof. Some respondents submitted that these general clauses should be reformulated to have a *more specific meaning and proper normative force.* One of them proposed that the "repudiation of commercial sexual exploitation", can be included as a preamble of the list of standards "…marriage bureaux, noting that sexual exploitation of persons, especially women and children should be repudiated …".

4.2. Keeping track of marriages

Almost none of the people interviewed was in favor of keeping track of marriages. They argued that this obligation is *unfeasible, imprecise and inefficient.* It was claimed by employers and employees that the realization of this obligation impose an unnecessarily heavy burden on marriage bureaux. Clients expressed fears that keeping track of marriages can infringe fundamental human rights. The respondents alleged that keeping track of marriages would be

illegal without the prior and expressed consent of clients. Employers and employees feared, moreover, that this requirement can deter people to resort to the services of bureaux subscribed to the quality management system.

4.3.Independent emergency contact numbers

Almost all participants were of the opinion that independent emergency contact numbers are the *most effective tools* against sexual exploitation. Only some of the employers argued, however, that they have no financial means to contribute to its maintenance costs. Non-profit organizations (e.g. Association Against Violence Towards Women And Children) stated that they are willing to be involved in the quality label system by providing emergency contact numbers.

4.4. Identification of responsible persons

All respondents were in favor of the obligation that persons responsible for providing the services should be clearly identifiable. This obligation could easily contribute to the prevention of sexual exploitation by creating an „area of personal responsibilities".

4.5. Identification of the users

All respondents were of the opinion that *it could minimize the risk of trafficking in human beings* and sexual exploitation if the users of marriage bureaux were obliged to identify themselves. Others (especially employers of small traditional firms) suggested that this requirement can show mistrust towards clients. It was also submitted that the obligation to be identified could even deter users from marriage bureaux involved in the quality label system. Most of the participants feared that this obligation could infringe fundamental rights, relevant rules of data protection, especially with regard to sensitive data, such as sexual orientation.

Some respondents asserted, moreover, that it is technically *impossible to fulfill* this requirement *in case of internet-based marriage bureaux.* On the internet nobody can impede that persons register with false personalities. Neither moderators, nor service providers has the possibility to check the validity of submitted data. It was proposed, however, that these obstacles can easily be surmounted by the obligation to use credit cards. With the introduction of this requirement it was feared that internet sites would lose their advantage, namely that they are usually available at free of charge.

4.6. Measures to evade misuse of the forum

All respondents were of the opinion that marriage bureaux should take measures to evade misuse of the forum by prohibiting any expressions or images containing either obscenity, vulgarity, pornography or offensive, threatening, harassing, hateful and unlawful language etc. It was argued by some employers and employees, however, that these concepts, especially those of obscenity and vulgarity, cannot be defined easily. Some of them added that the *role of moderators* should be explicitly mentioned in the requirements. It was also submitted that when the moderators decide on prohibiting any expression, it should be taken into account

whether the topic of the forum is „romantic affairs" or „extreme sexual desires".

4.7. Conditional registration

Some respondents supported that any *registration* to a forum of a marriage bureau *should be postponed* until it is checked by competent moderators. In this system the user can be seen by the others only if the content of his/her profile is in line with the policy of the web-site, namely it is not offensive, threatening, harassing, hateful etc.

4.8. Profiling of permanent clients

One employee of a traditional marriage bureau proposed that marriage bureaux should *evaluate the feedbacks from clients,* especially concerning the behavior of other customers they have met. After the evaluation of the relevant data certain clients could even be excluded from the services of the given marriage bureau.

4.9. Supervising the resemblance of photos and videos

It was put forward that traditional marriage bureaux should monitor during the interview whether photos and videos attached to the files *resemble the actual person.* It is obviously impossible to fulfill this requirement in case of an internet-based marriage bureau.

5. Granting and supervision of the label

According to the majority opinion quality labels should be issued and supervised by *external bodies* to provide impartiality and efficiency in the not really well-regulated sector of marriage bureaux. Even employers and employees were of the opinion that only external control can protect the interests of victims from being neglected by enterprises pursuing solely economic goals. Moreover, there are several organizations belonging to this sector which are involved in the business of sexual exploitation, especially in the exploitation of prostitution of others. These bureaux could not be trusted with the supervision of requirements that are day-to-day violated by them.

It was widely accepted that the supervising body may *withdraw the quality label* only in case of *grave and/or repeated infringements* of the requirements.

6. Recapitulation (as well as Executive summary)

In the framework of the project JLS/2005/AGIS/063 between the European Commission and Ghent University, Institute for Legal Studies of the Hungarian Academy of Sciences conducted *qualitative research* on the development of European quality standards and quality labels for marriage bureaux to prevent trafficking in human beings and sexual exploitation in Hungary. The qualitative research encompassed *in-depth interviews* with representatives (employers,

chief executives, employees and agents) and clients of marriage bureaux.

6.1. Marriage bureaux and trafficking in human beings

It was certified and accepted by respondents that marriage bureaux are *extremely vulnerable to be misused* for trafficking in human beings and sexual exploitation. It was alleged that many clients are violent or soulless, some marriage bureaux are even on the edge of legality by being involved in certain forms of sexual exploitation or facilitating domestic slavery.

6.2. Regulation of marriage bureaux

Marriage bureaux are *less regulated* than e.g. the travel sector. Traditional marriage bureaux are regulated by codes on the service sector in general. Internet-based marriage bureaux are subject to the growing number of acts and ministerial decrees controlling the activities of internet service and content providers. It was widely accepted by the respondents that introducing quality labels on top of this *"leaky net" of legislation* has an added value to prevent trafficking in human beings and sexual exploitation.

The respondents usually claimed that the role of *self-regulation,* and especially quality management systems **is crucial** with regard to marriage bureaux, since **trust is** an **essential** prerequisite for co-operation. Most employers and executives were of the opinion, therefore, that quality management systems should be introduced for marriage bureaux.

6.3. Quality management systems to prevent trafficking in human beings and sexual exploitation

The overwhelming majority of respondents *endorsed* the plan that a *European quality management system* is to be introduced for marriage bureaux to prevent sexual exploitation. All respondents argued that it is the interest of honest marriage bureaux to introduce a quality label system to *clean the market from malicious firms.* It was argued that traditional marriage bureaux with a quality label can easily *gain advantages in the competition,* because trust is of essential *importance in this market.* Some others were willing to participate in the quality management system, since they feel compassion for the victims of sexual exploitation (especially for children).

It was generally acknowledged that the success of the entire label system depends upon its acceptance. Therefore it was argued that *public awareness raising and advertising* in specialized publications are of crucial importance during the implementation of the project.

6.4. Certain requirements of the quality management system to prevent trafficking in human beings

There are several requirements in the list which can not be accomplished by internet-based marriage bureaux. These are especially the following: „keeping track of marriages", "ensuring that the users of the service are obliged to identify themselves", "appropriate visa policy". It

was argued, therefore, that a *separate list of requirements* should be introduced with regard to internet-based marriage bureaux.

Most of the participants alleged that *vague declarations* such as "ethical policy", "common repudiation of commercial sexual exploitation" *are unnecessary* as elements of the list of requirements.

Almost all respondents argued that the obligation of *keeping track of marriages is unfeasible, imprecise and inefficient.* It would impose an unnecessarily heavy burden on marriage bureaux or can deter people from the services of marriage bureaux involved in the quality management system.

All participants were of the opinion that *independent emergency contact numbers are the most effective tools* against sexual exploitation. Non-profit organizations are willing to provide emergency contact numbers for the quality label system.

All respondents were *in favor of* the obligation that persons responsible for providing the services *should be* clearly *identifiable.*

The majority of respondents were of the opinion that *it could minimize the risk of trafficking in human beings* and sexual exploitation if the users of marriage bureaux *were obliged* to identify themselves. Some respondents asserted, however, that it is *technically impossible* to fulfill this requirement in case of *internet-based marriage bureaux.*

All respondents were of the opinion that marriage bureaux should take *measures to evade misuse of the forum by* prohibiting any expressions or images containing either *obscenity, vulgarity*, pornography or offensive, threatening, harassing, hateful and unlawful language etc. Some of them argued that this requirement should be more specific by mentioning the tasks of *moderators* in this respect.

Some respondents supported the idea that any *registration* to a forum of a marriage bureau *should be postponed* until it is checked by competent moderators.

It was also proposed that traditional marriage bureaux should *evaluate the feedbacks from clients*, especially concerning the behavior of other customers they have met. After the evaluation of the relevant data certain clients could even be excluded from the services of the given marriage bureau.

It was put forward that traditional marriage bureaux should monitor during the interview whether *photos and videos* attached to the files *resemble the actual person*. It is obviously impossible to fulfill this requirement in case of an internet-based marriage bureau.

6.5. Granting and supervision of the label

According to the majority opinion quality labels should be issued and supervised by *external bodies* to provide impartiality and efficiency in the not really well-regulated and borderline sector of marriage bureaux.

It was widely accepted that the supervising body may *withdraw the quality label* only in case of *grave* and/or repeated *infringements of the requirements.*

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Zusammenfassung

Der Begriff des Menschenhandels umfasst Handlungen mit denen Menschen (Frauen, Männer und Kinder) unter Verletzung ihrer Selbstbestimmung in ein Ausbeutungsverhältnis (jegliche Formen der sexuellen Ausbeutung, Ausbeutung der Arbeitskraft oder Entnahme menschlicher Organe) vermittelt werden. Der Verfasser untersucht die Durchführbarkeit des europäischen Mindestanforderungen für Heiratsvermittlers um den Menschenhandel zu verhindern.

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L'assurance maladie en France

La protection sociale fasse partie en France, la definir n'est pas chose aisée. La preuve en est qu'elle n'est pas référencée en tant que telle dans le dictionnaire. Celui-ci désigne néanmoins la „protection" comme un acte ou une action de se prémunir, et le terme „sociale" comme ce qui se rapporte à un groupe d'individus. Se limiter à déterminer la protection sociale comme un ensemble de règles édictées par une institution (l'État, une collectivité publique, un organisme privé) pour protegér un groupe d'individus (les travailleurs, les chômeurs, les pauvres) serait trop large, puisqu'une telle definition pourrait s'appliquer aussi bien à l'école ou à la justice qu'à la protection sociale. La circonscrire à la protection contre maladie, la maternité, l''invalidité, le décès, la famille ou la vieillesse (qui représente la securité sociale) serait trop restreint, car elle ferait fi de la politique de protection contre le chômage uo la pauvreté dont elle a la charge. C'est pourquoi il serait plus juste dire que le protection sociale a pour ambition de protéger les individus contre les aléas de l'existence et les fluctuations de leurs revenus.[1]

En France Sécurite sociale peut se rattacher au modèle historique des assurances sociales de Bismarck. Celles-ci sont nées en Allemagne entre 1880 et 1890 d'une concession faite par le chancelier allemand aux syndicalistes au moment où l'industrialisation se fait féroce et que des courants marxistes voient le jour. Les assurances sociales s'adressent aux travailleurs les plus défavorisés. Elles ont donc un caractère socioprofessionnel.Elle sont une véritable petite révolution car, pour la première fois, elles organisent un système de protection qui n'est pas privé (celui que toute personne pourrait se constituer par sa propre épargne ou la couverture qu'un employeur pourrait concéder, de façon arbitraire, à son salarié). Le principe: le travailleur cotise et perçoit une prestation qui est déconnectée du montant de la cotisation qu'il a versée, l'institution gestionnaire ne devant pas procéder à la selection des risques. Les fondateurs la Sécurité sociale en France (portée par Pierre Laroque) souhaitaient, comme l'atteste l'exposé des motifs[2] de l'ordonnance[3] de 1945 qui va mettre en place la Sécurité sociale, un système

1 Nathalie DESTAIS: Le système de santé. Organization et régulation, Paris, LGDJ, 2003.

2 L'exposé des motifs est l'argumentaire (les explications, les motivations) de l'auteur d'un texte présénte, en l'expèce l'ordonnance.

3 Une ordonnance est un texte élaboré par le gouvernement qui relève normalement de la loi (du Parlement). Le gouvernement deamnde au Parlelement l'habilitation de prendre, pendant un délai déterminé, des mesures qui relèvant de la loi. Si l'ordonnance est ratifée dans le délai imparti, elle acquiert valeur législative. Sinon, elle devient caduque.

répondant au modèle de Beveridge. Lord Beveridge a été chargé, en Grande-Bretagne, d'étudier la couverture des risques sociaux. Il a remis son rapport en 1942. Celiu-ci est rendu alors que la Grande-Bretagne connaît une pauvreté extrême (due essentiallement à l'industrialisation) et alors que la population se retrouve unie – au-delà des classes sociales – pour affronter la guerre. C'est dans ce contexte historique que lord Beveridge préconise un régime unique ayant pour but d'éradiquer la pauvreté.[4] Il constitue un minimum (au-delà, la population est libre de faire appel à une couverture privée pour ses besoins propres). Le système de protection sociale qu'il propose est fondé sur les trois principes suivants, dénommés par la doctrine les trois „U": unité, unicité, universalité. Une seule institutions gestionnaire (unicité), un seul type de prestations forfaitaires pour une catégorie déterminée (salariés, chômeurs, femmes divorcées, enfants etc.) (unité), tous les risques assurés (chômage, invalidité, assurance maladie etc.) (universalité). Le financement est assuré par l'impôt.

Le plan français de Pierre Laroque, en 1945, est imprégné de ces deux modèles.[5] Il s'explique aussi par le contexte socio-politico-économique de la France à cette époque. La France est en pleine reconstruction, sort des années noires de Vichy et connaît un élan de fraternité. Trois types d'objectifs lui sont attachés. Il vise, d'une part, à l'émancipation des travailleurs et, d'autre part, au redressement démographique du pays. Le cadre économique est celui du plein emploi. Enfin, politiquement, il veut légitimer l'ordre mis en place à la Libération. En gros, le plan présénté en 1945, sans abolir tous les régimes existants, s'appuie sur une volonté de généralisation de la Sécurité sociale à toute la population par un système d'assurance sociales (visant d'abord les salariés du commerce et de l'industrie) On se rapproche ainsi de l'idée d'universalité du modèle bévéridgien, même si tous les risques ne sont pas visés (le chômage en est exclu). Il repose sur une série de caisses, dont la gestion est assurée par un conseil d'administration constitué de syndicats, à compétence générale.[6] Le financement est assuré par une cotisation sociale. On tend alors vers le modèle bismarckien. Rapidement (des 1946), les résistances corporatistes ont raison de l'unification d'un régime unique et obtiennent le maintein des régimes spéciaux.[7] Par la suite, la généralisation d'une couverture sociale aura bien lieu, mais dans diversité: extension de certaines prestation de Sécurité sociale (prestation familiales quelle que soit la qualité de son bénéficiaire: travailleur, chômeur etc.), remborsement de soins de santé (identique pour les salariés et les fonctionnaires, généralisé via la coverture maladie universelle).[8] Le risque chômage est couvert, à partir de 1958, par une convention collective particulière. Les hésitations, dès l'origine de la mise en place de la Sécurité sociale, en faveur d'un modèle béveridgien. Ou bismarckien, sans hiérarchie entre ce qui relève de la Securité sociale ou de l'aide sociale, sont les causes de l'architecture toute particulière en France de protection sociale. Quoi qu'il en soit, indéniablement, le régime général demeure le premier régime. Il couvre presque 80% de la population.[9]

Même la Sécurité sociale n'est pas une notion aux contours précisement définis. Résultat d'une lente élaboration, elle repose sur quelques principes simples, mais elle s'organise et

4 La Sécurité sociale a por corollaire un retour au plein emploi.

5 Bruno PALIER: Gouverner la Sécurité sociale. Les transformations du système français de protection sociale depuis 1945, Paris, PUF, 2002.

6 M. LAROQUE: Guide de la protection sociale, Dunod, 2001, p. 356.

7 D. TABUTEAU: Assurance maladie: les „standards" de la réforme, Dr. soc., 2004, p. 872, et l'auteur d'ajouter: Comment imaginer que l'évolution d'un secteur correspondant au dixième de l'économie mationale pourrait ne connaître ni soubresasauts, ni difficultés et ne pas être contraint à des adaptations délicates, parfois tardives ou imparfaits.

8 Patrick HASSENTEUEL – Sylvie HENNON-MOREAU: Concurence et protection sociale en Europe, Rennes, PUR, 2003.

9 Cf. P.-Y VERKINDT: Emploi, chômage et retrait: le chantier ne fait que commencer. Dr. soc. 2003. p. 948.

prend des formes qui varient d'un pays à l'autre. Système élaboré de garanties destinées à protéger des catégories plus ou moins larges de personnes contre certaines évantualités, elle apparaît, en débit de la diversité de sa compréhension, comme une rélaité universelle. Le besoin de sécurité de l'homme a donné lieu à l'émergence de diverses pratiques et de divers mécanismes destinés à lui permettre d'affronter des situations auxquelles il ne peut pas faire face de manière correcte par lui-même. On connaît les méthodes, issues en général de de l'initiative privée, qui ont préexisté à la sécurité sociale: c'est l'épargne, le secours, l'assistance, l'assurance, la mutualité etc.[10]

La protection sociale de base obligatoire se compose des assurances sociales et des assurances accidents du travail/maladies professionnelles. La Sécurité sociale se subdivise en branches, on distingue les assurances maladie, maternité, invalidité, dècès, l'assurance accidents du travail, l'assurance vieillesse et les pretations familiales. La sécurité sociale exerce en outre une action sanitaire et sociale.[11] Les assurances sociales avaient, vocation à protéger le travailleur. C'est en cette qualité que celui-ci est couvert par les assurances sociales, mais celles-ci comprennent, pour chacun des risques, des conditions de couverture – généralement dénommées conditions d'ouverture des droits – spécifiques. Certaines personnes ne sont pas des travailleurs, mais bénéficient quand même de certaines prestations offertes par la Sécurité sociale. Il s'agit des prestations familiales, qui sont généralisées à toute la population, des prestations en nature de l'assurance maladie, via la coverture maladie universelle et des prestations dites non contributives.[12]

L'assurance maladie est au fond assez mal nommée. L'expression est en réalité trop étroite, pour au moins deux raisons. En premier lieu, cette assurance sociale couvre tout autant les accidents que les maladies. En second lieu, la couverture touche les dépenses de santé exposées par l'assuré alors même que celui-ci ne serait pas réellement malade. En somme, les malades imaginaires[13] ne sont pas exlus du cercle des personnes couvertes, au moins pour les prestations en nature car s'agissant ne soient point prescrits imprudemment.[14] Il est à peine besoin d'insister sur l'importance de la couverture maladie, et sur les exigences de son financement. Il est tout à fait évident que les dépenses engagées surc e pan essentiel de la Sécurité sociale doivent être autant que possible maîtrisées et c'est bien en ce sens que s'inscrit, notamment, la récente loi du 13 août 2003, relative à l'assurance maladie.[15] Pour autant, il ne faut pas non plus perdre de vue que l'assurance maladie est une pièce essentielle de la mise en œuvre du droit de valeur constitutionelle à la protection de la santé et que, à ce titre, elle mérite de se voir reconnaître le plus large champ. Le droit positif incite en tout cas à déterminer le cercle des personnes couvertes puis à mener l'anayse des prestations, en nature et en espèces, servies.

L'assurance maladie est le plus gros poste de dépenses du régime général. Pour bien comprendre l'assurance maladie, quelques remarques préliminaires s'imposent. Cette assurance sociale est un financeur de soins, c'est-à-dire qu'elle rembourse de soins à un usager qui se les procure auprès d'un prestataire de services. C'est là une spcificité de l'assurance maladie qui instaure un rapport à trois – l'usager, le prestataire de services (médecine de villeou hôpital) et la caisse d'assurance maladie – tandis que les autres assurances sociales reposent

10 Patrick HASSENTEUEL: Les médecins face à l'État, Paris, Presses de Sciences Po, 1997.

11 Mementos. – Dupeyroux J. – J., Droit de la sécurité sociale, 10em édition par X. Prétot, 2003, p. 165.

12 Parce que leurs bénéficiaires jouissent des prestations sans cotiser au régime.

13 Resterait bien sűr à savoir s'il y a réellement des malades imaginaires. Loin de nous en tout cas l'idée sotte que ceux qui souffrent de troubles psychologiques entreraient dans cette catégorie.

14 Le maintien des droits est également accordé à l'ayant droit, pour les prestations en nature.

15 Patrick HASSENTEUEL: Les médecins face à l'État, Paris, Presses de Sciences Po, 1997.

sur un rapport binaire (usager/caisse). Ensuite, elle repose sur des principes généraux spécifiques: le libre choix du médecin par le malade, le paiement à l'acte du médecin, l'avance des fraispar le patient et le caractèrecuratif de la médecine, faisant passer au second plan la politique de prévention.

L'assurance maladie comporte des prestations en espèces (indemnités journaliéres) destinées à composer la perte de salaire qu'occasionne l'arrêt de travail et des prestations en nature couvrant tout ou partie des soins médicaux ou paramédicaux. L'assuré social, seul, à l'exlusion de ses ayants droit, peut prétendre aux indemnités journalières. Les prestations en nature sont versées à l'assuré et aux membres de sa famille à charge. Pour l'ouverture du droit aux prestations, deux conditions alternatives dans chaque période de référence sont prévues, soit un montant de cotisations, soit un nombre d'heures de travail.[16]

Les prestations en nature comprenment, essentiellement, le remboursement des divers frais médicaux, pharmaceutiques, d'hospitalisation et autres occasionés par la maladie. L'assure socal peut choisir librementson médecin. Il doit, en principe, faire l'avance des frais médicaux qui lui sont ensuite remboursés par la caisse primaire d'assurance maladie. Certains soins sont soumis à une autorisation préalable de la caisse (prothèses dentaires, cures thermales etc.). Les actes professionels des praticiens qui donnent lieu à remboursement sont énumérés dans une nomenclature générale des actes professionnels, fixée par arrêté ministériel. Le remboursement des frais engagés par l'assuré ou ses ayants droit s'effectue sur la base de tarifs fixés de façon conventionnelle ou réglementaire, déducation faite de la part des frais restant à sa charge (ticket moderator). L'assuré peut, dans certaines conditions, n'acquitter que le ticket modérateur. Dans ce cas, la part remboursée par la caisse n'est pas versée à l'assuré mais à l'établissement, au praticien ou au pharmacien ayant passé convention avec cet organisme. C'est ce que l'on appelle le tiers payant. Le ticket moderateur varie selon la nature des frais engagés. L'objectif de la mesure est de responsabiliser les assurés sociaux. Mais la portée de ce dispositif resté à prouver, la plupart des mutuelles prenant en charge le ticket moderateur. En outre, de nombreuses mesures d'exonération existent.

Compte tenu du dérapage des dépenses lié à la suppression de la participation des assurés en affection de longue durée, la loi de financement de la Sécurité sociale pour 2004 a revu les critères d'exonération du ticket modérateur dans ce cadre. Les actes et prestations nécessités par le traitement de l'affection de longue durée et pour lesquels la participation est limitée sont désormais définis dans un PIRES,[17] révisable, établi conjointement par le médecin traitant et le médecinconseil de la caisse. La mesure concerne les trente affections de longue durée répertoriées dans le Code de la Sécurité sociale et celles dites „hors liste".[18]

Le droit aux prestations en nature de l'assurance maladie est en toute hypothèse soumis à des conditions de durée minimale de cotisation ou d'activité salariée ou assimilée. Ces conditions sont, comme il se doit, assez souples. L'assuré droit de surcroît résider sur le territoire français. Les prestations en nature sont de nature diverse. Ainsi le libre choix du médecin par le malade est-il dans certains cas limité. En principe ce remboursement est seulement partiel puisqu'une partie de la dépense, appelée pour des raisons depuis longtemps dépassées ticket modérateur. Le ticket modérateur est la partie de la dépense de soins dont la Sécurité sociale n'assure pas le remboursement ou qu'elle ne prend pas à sa charge. Il en est un peu du ticket modérateur comme du plafond puisqu'il nourrit un débat très vif, qui oppose ses partisans à ses détracteurs. Du côte des premier sin fait valoir que le ticket modérateur

16 Catherine SEBBAH: Le système de protection sociale en France. ASH Éditions – Groupe Liaisons S.A. 2004. 1, avenue Edouard Belin, 92856 Rueil-Malmaison cedex. pp. 19-30.

17 Protocole de diagnostic et de soins

18 Patrick HASSENTEUEL: Les médecins face à l'État, Paris, Presses de Sciences Po, 1997.

responsabilise l'assuré. En lui laissant le poids d'une partie des débours, il évite l'utilisation abusive du système de soins et par là évite à la Sécirité sociale des problems financiers plus graves encore que ceux qu'elle connaît.[19] Création de la loi du 13 août 2004 relative à l'assurance maladie la contribution forfaitaire de l'assure. Cette contribution consiste à laisser définitivement à la charge de l'assuré une somme forfaitaire par acte médical, dans la limite d'un plafond annuel fixé par décret.[20] Il y a tierspayant ou, ce qui revient au même, dispense d'avance des frais lorsque la dépense de soins n'est pas acquittée par l'assuré lui-même mais pour son compte par un tiers, qui peut bien entendu être un organisme de sécurité sociale.[21] Longtemps et parfois encore regardée avec défaveur par le corps médical, qui y a vu souvent le risque d'une atteinte à l'indépendance et à l'exercise libéral de la médecine, la technique du tiers payant dont les avantages pour beaucoup d'assurés n'ont pas besoin d'être soulignés a fin ipar s'imposer dans un vaste domaine. Il s'agit en effet de rien moins que des dépenses d'hospitalisation et de celles liées à un accident du travail ou une maladie professionelle. C'est alors l'organisme de sécurité sociale qui règle directement le prestataire de services.[22] C'est aussi le cas depuis peu pour les dépenses de santé exposées auprès du médecin référent que l'assuré s'est choisi. La technique du tiers payant peut se combiner avec l'exonération de ticket modérateur. Elle se combinera aussi, à l'assuré, dès lors que celui.ci ne pourra pas revendiquer un cas d'exonértation de cette contribution. Les frais d'hospitalisation se répartissent pour l'essentiel en deux catégories, selon qu'il s'agit des frais de soins, correspondant aux actes médicaux et chirurgicaux, ou des frais de séjour, au sens large du terme. Quelle que soit leur catégorie, ces frais sont pris en charge par les organismes d'assurance maladie, en principe à hauteur de 80%. L'assuré ou l'ayant droit n'a donc à sa charge que les 20% restants. Encore faut-il préciser que, dans de nombreaux cas, les frais d'hospitalisation font partie des dépenses de soins avec exonération complète de paticipation de l'assuré, de sorte que celui-ci bénéficie d'uneavance des frais intégrale.

Les prestation en espèces de l'assurance maladie consistent en indemnités journalières, versées par la caisse primaire d'assurance maladie. Il faut cependant réserver L'hypothèse, assez fréquente, dans laquelle l'employeur maintient ou doit maintenir son salaire au travailleur pendant une partie au moins de l'arrêt de travail. Le droit aux prestations en espèces de l'assurance maladie est subordonné à une durée minimum de cotisation ou d'emploi. Les prestations en espèces sont dues seulement au cas d'incapacité physique et totale de travail. Les caisses sont donc fondées, comme le leur permet leur règlement intérieur, à suspendre le versement des prestations s'il apparaît que l'assuré en arrêt de travail se livre en réalité à un autre travail, salarié ou non, ou encore s'il quitte son domicile en dehors des heures de sortie autorisées ou enfin, plus largement, s'il prive la caisse de toute possibilité de contrôle. De même, en cas d'affection de longue durée, la caisse peut suspendre, réduire ou supprimer le versement des indemniés journalières si l'assuré se livre à une activité non autorisée. C'est à l'assuré qu'il revient de prouver que l'activité a été autorisée par la caisse.[23]

Le système de santé français est une branche de l'économie, produisant des biens et des services à finalité sanitaire. Certes, ce marché, caractérisé par l'asymétrie d'information entre

19 Patrick HASSENTEUEL: Les médecins face à l'État, Paris, Presses de Sciences Po, 1997.

20 Art. L. 322-2 Il du Code de la Sécurité sociale, issu de la loi du 13 août 2004. La nouvelle Union nationale des caisses d'aasurance maladie aura ici encore compétence pour fixer le montant de la contribution exigée.

21 Art. L. 161-36-2- du Code de la Sécurité sociale, issu de l'article 3 de la loi du 13 août 2004., et qui ne s'appliquera qu'à compter du 1er juillet 2007.

22 Art. 25 de la loi, instaurant un nouvel article L. 162-1-15 du Code de la Sécurité sociale.

23 Jean-Pierre LABORDE: Droit de la sécurité sociale. Presses Universitaires de France, 2005. 1er édition. 6, avenue Reile, 75014 Paris. pp. 268.-288.

un producteur souvent dépendant d'un prescripteur, face à un consommateur qui n'a pas choisi de l'être, le tout solvabilisé en grande partie par des prélèvements obligatoires, n'est pas un marché comme les autres. Mais ces caractéristiques n'exonèrent en rien le système de la nécessité de se financer, c'est-à-dire de convertir en argent la valeur de ses productions pour rémunérer le capital et le travail engagé dans le processus productif. Les sources de financement, qu'elles soient en provenance des prélèvements obligatoires ou de la participation directe ou indirecte des assurés, s'essoufflent, depuis le début des années quatre-vingt-dix, entraînant une recherche de maîtrise du système.[24]

En France système de santé et d'assurance maladie est obscur parce que complexe. Le débat nécessite que les choix faits soient explicables à l'opinion publique, ce qui implique une clarification à différents niveaux. La loi de juillet 1999 sur la couverture maladie universelle permettra de bien définir la population couverte et de la localiser dans les régimes existants qui deviendront, à terme les guichets d'un système unique. Avec la couverture maladie universelle de base, la personne qui ne peut pas bénéficier des prestations en nature d'un régime d'assurance maladie est rattachée au régime général, dans ce seul but. Il est ainsi dérogé au principe du rattachement au régime général sur critère socio-économique. Deux précisions: l'affiliation ne vaudra que pour le régime d'assurance maladie, sans ouverture de droit à d'autre prestations (vieillesse, décès, invalidité). Elle ne permettra de bénéficier que des prestations en nature de l'assurance maladie et non prestation en espèces. Les personnes de nationalité étrangère doivent en outre justifier être en situation régulière au regard de la legislation sur le séjour des étrangers en France à la date de leur affiliation. Certaines personnes ne bénéficient pas de la couverture maladie universelle même si elles répondent à la condition de séjour stable et régulière. Contrairement à une idée reçue, la couverture maladie universelle de base n'est pas nécessairement gratuite. Elle ne l'est que 1) pour les personnes dont les ressources n'excèdent pas un certain plafond, fixé par décret, 2) les titulaires du revenu minimum d'insertion, 3) et ceux de la couverture maladie universelle complémentaire gratuite. La personne peut demander le bénéfice de la couverture maladie universelle auprès de la caisse primaire d'assurance maladie, des centres communaux d'action sociale, des services sociaux, des associations agréées ou des établissements de santé. Elle doit joindre à sa demande un justificatif de résidence stable et régulière et remplir un formulaire. Si la personne déclare ne pas bénéficier des prestations en nature d'assurance maladie et maternité, elle est affiliée sans délai à la couverture maladie universelle de base. Ce n'est qu'a posteriori que la caisse vérifie que l'intéressé peut être maintenu ou non au régime général pour l'affiliation à la couverture maladie universelle. Corrélativement, et afin qu'il n'y ait pas de rupture de droits, en cas de passage d'un régime obligatoire à un autre, l'organisme continue à assurer le versement des prestations en nature tant que l'assuré n'est pas encore affilié à un autre régime.

Dénommée couverture complémentaire en matière de santé par le législateur, la couverture maladie universelle complémentaire est en réalité une mutuelle accordée gratuitement aux personnes aux revenus modestes, qui comporte certaines spécificités. D'une part la couverture peut être gérée non seulement par une mutuelle, une société d'assurance ou une institution de prévoyance, mais aussi par la caisse primaire. D'autre part elle est gratuite. Comme pour la couverture maladie universelle de base, les demandeurs au dispositif doivent justifier d'une résidence ininterrompue depuis plus trois mois sur le territoire. Les demandeurs à la couverture maladie universelle complémmentaire doivent, en outre, justifier de ressources inférieures à un plafond, déterminé par décret. De fait, l'instauration de ce seuil conduit à exclure certaines personnes, au nombre desquelles certains titulaires de minima sociaux. Pour

24 Catherine SEBBAH: Le système de protection sociale en France. ASH Éditions – Groupe Liaisons S.A. 2004. 1, avenue Edouard Belin, 92856 Rueil-Malmaison cedex. p. 22.

atténuer l'effet de seuil, une aide à l'acquisition d'une couverture santé a été mise en place par la Caisse nationale de l'assurance maladie. Les ressources prises en compte sont celles qui ont été effectivement perçues au cours des douze mois civils précédant la demande, nettes de prélèvements sociaux obligatoires, de la CSG et de la CRDS.[25] Le foyer demandeur de la couverture maladie universelle complémentaire doit s'adresser à la caisse primaire d'assurance maladie. Le demandeur doit remplir la demande de prise en charge et la déclaration de ressources. Il doit également indiquer l'organisme qu'il choisit pour gérer la couverture maladie universelle complémentaire: mutuelle, institution de prévoyance, société d'assurance, caisse primaire. La décision d'attribution est prise dans les deux mois et la date d'effet est fixé au premier jour du mois qui suit la date de décision de la caisse. Toutefois, en cas d'urgence, le droit à couverture maladie universelle complémentaire est ouvert au jour du mois qui suit le dépôt de la demande. La couvertuer maladie universelle complémentaire est ouverte pour un an, le renouvellement se faisant compte tenu des ressources du demandeur.[26] La bénéficiaire se voir appliquer le système du tiers payant: il ne paie pas l'avance de frais; les praticiens et établissements de santé étant ultérieurement remboursés de leurs prestations par les organismes de prise en charge.

La loi portant création de la couverture maladie universelle a prévu la création d'un fonds de financement de la couverture maladie universelle. Ce fonds est un établissement public national à caractère administratif, comprenant un conseil d'administration et un conseil de surveillance. La contribution trimestrielle, au taux de 1,75% est assise sur les primes ou cotisations afférentes à l'activité de protection complémentaire en matière de frais de santé. Ces organismes déduisent aussi un montant égal à 75 € par trimestre et par bénéficiaire de la protection complémentaire en matière de santé. Les caisses d'assurance maladie sont remboursées par le fonds intégralement. Les organismes d'assurance complémentaire supportent la dépense, compensée par la déduction à laquelle donne droit la souscription d'un bénéficiaire. Si le total des déductions est supérieur au montant de la contribution, le fonds couverture maladie universalle procède alors au versement de la différence.[27]

En France le systéme de santé et d'assurance maladie est opaque en raison de sa complexité, de sa diversité et du refus de beaucoup de ses acteurs de voir des tiers faire la lumière sur leurs activités. Ce systéme d'information doit être bâti en fonction des producteurs de soins, d'autre part. Parallèlement aux opérations lourdes de restructuration, il faut allouer les ressources aux dufférents acteurs du système sanitaire. La maîtrise des dépenses, comme l'appréciation de la qualité, impliquent un débat et une négociation à un niveau partinent. La guestion du système de soins hospitaliers et ambulatoires, relève d'une appréciation plus proche du terrain: c'est la région qui doit se voir déléguer une fraction de l'enveloppe nationale des dépenses remboursables en fonction des caractéristiques démographiques et de morbidité de chaque région. Tous les pays développés connaissent un viellissement de leur population.[28] Le viellisement n'est pas, à lui seul un facteur d'augmentation de la dépense de soins.[29]

25 Catherine SEBBAH: Le système de protection sociale en France. ASH Éditions – Groupe Liaisons S.A. 2004. 1, avenue Edouard Belin, 92856 Rueil-Malmaison cedex. 135.-143. pp.

26 P. BREUIL-GENIER: Généralistes puis spécialistes: un parcours peu fréquent. INSEE Premiere, n° 709, avril 2003. La définition de l'épisode de soins retenu par l'étude est restrictive (actes réalisés dans les quinze jours, ou dans le mois) et il est possible donc qu'elle inclue dans des épisodes de soins distincts, des actes qui dans le cadre du dispositif médecin traitant relèvent d'une même séquence.

27 Cf. T. BUCHMULLER et al.: Consulter un généraliste ou un spécialiste: Influence des couvertures complémentaires sur le recours aux soins. Question d'économie de la santé, CREDES, n° 47, janvier 2002.

28 Si le viellissement existe partout, c'est à des rythmes trés variés.

29 Michel GRIGNONet al.: Les conséquences du viellisement de la population sur les dépenses de santé. Questions d'économie de la santé, Paris, CREDES, n°66 mars 2003.

La durée pendant laquelle on est très malade et donc fortement consommateur de soins augmente peu. Il n'y a donc pas, du fait du viellisement, élargissement de la période au cours de laquelle on est très consommateur, mais déplacement, au rythme de la prolongation de la durée de vie, de la période de forte consommation. La vraie incidence du viellissement sur les dépenses est plus culturelle que sanitaire. Une autre problème, le maintien, malgré la mise en place de systèmes souvent universels d'assurance maladie, de graves inégalités sociales de santé et d'inégalités d'accés aux soins. Dans tous les pays dévéloppés les catégories socialement défavorisées utilisent moins de médecine de ville, recourent moins à la prévention, et finissent, à pathologie de départ équivalente, par coûter plus cher. Toute aggravation des inégalités d'accés aux soins porte en elle une augmentation de la dépense finale pour un résultat sanitaire dégradé. On pourrait ajouter à ces problèmes communs le fait que dans tous les pays le coût de la consommation de médicaments progresse plus rapidement que la dépense globale et que les évolutions technologiques, dans un domaine ou la technologie nouvelle ne remplace pas l'ancienne mais s'y ajoute sont un facteur d'augmentation de la dépense. Ce problème est d'autant plus common à tous les pays développés que les industries productrices des médiacaments et des technologies médicales sont fortement concentrées et internationalisées.

Les typologies[30] classiques distinguent des systèmes beveridgiens, qui assurent, grâce à un financement fiscal, une couverture maladie universelle (Royaume-Uni, pays scandinaves, Canada) et des systèmes bismarckiens qui proposent, sur la base d'un financement par cotisations sociales, une couverture professionelle (Allemagne, Austriche, France, Belgique). Dans la réalité ces distinctions, qui conservent une force de description historique importante, sont fragilisées par les évolutions récentes. Sauf aux États-Unis, tous les systèmes profesionnels, sont aujourd-hui pratiquement devenus universels. Les pays qui finançaient leur système avec des cotisations sociales ont introduit une part croissante de financement fiscal. L'Allemagne elle-même, berceau historique des systèmes bismarckiens débat aujourd-hui de la mise en place de deux types de financementqui s'éloignent chacun du modèle originel.[31] A l'inverse les pays qui finançaient leur système sur une base exclusivement fiscale vont chercher des ressources nouvelles dans des prélèvements assis sur les revenus professionnels. Les modes d'organisation du système de soins différent selon que le patient accède librement à une médecine spécialisée très présente en ville ou qu'il n'accède à la médecine spécialisée qu'à l'hôpital après passage obligatoire par un généraliste.[32] Des modes de rémunération des professionnels différents a'articulent, sans que les liens soient mécaniques, avec ces modes d'organisation du système de soins. La volonté, dans les pays où l'accès à la médecine spécialisée est libre, de mettre en place des fillières de soins, peut tendre à rapprocher les systèmes, mais les modifications des modes de rénumeration, et surtout place respective de la médecine de ville et de l'hôpital ne peuvent se réaliser que progressivement.[33]

Les systèmes différent par le rôle et les fonctions qu'ils donnent aux acteurs. Des rapprochhements existent, mais l'étude des situations nationales confirme que les caractéristiques de chaque système ont un ancrage historique et culturel fort.[34] Ce qui ne veut

30 EOHCS (European Observatory on Health Care Systems), Health care Systems in Eight Countries: Trends and Challenges, Londres, London School of Economics, avril 2002.

31 Patrick HASSENTEUFEL: Les médecins face à l'État, Paris, Presses de Sciences Po, 1997.

32 Filière de soins gérées par le généraliste qui joue le rôle de „gate keeper".

33 OCDE (Organization de développement et de coopération économiques), Panorama de la santé, Paris, OECD, 2003.

34 L. AUVRAY – A. DOUSSIN – P. LE FUR: Santé, soins et protection sociale en 2002. CREDES, Question d'économies de la santé, n° 78, décembre 2003.

pas dire que l'on ne peut pas le changer, mais que les changements ne sont pas seulement affaire de construction administrative. Les systèmes beveridgiens (universels et financès par l'impôt) s'étaient construits sur des logiques d'enveloppes budgétaires. Les premières réformes des systèmes bismarckiens (professionels et financés par cotisations sociales) ont tenté de mettre en place ces mêmes enveloppes budgétaires. Ce qui est remaquable aujourd-hui c'est que, sans abandonner totalement les systèmes d'enveloppes fermées les réformes engagées, tant dans les premiers systèmes que dans les seconds, visent à introduire des mécanismes concurrentiels.

Summary

Health care insurance in France

In France the health care insurance scheme covers the costs of medical, dentist, and pharmacist care as well as hospital costs. Health care is covered under a professional social insurance, entitlement to compensation for health care costs depends on specific employment and contribution conditions. First of all the insured person must pay the costs himself. He is afterwards reimbursed. But there is never a full compensation. For each activity regulations determine a personal cost sharing amount by the insured person (ticket modérateur). The mean-tested Universal Medical Coverage (Coverture Maladie Universelle) provides a basic health care coverage for any legal resident In France not yet covered by any scheme and a free complementary coverage for individuals and their family whose income is below a certain limit.

Zusammenfassung

Sozialversicherung in Frankreich

In Frankreich sind wir im Rahmen der Sozialversicherung auf die Erstattung unserer ärztlichen, zahnärztlichen, apothekerischen Kosten, die auch die Behandlung im Hospital enthält. Die Sozialversicherung ist verbunden mit dem Rechtsverhältnis der Versicherung an Beschäftigungsbranchen gebunden und die Erstattung der Kosten richtet sich je nach den einzelnen Beschäftigungsbranchen, je nach der Höhe der auf den dort geleisteten Abgaben beruhenden Abgaben.

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Corporate Social Responsibility (CSR) and Labour Law – Parallelisms or Crossroads?

1. Introduction

Nowadays, the "fashion" of CSR (Corporate Social Responsibility) is becoming more and more widespread and the notion of CSR itself is appearing as a managerial buzzword. Ideas of CSR nowadays permeate the business community and are becoming central to their reputation. In this paper I will attempt to place this new "fashion" of voluntary CSR initiatives into the context of the labour law dimension. It is not new at all to argue that firms should behave ethically or on a responsible manner. On national levels companies have long been subject to regulation by governments regarding some aspects of social responsibility. In this context, the regime of labour law is very important, because it regulates and enforces the main social responsibilities of enterprises (employers) towards employees.[1] In this sense, labour law can serve as the legal root or the legal baseline of CSR concerning labour issues. However, in the context of economic globalisation "state law is no longer plausible as a benchmark for responsible corporate behaviour."[2] That is why it is important to analyze the interplays and intersections between these two areas: the relatively "old" concept of labour law and the relatively "new" CSR-concept are competing for largely similar goals. The aforementioned similar goals are indeed unquestionable ones, namely the protection and well-being of workers, or in other words: the socially responsible treatment of workers. Theoretically, both labour law and CSR (especially the so-called "internal" aspects of CSR) are striving to fulfil these "humanistic" goals, although through very different practical mechanisms. This paper is basically a theoretical one, trying to identify some possible connections between the two areas.

1 In terms of CSR and business ethics, employees are core and primary „stakeholders".

2 Harry ARTHURS: Private Ordering and Worker's Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation; In: Labour Law in an Era of Globalization, ed. by: Joanne CONAGHAN – Richard Michael FISCHL – Karl KLARE, Oxford University Press 2002. p. 473.

2. Some approaches to CSR

The global idea of CSR basically considers that a corporation is not just a self-centred profit making entity, but that the company and its actions are also integral part to the economy, society and the environment in which they occur. However, as an introduction, we can point out with Nigel Roome that "the overall agenda for CSR is confused and fragmented."[3] Although the concept itself is still quite fluid and ambiguous, CSR now represents an "essential element of the European Social Model."[4] In the interpretation of the European Union for example, CSR describes a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders[5] on a voluntary basis.[6] It is also about enterprises deciding to go beyond simple minimum legal requirements and obligations stemming from collective agreements in order to address societal needs. However, these voluntary initiatives are often regarded to be only vague declarations and PR-tools, without any real legal value. Indeed, mushrooming issues of CSR are emphasizing voluntary approaches – systems of self-regulation and self-imposed rules based on often uncertain ethical concerns – rather than patterns of traditional legal accountability backed by international or national enforcement mechanisms. "Globalization has undermined the ability of any one country to regulate the full panoply of activities of transnational companies, casting doubt on the assumption that corporate social responsibility concerns can be fully addressed by reliance upon existing law."[7] Indeed, national labour law is also unable to capture the whole spectrum of social responsibility.

On the other hand, we can identify more complex definitions of CSR than the European one, but the legal aspects in CSR are limited in every way. According to Matten and Moon "probably the most widely accepted and referred to conceptualisation of CSR found in the business and management literature is that of Archie Caroll, who sees CSR as a construct relating to four different areas of business-society relations."[8] These four aspects are the followings:

- Economic responsibility (mainly towards shareholders) – This is the reason why businesses are set up in society; the satisfaction of economic responsibilities is thus required of all corporations.
- Legal responsibility („playing the rules of the game") – It is also required of all corporations seeking to be socially responsible.
- Ethical responsibility (to do what is right, just and fair, even when there is no obligatory

3 Nigel ROOM: Some Implications of National Agendas for CSR, In: Corporate Social Responsibility Across Europe – André HABISCH – Jan JONKER – Martina WEGNER – René SCHMIDPETER (eds.), Springer Berlin – Heidelberg. 2005. p. 320.

4 EUROPEAN PARLIAMENT Draft Report on corporate social responsibility: a new partnership, Committee on Employment and Social Affairs, Rapporteur: Richard Howitt, Provisional 2006/2133 (INI). p. 6.

5 Stakeholders: people or organisations who can affect corporate operations or are affected by them; ranging from employees, customers and shareholders to citizens' action groups; most companies find organised communications with stakeholders a good investment. Corporate Social Responsibility in Context (2005), A Pocket Guide, Context Group Ltd. p. 30. Workers are primary stakeholders.

6 Green Paper „Promoting a European Framework for Corporate Social Responsibility" EUROPEAN COMMISSION COM (2001) 366.

7 Cynthia A. WILLIAMS: Corporate Social Responsibility in an Era of Economic Globalization; University of California – Davis Law Review Vol. 35., 2002. p. 731.

8 Dirk MATTEN – Jeremy MOON: A Conceptual Framework for Understanding CSR, In: Corporate Social Responsibility Across Europe – André HABISCH – Jan JONKER – Martina WEGNER – René SCHMIDPETER (eds.), Springer Berlin – Heidelberg, 2005. p. 337.

legal framework to do so) – Ethical responsibility is generally expected by society over and above economic and legal expectations.

- Philanthropic responsibility (e.g.: charitable donations, recreation facilities for employees and their families etc.) – Philanthropic responsibilities are merely desired of corporations.

Although this multidimensional approach puts some emphasis on the legal aspects of CSR, the core debate in CSR is about voluntary initiatives by corporations based on ethical or philanthropic motivation. After sketching our basic understanding of labour law, we will contrast the terminology of labour law (a specific, but core legal aspect of CSR) with the language of the infinite field of voluntary CSR.

As regards working conditions, CSR promises that "profitability and good working conditions can go hand in hand."[9]

3. Changes in the conceptualisation of labour law

Originally and historically, the so-called "protective" labour law is the law of subordinate or dependent labour. „The original purpose of labour law was to offset the inherent economic and social inequality within the employment relationship."[10] Labour rights were basically seen as an attempt of redressing the inequality between the employer and the worker, and an attempt of blocking the potential abuse of economic power. No doubt, the striking imbalance of power between individual workers and employers is still obvious. However, "the post-War consensus in Europe based on the notion of equality between employer and worker and support for collective representation has broken down since the 1970s."[11] Replacing the traditional ideologies behind labour law, different forms of new regulatory theories are emerging. The lowest common denominator of these new theories that all take the market system as their foundation. No doubt, times are changing around the concept of labour law: while the intervention of labour law into the market order was an evidence before, today there is a need for new justifications for such interventions. Contemporary regulatory theories treat the market, the freedom of enterprise, the private law of contract and property as a state of nature into which legal institutions may intrude. As a matter of fact, labour law is now forced to justify itself in the mirror of the overriding neo-liberal efficiency-criteria. Labour regulations are expected to be efficient in the sense that its costs do not suppress the potential benefits. As regards the European context, the new notion of "flexicurity" refers to the same dilemma.[12] All in all, the classical rigid model of labour regulation is clearly untenable in the dawn of the

9 Philippe BRONCHAIN, ed. (2003): Towards a sustainable corporate social responsibility, European Foundation for the Improvement of Living and Working Conditions. p. 3.

10 EUROPEAN COMMISSION (2006) Green Paper: „Modernising labour law to meet the challenges of the 21st century" (presented by the Commission) p. 4.

11 Bob HEPPLE: Four Approaches to the Modernisation of Individual Employment Rights; In: Changing Industrial Relations and Modernisation of Labour Law, Liber Amicorum in Honour of Professor Marco Biaggi. Roger BLANPAIN – Manfred WEISS (eds.), Kluwer Law International, The Hague, 2003. p. 183.

12 The Integrated European Guidelines for Growth and Jobs – 2005 Integrated Guidelines 2005–2008 (adopted on 12/07/2005), [OJ L 205/21 of 06 August 2005] – highlight the need for the adaptation of employment legislation to promote flexibility combined with employment security.
A new Green Paper – EUROPEAN COMMISSION (2006) – looks at the role labour law might play in advancing a "flexicurity" agenda in support of a labour market which is fairer, more responsive and more inclusive, and which contributes to making Europe more competitive.

21st century. In the globalized world, nation states' power in enforcing protective labour regulations is limited.

Thinking about the pressing need of the reconstruction of the concept of labour law, CSR comes naturally into the picture. The vague, flexible, voluntary and self-regulatory nature of CSR fits perfectly into the rapidly changing context of labour regulation. Such important phenomena as the rapid technological progress, the increased competition stemming from globalisation, the liberalization of trade, the domination of multinational corporations, changing consumer demand and significant growth of the services sector, the growth of worldwide network society and the emergence of even longer global supply and production chains are favourable for the flexible CSR-idea. There is even more global discussion about CSR, while sometimes we can have the impression that classical methods of labour law are almost forgotten in the discussions.

4. Parallelisms and crossroads between CSR and labour law – some impressions

If we contrast the "old" terminology of labour law (a specific legal aspect of "internal" CSR) with the fashionable and relatively new language of the infinite field of voluntary CSR, we can have the strange impression that somehow an "alternative labour regulation" is emerging under the veil of CSR. Regardless of whether it is a threat or an opportunity, some parallelisms and/or crossroads can be clearly identified between the two fields. As we have already discussed: although there are different tools and technical mechanisms in each regime, the overall goals of both regimes are more or less the same or overlapping at least: to treat workers on a socially responsible manner and to modify corporations' internal culture in this respect. Here, I would like to sketch some impressions about the possible parallelisms and/or crossroads between labour law and CSR. The following table is neither comprehensive nor fully precise. The comparison is intentionally "ad hoc" and simplified. My main goal with the following table is only to present some thought-provoking impressions about the relationship between CSR and labour law. The order of the different angles is by no means an order of importance. My intention here is only to shed some light on the occasional interplays between labour law and CSR. The table is a very mixed one: I will combine here individual aspects of labour law with collective ones, and theoretical concerns with more practical ones. Of course, each segment of the following table would require further deep comparison and analysis, but it is not the task of the present paper. I also won't comment the different aspects here; I am only trying to bring some previously disguised and maybe unseen connections to the surface. We will see that the language of CSR is mimicking somehow the rhetoric and terminology of classical labour law, however, on a more business friendly, softened and "toothless" way.

LABOUR LAW	CSR
COMMON OR SIMILAR GOALS	
Socially responsible treatment of workers; reoriented corporate internal culture, improvement in working conditions etc.	
SOME BACKGROUND FEATURES OF EACH CONCEPT	
State-centric concept.	Private, mainly managerial (business-centric) concept.
Main level of regulation: national.	By nature, CSR is a global (transnational) concept, without clear contours. CSR is also about denationalization of social issues.
Labour law presumes an interventionist welfare state.	CSR is backed by the the neo-liberal concept of the „minimal" state.
State regulation.	Voluntary corporate policies, „privatized" self-regulation or „civil regulation" (e.g.: codes of conduct), or mere philanthropic gestures.
"Hard law".	"Soft law".
It is about legal liability.	It is about moral or political responsibility.
Rather „security"-oriented.	Rather „flexibility"-oriented.
Reactive nature of regulation and sanctions.	CSR is rather a pro-active approach.
Value-based regulation (e. g.: „social rights").	Market-based and interest-based standards („business-case").
Fixed minimum-standards.	Vague, „above and beyond the law" approach.
„Direct" labour regulation.	No regulation, just pure „voluntarism" or „indirect" labour regulation (e.g.: through public procurement law, company law, consumer law).
Basically prescriptive and prohibitive nature of legislation.	Enabling, facilitating, reflexive nature of legislation (or no CSR-related legislation at all).
Universal, sector-neutral regulation - a "level playing field".	Highly individualized, fragmented CSR-policies, "no one size fits all" approach.
Labour law is a relatively stable construct.	CSR is a continuous learning process for organisations.
Labour law is restricted to single companies, and only applicable within the classical boundaries of companies.	CSR is also about managing (monitoring) supply chains (networks, subcontractors etc.) on a socially responsible way.
SOME EXAMPLES OF PARALLELISMS (OR CROSSROADS)	
Legal guarantees of equal treatment, non-discrimination etc.	Voluntary „diversity" programmes, company policies to promote equality and equal treatment etc.
Working time regulation.	„Family friendly" working time systems, the vague concept of work/life balance.
Legal guarantees of studies besides work (e. g.: study contract).	Promotion of uncertain concepts such as „life long learning", employability, on-the-job training etc. Broad commitments to support the right to work.
Clear dismissal protection.	„Socially responsible", humanistic style of downsizing etc.
Regulations on transfer of undertakings and "restructuring".	"Prepare and equip the workforce for anticipating and managing change", the concept of "socially successful restructuring."
Clear prohibition of child work.	Supportive company policies towards the elimination of child work, minimum-age-policies - "self-definitions".
Clear and enforceable OSH (occupational safety and health) regulation.	Preventive culture of OSH ("prevention pays off"-approach). "Promises" about safe and healthy workplaces.
Bipartite, traditional collective bargaining.	No bargaining at all, or "multi-partite", partnership-based dialogues.
Traditional social dialogue.	Multi-stakeholder dialogues.

Bipartite collective agreements on labour issues.	Mainly unilateral company codes of conduct.
Bargaining with Trade Unions.	Partnership with NGOs (and at the same time: union-free environment is often preferred).
Participation of workers: works councils, European Works Councils, rights for information and consultation, co-decision-rights, etc.	"Stakeholder-theories", vague partnership approaches, participative management philosophies etc.
Courts.	Voluntary, alternative methods of dispute resolution (e.g.: inner complaint mechanisms for workers, company ombudsman etc.).
Inspection of labour standards through official state agencies.	Privatized audit of labour standards (especially in supply chains), the role of the so-called CSR-industry.
Clear minimum wages.	Obscure, unidentifiable concepts of fair, decent or "living" wages and adequate compensations.
Legal guarantees of work-discipline.	Discretionary rules of work-discipline.

5. Some interpretations of CSR in the light of labour law

In terms of labour law, CSR can be interpreted in several different ways. Here, I would like to outline briefly the most common clusters of approaches.

There is a general assumption that any form of mandatory regulation presupposes some kind of self-regulation.[13] As regards labour law, this assumption is especially valid, because labour and "social rights lack effective procedures and mechanisms for their enforcement."[14] In fact, the final implementators of labour law are mostly corporations; the letter of labour law will become operational in actual workplaces. In order to be able to rightly implement the essence of labour regulation, corporations need to internalize the values of labour law to certain extent. In this sense, self-regulatory CSR-initiatives (e.g.: a code of conduct) can be seen as the product of a successful process of internalization or as a formal strategy for enhancing compliance. To put it differently: CSR-initiatives sometimes can be considered to be one tool for implementing the values of labour law. At best, CSR-tools are percolating norms into actual corporate practices and can be understood as a potential driver for better compliance and enforcement of minimum legal standards. Labour regulation has always had a strong voluntary or semi-voluntary aspect (even in the continental Europe, but especially in Anglo-Saxon countries). In this respect, CSR is just another form of voluntarism "around" labour law. CSR can "remind" corporations of their legal responsibilities and encourage them to take on broader and more positive responsibilities. It is important to note here that in general, "legal requirements can be understood in a more or less restricted manner depending on

13 The opposite is also true: „Voluntary approaches to corporate citizenship take effect in a legal context." Halina WARD: Legal issues in Corporate Citizenship – Prepared for the Swedish Partnership for Global Responsibility; Global Ansvar – Swedish Partnership for Global Responsibility, IIED, February 2003. p. 5.

14 Bob HEPPLE: Four Approaches to the Modernisation of Individual Employment Rights; in: Changing Industrial Relations and Modernisation of Labour Law, Liber Amicorum in Honour of Professor Marco Biaggi. Roger BLANPAIN – Manfred WEISS (eds.), Kluwer Law International, The Hague, 2003. p. 188. Hepple writes the followings in another article: "Social rights are like paper tigers, fierce in appearance but missing in tooth and claw." Bob HEPPLE: Enforcement: the law and politics of cooperation and compliance, In: Social and Labour Rights in a Global Context – International and comparative perspectives, edited by Bob HEPPLE, Cambridge University Press, 2002. p. 238.

whether this refers to the letter and/or the spirit of law, collective bargaining and case law."[15] In this context, CSR-policies might represent the "spirit of law". From another aspect: labour standards are generally basic minimum standards, thus there is always huge scope for self-regulation and self-policing above and beyond the law. According to these assumptions, CSR can be helpful and productive in terms of labour law. After all, CSR can also be an opportunity, not just a threat.

Even the ideas which see an opportunity in the CSR-agenda are divided and confused. It is either possible to envision a fruitful future partnership between labour law and CSR (e.g.: by trying to gradually embed somehow the tools of CSR into the system of labour law), or to argue that CSR can only have a positive role strictly outside and above the field of labour law, "beyond compliance". There is also a choice to view CSR as a new and innovative background-ideology or guiding principle for labour law. Indeed, we can reaffirm that one of the main goals of labour law has always been and still is to regulate the social responsibilities of corporations towards workers (considering them as the core stakeholders). According to the latter arguments, CSR may help to identify new fields for possible future labour regulation and give rise to direct consequences in regulation. In other words: CSR may serve as a catalyst for labour law, bringing new ethical dilemmas to the surface. In terms of international labour law it is also possible to interpret CSR as a new method of filling sensitive regulatory gaps (e.g.: regulating the globally still basically unregulated multinational corporations through self-regulation at least; helping multinationals to manage global supply chains more ethically and labour-friendly with codes of conduct).

On the other hand, the phenomenon of CSR can certainly give rise to suspicion. According to many, CSR could be characterized as a private sector response to inadequate and ineffective regulation of labour standards at both the domestic and the international level. "In this sense CSR could well represent the privatization of international labour law".[16] Clearly enough, there is a tendency to marginalize the role of public policy (e.g.: labour law) and to over-emphasize the role of various actors (e.g.: NGOs) and fragmented motives (e.g.: the "business case" for CSR) in the promotion of socially responsible business movement. We can remark sadly that while development and innovation in (international and national) labour law have been slow in coming over the past several decades, the plethora of voluntary CSR initiatives has grown out of almost nowhere at a fast pace. However, traditionally the (welfare) state is the main regulator and controller of private entities (such as corporations) and their social responsibilities. Among the regulatory tools of the (welfare) state, labour law enjoys a distinguished place. CSR represents a highly individualized and fragmented approach to social responsibility, which have the potential to undermine the prestige of labour law.

Owing to the above-mentioned tendencies, CSR is often seen by labour lawyers as a mere dangerous threat. In this respect, CSR is frequently interpreted as a substitute of labour regulation and as a means of removing or softening the pressure of government control over corporations. In other words: CSR-initiatives can serve as means of pre-empting, bypassing or replacing labour law in the long run. Voluntary and flexible CSR initiatives are much more popular in business circles than the enforceable (sometimes "rigid") labour laws. The popularity and the "fashion" of CSR among influential and powerful (multinational) corporations might overshadow the traditional paths of enforcing labour regulations. While voluntary CSR could certainly serve the competitiveness of corporations on a more flexible

15 BRONCHAIN, Philippe ed., (2003) p. 8.

16 Brian W. BURKETT – John D.R. CRAIG – Mathias LINK: Corporate Social Responsibility and Codes of Conduct: The Privatization of International Labour Law, Canadian Council on International Law Conference, Friday, October 15, 2004, Heenan Blaikie. p. 1.

way, labour law is often considered to be a socially motivated, maybe anachronistic "curb" in terms of the liberal-capitalist style of economic growth.

Harry Arthurs offers an excellent contemplation about the mechanisms of CSR as the tools of "reproduction of legality". Here, I would like to briefly sum up and comment his main arguments in three stages.[17]

1. According to Arthurs, at a superficial glance, voluntary CSR initiatives may seem capable of reproducing many of the substantive and procedural characteristics of state labour legislation. (These tendencies are also visible from our previously presented table).
2. However, he continues, at a middle distance, the differences between labour law and voluntary regimes become more visible and apparent. He offers some further relevant comments: While legislation applies to the generality of enterprises, CSR only to those which have acted voluntarily (the "free-rider" effect). While the language of regulatory statues are relatively precise and directory, the language of CSR is vague, hortatory, and not well suited to compelling compliance in circumstances which are unclear or controversial (CSR favours the tendency of "self-definition"). While labour law is enforced ultimately by coercive mechanisms, CSR typically implies no such coercive power. Similarly, labour law is mainly enforced by state agencies, the enforcement of CSR-initiatives (if any) is "privatized". And finally, while those charged with violating state labour standards are judged by a court or independent regulatory tribunal; those charged with violating CSR-standards are generally judged by themselves or their nominates (or not judged at all). Arthurs concludes here that CSR-initiatives (such as codes of conduct) are at best only a rough approximation of liberal legality, not a strict replication of it.
3. On a close examination, Arthurs reveals the complexity of the above-described comparison between state labour law and CSR. He points out that it is a mistake to compare the above-described ideal model of labour legislation with CSR. This method simply can not reflect the actual realities, where state regulation also suffers from flaws, weaknesses, imperfections. In facing the realities of contemporary weaknesses of labour law, "we will see that voluntary CSR initiatives bear a closer resemblance to state regimes than we may care to admit." The followings are the main basic factual weaknesses of current labour law according to Arthurs:
   - The coverage of state regulatory regimes in practice is less than universal (because of constitutional limitations, political influence, materiality thresholds etc.).
   - State regulatory regimes are sometimes no more comprehensive than voluntary initiatives.
   - The basically clear language of statutory labour law can be easily frustrated by lengthy challenges or overturned by unsympathetic courts.
   - In both state and self-regulation systems, corporations tend to have the last word.
   - Sometimes states do not have enough motivation, capacity and resources to sufficiently mobilize the state's coercive power (e.g.: labour inspections) to secure compliance with labour law. In practice, state enforcement systems have often become no more rigorous than those established under voluntary regimes.
   - State regulation is also susceptible to "regulatory capture". The lobbying power of different actors (especially from the business world) can not be denied.
   - The practical effects of state regulation are constrained by globalization and other powerful forces (such as neoliberalism).

Arthurs concludes with the following statement: "Ironically, then, given that state regulation of the workplace is in disrepair and disrepute, voluntary corporate regimes may not produce

17 The followings are based on Harry Arthurs' work. Harry ARTHURS, p. 479-450. (It should be mentioned that Arthurs' analysis is basically about the case of the US. Notwithstanding, his arguments are generally relevant in the theory of labour regulation.)

such very different outcomes." In this sense, CSR (with all of its flaws) can be considered to be the facsimile of contemporary "imperfect" labour law to some extent. However, Arthurs reaffirms that labour regulation and voluntary initiatives are not mutually exclusive alternatives. "To some extent the two systems exist in a state of symbiosis, and are more similar in their strategies and outcomes, more ideologically aligned, more mutually dependent and operationally integrated than in generally believed – but only to some extent."[18]

6. Conclusions

The paper argues that CSR would be undemocratic without the proper intervention of the law. Social responsibility of business can not be based solely on the discretion of private companies. CSR is not just about voluntary actions; it is also about the coercion of more traditional forms of statutory intervention, such as labour law. In the shadow of a framework of legal accountability, voluntary CSR-approaches will often be ineffective and will remain contested. "Traditional labour law, social dialogue, industrial relations and collective bargaining are among the most important institutional frameworks through which society can ensure that business activity has a positive social impact."[19] CSR must not be permitted to be used as a substitute for the proper role of labour law, because corporations have no general legitimacy to define voluntarily its duties in society (concerning especially the duties towards workers). It is important to secure by all means that CSR can not reinterpret or evade labour law, because labour law is articulating the legitimate expectations of society regarding business behaviour in relation to workers. However, it is not possible and expedient anymore for labour lawyers (and for labour law scholars) to ignore or neglect the new challenges and alternatives created by the emerging "fashion" of voluntary CSR. In the near future, a fruitful and decent balance should be found between labour law and CSR. The artificial "voluntary/regulatory" divide still operates as a brake on innovative legal thinking. In the global economy, there is no one clear-cut way to force multinational and other corporations to be socially responsible. All relevant and possible means – such as labour law (both international and national) and CSR among others – should be mobilised towards such ambitious goals as the even more extensive social responsibilities of global business. Surely, there is a pressing need to rethink the respective roles and responsibilities of business, civil society and governments concerning the realization of labour standards.

18 Op. cit. p. 484.

19 ICFTU (2004): Final Resolution – The Social Responsibilities of Business in a Global Economy. ICFTU, Eighteenth World Congress, Miyazaki, 5–10 December 2004. 1.

Zusamenfassung

„Soziale Verantwortung der Unternehmen" (CSR, Corporate Social Responsibility) und Arbeitsrecht – Paralellen oder Kreuzwege?

Die Studie analysiert aus theoretischer Sicht die Wechselwirkungen zwischen dem Konzept der sozialen Verantwortung der Unternehmen (kurz CSR) und dem traditionellen Arbeitsrecht. Nachdem die Begriffe „CSR" und „Arbeitsrecht" geklärt worden sind, wird in der Studie impressionsartig, in Tabellen gefasst versucht, die möglichen, etwaigen Paralellen und/oder Kreuzwege zwischen den beiden Gebieten aufzudecken. Danach wird im zentralen Kapitel 5 des Artikels das Konzept der CSR aus der Perspektive des Arbeitsrechtes analysiert und thematisiert. Hauptziel der Arbeit ist es, die möglichen Auswirkungen der CSR auf das traditionelle System des Arbeitsrechtes nachzuweisen. Die Hauptkonklusion der Studie ist, dass man langfristig eine gesunde Balance zwischen der „freiwilligen", selbstregulierenden Idee der CSR und der „härteren" Regelung des Arbeitsrechtes mit rechtsverbindlicher Kraft finden muss. Es ist wichtig, dass diese beiden Konzepte nicht zur gegenseitigen Auslösung führen, sondern der gegenseitigen Stärkung dienen.

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Some Historical Characteristics of Hungarian Public Administration in the Bourgeois Age

1. Our present-day state, if it is a **constitutional one, founded on the rule of law**. While our 19th century national state was a ***Rechtsstaat*** with a historical constitution that expressed the gist of the form of government with a multitude of laws built upon each other. This was the constitutional monarchy whose fundamental idea found expression in the formula *rex regnat, sed not gubernat*. The principle of law-governed state was the government responsible to the Parliament At the same time; the state is nothing but – to used Kant's formula – the sum total of individuals living under the rule of law. Born free and having inalienable rights, individuals concluded a social contract to guarantee that situation. Hence it follows, on the one hand, that individuals as representatives the sovereign people that rule over themselves created the parliament as the depository of people's sovereignty. Its function was to define the behavioural norms in relations that are calculable and could be planned, and that freedom and the sanctity of private property might come to prevail.

On the other hand, in the **monarchy–parliament relationship** the burden of responsible governing is put on the back of the government. The centralists and doctrinaires, therefore, prefer a strong central power, and seek to keep the balance between sovereignty, due to rule, and that of the people.

Beside the state theory, based on Rousseau's **social contract and people's sovereignty**, the other **theory is that of the nation-state,** that considers the state as historical conditions, arising from the social animal nature of Man. No matter which of these theories of state shall we take as basis for our view of state, we certainly should regard the state as **a legal organisation**. Among the forms of law, state will exist in the harmonious operation of public institutions called forth by law. The **classic example of nation-state** is presented to us by the Hungarian state – as Kálmán MOLNÁR emphasised in his study entitled "State theories in the positive constitutional law". "The state organisation based on the doctrine of the Holy Crown realises in an almost idealised perfection of that particular form of state life which duly ensures predominance of the national will. … While it brings the great principle of the right of national self-determination into all the state institutions, on the one hand, with the construction of the legal concept of nation, it also provides for predominance of the *volonté générale*, on the other.". In a nation-state, to wit, the popular representation is that particular organ of the nation which – often rising above the discording partial interests running against

public interests – is organised in such manner that it could be able to recognise, identify clearly and also realise the national interests. It thus could most effectively serve, though indirectly, the interests of its citizens in wider perspective."

However, it is only the incessant struggle for national independence that can explain the particular importance of our independent statehood, unparalleled with other peoples – as was emphasised by Győző CONCHA, founder of political science in Hungary. Eminent politicians who tried to counter-balance mainly the roles of the national assembly and the government by the counties represented these „eccentricities". This **centralist–munipalist dichotomy** has been present unbroken in our administrative thinking ever since. It may be, then, justifiable to raise the question of what explains the incessant county system that has been flourishing even after Act III of 1848? A clear answer to this question may be given by CONCHA's explanation: "breaking" the country's territory "into federation", which, however, does not provide independence. Instead it makes the solution of the nation's most important tasks impossible: meeting the public needs and in the administration of the former, the judicial defence of law.

2. It well characterises the **alternating role of the responsible government and the counties** that the original competence of municipalities was maintained after the 1867 Compromise. Moreover, the nicest government decree of all times on local authorities – the draft of 10 April 1867 – as an invaluable compromise of the political forces declared that besides the self-governments of public municipalities, those of the national-level municipalities should also be given room. In exchange for this, the government will guarantee autonomy for municipalities, but expects reciprocity on their part. This parallelism, however, still lagged far behind what Ferenc DEÁK would represent in the question of counties. "Counties are not co-ordinated bodies towards the state power. But are bodies that form part of all government systems, to which the state gave autonomy in the interest of governmental expedience. Counties, furthermore, are not federal part of all states, and should not have rights separate from the states or just contrary to it."

The well-balanced relationship of the legislative executive had fully tolerated the municipal freedom still for the year of the fusion (1875). To offset that Act IV of 1869 had been passed by Parliament, and with this a classic judicial attribute – judicature – had been removed from the competence of counties, the first laws on municipalities (1770) and communities (1771) still gave almost unlimited freedom in the fields of both making statutes and of the application of law. As regards the latter, the government might interfere only if it was so requested by the affected. These "first rules" provided the counties and communities an almost unlimited right to collect surtaxes over and above the direst tax. Furthermore, towns might levy community surtaxes over and above the indirect government tax, on top of all; they might introduce new taxes. Thos idealistic situation, however, only lasted until the foundations of the institutional system of the constitutional state have been laid.

The **committee on public administration,** set up in 1876, constituted the first step against the local authorities. Although it was organised with the aim of ensuring an effective co-ordination between the local (municipal) and the state administration, in reality, however, the appointed and elected officials equally came under the influence of the county's Lord Lieutenant. This was aggravated by the fact that disciplinary proceedings againstofficials were removed from the competence of courts of justice and this competence was added to the tasks of the mister of the interior.

The so-called **second law on municipalities,** however, disturbed the mentioned state of balance by extending the discretionary powers of the county Lord Lieutenant, by prescribing the obligation of advance presentation of ordinances and by-law made by municipalities.

At any rate it made plenty of room for the government's influence. The government could find way to make changes even within the competence of obligatory municipal ordinances. For example to replace ordinances with provisional decrees "out of necessity". The law on municipalities also laid down that the government may the ex officio observed unauthorised or illicit decisions annul, and order a new procedure. However, the loose, careless style of our laws or, for example, the definition of the concept of self-government (the undefined state of our own affair), besides all this, the question of incompetence became rather problematic which carried in itself the continuous injury of the freedom of self-government. This situation improved only with Act LX of 1907 insofar as the municipalities were allowed to appeal a for legal protection against the injurious intervention on the part of the government/Lord Lieutenant with Court of Administration.

The Law of 1886 to wit, narrowed down the county competence to decisions on internal affairs, mediation of government-level public administration, to execution of government decrees, and to political affairs.

3. The **duplicity of municipal and administrative competencies** constitute the great "deviance" in the progress history of Hungarian public administration – as has been established by Ödön POLNER. By adding the administration of home affairs, as sui generis administrative task to those of government-level administration, the above-mentioned law essentially led to a **distorted thinking in the self-government-**field. It is true that this solution made it possible to meet the needs of the state (nationalisation) which proven by the fact that the chief constable acting as the chief administrative officer of the county reserve himself the three main rights of nomination in community elections. Performing the state-related responsibilities, the notary was – from 1920 onwards – simply 'lifted" to the country government.

The county had lost its real function as self-government in the 19th century when its **right to levy taxes was withdrawn** in 1883. From that time on, it became indisputable that the medium level of administration was nothing but a corporate body of centralisation, i.e. a municipality designed to fully execute the government interests and policies.

Perhaps it is not uninteresting to refer to a less known historical connection. The **origin of this peculiar duplicity** date back to the centuries of the early Middle Ages, more particularly, to the practice of exaggerated estate donations of King András II- According to recent investigations, the shrinking incomes of royal estates proved to be insufficient to cover the increasing royal budget. On this account the ruler opted for the forced, but conscious donations of the rest of royal estates. He did so in the hope that instead of the highly expensive management of royal estates, which consumes the big incomes, the private landed estate thus arising would be more interested in the use of land, and the incomes to be produces that way would be possible to be deprived. It, then, seems an acceptable to postulate that the rise of the nobiliary county results from a coercive but conscious donation. At he same time, the Hungarian feudalism which had come to flourish by the late 1200s also resulted in activation of the nobiliary county as a nobiliary community. Its strengthening was also promoted by the royal court when – with the nobiliary county ceased to exist – increasingly entrusted the "state tasks" (economic, military, judicial) to the counties. As Lajos RÁCZ appropriately remarked: these organisations acting in double capacity are the **self-governing**, and the **interest representing communities of the country nobility**, which – beside their own government – are performing out of necessity "**public administrative**" and **other** tasks. With this the relations with the governmental centre of the king would be necessarily strengthen. All the more so as they received instructions for the execution of task from the central governmental organ. This way the royal centre depended on the nobiliary county, but also depended on it politically for the lack of strong towns.

4. Another striking characteristic of Hungarian territorial and local administration is that the **legal concept of town** had been ousted by the beginning of the bourgeois age. The legislation recognises only community as local unit of administration. While the feudal age had discerned towns, market towns and their numerous variants, by the second half of the 19th century the legal concept of community came into sole and exclusive usage. The only difference made was in degree, namely on district level between minor communities and higher communal ties. The concept of community created a bourgeois liberal antithesis of the feudal concept of town.

The community–county relationship also developed in a special fashion in the second half of the 19th century. As been formerly referred to the centrist and municipalist views, it is proven in context the medium and lower level relationship that what was formulated by the doctrinaires only gave the impression merely theoretical theses, and the history of communities, considering their long development, can be ranked in the sphere of **administrative tutelage**. According to a widely known theorem, the sum total of communities is the county as a voluntary integration of communities. This, however, never existed and represented quite another quality than the West-European ***Kommunalverbund*.** The community as a *sui generis* institution is also of a double-bound nature in the legal view of the bourgeois age. Community that developed from the former community of goods and which was invested with the rank of legal entity in both private-law and public-law respects, though not independent, is a unit defined partly as part of the state, partly as an organic part of the municipality. The **community**, then, is a **municipality** that operates in an organisation prescribed by law and the sectional quality of which is disposed of by the state. On this account, it could not make structure changes (e.g. fusion) on its own initiative that would have led to the cease of its communal independence. This **public administrative quality** in the community as self-government and in the municipality has remained a systematically coded element of Hungarian public administration.

As concerns the towns, they were only recognised by the mentioned laws in municipal framework in community rank. The municipal borough performed public administration as first and second instance. Its role is similar to that of the county, is corporate body is the town council, its first official is the mayor. As towns developed, these frameworks proved to be narrow. An even more serious problem was caused – in addition to the increasing costs of administration – by the loans raised to cover their own needs, and particularly their infrastructure investments. Under the circumstances, it was on the initiatives of towns that the **law on the public support development of towns** and the **law on town planning** were adopted in 1912 and in 1937, respectively. These constituted two major achievements of the bourgeois-age legislation on Hungarian town-network.

5. Beyond all this, another special feature of the history of Hungarian public administration is connection with changes **in budget law.** It is a commonplace that no state can exist without public administration and that a modern state without budget is also inconceivable. Although the related literature more or less agrees that making a budget is essentially a function of public administration. But it has been proved since 1867 that the functioning of the state budget cannot be ensured without the approval of Parliament. Though it was a recurring refrain sounded in Parliament as early as the fists decade of Dualism that **the settling of state finances** was a vital question of Hungary. All "main national efforts should be directed to achieve this end and no legislation existed which if could not carried through in parallel with it, could by no means precede is".

All budget elements of our state finances system were drawn from the contemporary European states, especially from the English, French and Prussian-German models in a mixed form. It was paragraph 37 of Act III of 1848 that formed the basis of Hungarian budget law.

Notably, "The Ministry is bound to submit the statement of the country's revenues and demands as well as an account of past incomes managed by it annually to the Lower House for review and approval."

The curious feature of the exercise of he budget law lies in the fact that the "executive rules" were contained almost half a century later, in **Act XX of 1917 on state accountancy.** This legislation – among others – prescribed the preparation of budget estimates, the drafting of budget law, the way of its execution and the management of state property.

For the sake of historical fidelity, it is necessary to note that **it was in 1872 when the first full budget was drawn up** since it included the demand of the whole government and the estimates of all ministries.

The further 19th century specialities of Hungarian budget law are also used by the present-day theory such as appropriation, indemnity and institution of ex-lex.

As is generally known, **appropriation** is a word of English origin and of a double nature. It is an enabling act separated into expenditures and incomes. While, however, the English version records the targets of expenditures and makes thus sums more accurate, its Hungarian version has a contrary meaning, enabling the collection of incomes.

Indemnity is a characteristic "symptom" of Hungarian budget legislation which essentially means a particular authorisation to carry on the state finances within the framework of the expired budget act, that is, the **extension of the validity of the former budget law**.

Indemnity was a pragmatic legal solution, but it prevented the state finances from being carried on smoothly. As Zoltán MAGYARY, author of the excellent monograph on the budget law of the Hungarian state, emphasised: "(Indemnity) compels the government to have recourse to the expedient of permitting itself, on its own responsibility, supplementary or extraordinary credit as regulated by paragraph 16 of the law on accountancy. These harmful effects are felt to an especially high degree, if the indemnities are repeated, or extended to the whole budgetary year and thus the making of certain budget laws became obsolete, and so gaps are caused in the series budget laws, in the systematic further development of state finances," closely related to indemnity, as an antecedent of it, is the **budget deficit**, the state of **ex-lex.** This state may come about as a result of a conscious neglect of Parliament, also of the denial of adopting the budget. However, there is no precedent for it either in the classic bourgeois age, or in the one-party period, when it was conceptually excluded anyway, or more recently, in the period of the constitutional state.

The other variant of the occurrence of ex-lex results from not a conscious behaviour, but from a "happy coincidence" of different circumstances. To be mentioned, as examples are the failure of the co-ordination of interests, time pressure, i. e., the new budget cannot be completed in time. For the latter, already more precedents can be experienced in the history of our financial management. Yet another important lesson may be drawn from our indemnity laws which exclude ex-lex, namely that they almost without exception contain a provision which "date back' the effect of indemnity to the beginning of ex-lex. Thereby it provides a legal basis to the government to make claim to public debts retroactively.

If we wish to define these briefly presented categories numerically, then we come to thought provoking results. Somewhat pushing off the age of Dualism and regarding it as a characteristic base period when the requirements of the constitutional state functioned as state organisational values; we can present the following data, based on Zoltán MAGYARY's aggregation. Between 1867 and 1923, during **57 years (682 months) only 47 budget, but 79 indemnity laws were made**. 259 out of 682 months elapsed under indemnity. Within this: from 1867 to the occurrence of the first ex-law, then from 1899 to the expiration of the latest pre-war budget, indemnity extended to 72 months. **In 72 years, ex-lex occurred 11 times:** in 1899, 1903. 1912, 1917, 1918, 1922 (two times), 1923 (two times). Their total duration was 5 years and 61 days. (Facts loquuntur!)

Since the Peace Treaty of Westphalia budget law as part of the national sovereignty has undergone thoroughgoing changes and its classic institutions in the present period of the constitutional state slowly become part of legal history. Both the concept and content of sovereignty are in the process of reinterpretation. As financial jurists have wittily put it, the lethargy causing budget litany has become embedded in a new framework, in the **convergence programme.** This, together with the EU budget law and the intraintegration financial law will result in a novel budget law of quite new system, though hardly elaborated from the aspect of economics.

6. I should like to conclude this series of arbitrarily elected and discussed historical characteristics with an attribute of the public administration of nation-state, the principle of **law-dependence**.

As a development of constitutional state, the civil freedom and equality before the law, then with the guarantied corroboration of the judicial independence, public administration responsible for the execution of laws have come into the centre of scholarly investigation. Lawful behaviour was required not only of the citizens of the state, but the public organs were also expected to abide by the legal norms. Thus the idea of the law-governed state was 'concentrated' on public administration. On this account, a leading theoretician of this view, Otto MAYER could already characterise the law-governed state as the state of well-articulated administrative law. This qualitative change of direction is illustratively explained by the study of Professor Zoltán PÉTERI. He points out that the positivist. Rechtsstaat means such an order of relationship among law, public administration and the individual in that public administration may not interfere with the life of individuals either *contra legem* or *praeter* or *ultra legem* without proper legal basis. This legal dependence is dominant not only in the relationship between individual and administrative organs, but also in the legally regulated relationship among such organs. This guaranties by the **possibility of judicial review**. Here of special pubic-law importance among the extraordinary courts is the Court of Public Administration.

In the 80s of the 19th century legal literature, big debates were going on the subject of whether the administrative judicature should be built upon the ordinary judicial organisation or an independent forum should be organised to serve as court of administration. The CONCHA-NÉMETH argumentation representing alternating standpoints had many in commons the debate of the German Bähr-Gneist double representing also contrary views.

Finally – in 1896 -, the setting up of an **independent Court of Administration** won by taking over the Austrian-German model. This was supported by strong arguments in both the German (FLEINER, HATSCHEK, JELLINEK) and the Hungarian (TOMCSÁNYI, MÁRFY, BÓÉR) literature. From our viewpoint, the most convincing arguments of them is that the independent court will "let out" administrative law of the sphere of private-law situations and considerable add to it that private-law as the most dynamically developing field of law as third field beside penal law, might strengthen also dogmatically. The independent court is, then, very important on account of its indisputable **law-developing role**. The weight and role of leading cases considered by the Court of Administration, which settled controversial question of principle with the aim of the uniformity of the administration of justice, are outstanding. Although such rulings were not binding on administrative organs in the majority of contemporary states, yet in their practice they tended to submit to such rulings. Hence it follows that for the judging of contentious cases in public administration the judicial forums of administration are the most suitable.

Through the quarterly collection entitled "Leading Cases of the Hungarian Court of Administration, decisions concerning the uniformity of law and problems of theoretical significance", the **leading cases of the Hungarian Court of Administration** had a provably

positive effect on the legal quality of the operation of our public-administration organisation. These rulings played a compass-role in our loose law making though the public and lower administrative organs through special gazette might have gathered information of these judicial decisions. At the same time remained problematic that the biding force of the rulings of the Court of Administration were not extended to the administrative organs. Contrary to this, as is widely known, under paragraph 70 of Act LIV of 1912 courts were bound to abide by the law-conformity rulings and plenary session decisions of the supreme Court (Curia). To show the real situation, however, requires us to refer to decrees on the execution of Act XXVI of 1896 (decrees 105.000/1896 BM and 21.973/1896 Me) which prescribe "the careful study and the use as rules of behaviour" of the rulings of courts for the lower administrative authorities.

We have taken out the Court of Administratation from among the other historical characteristics, because its former function as a material guaranty of the constitutional state may serve as an example to be followed by our administrative judicature. This convection is corroborated – among others – by the intention of the ME decree referred to above whose citation speaks for itself. The careful study and sound application, whenever appropriate, of **rulings of the court** is necessary not only in the interest of clients, but also from the aspect of upholding and enhancing the authority of administrative organs. This is so because the frequent judicial changes of administrative measures and decisions will diminish the repute of authorities. Though there is hardly better means for increasing the public confidence in authorities than the conviction of the public that the view expressed by the administrative organs in the administrative process is approved and sanctioned by final judicial decision.

7. And here we have come to a cardinal problem that lies in the parting line of the manner, in which public administration operates. What used to be **lawfulness in the 19th century** that moved towards **practicability, rationality, usefulness, efficiency** and towards a world of such popular political slogans as small and inexpensive, big and expensive in the 20th century and particularly in the century of the global word.

In my opinion, it is only through lawfulness and practicability and the institution of administrative judicature that the balance of the way and objective of the rationalisation or reform of public administration can be drawn up. Though the significance of judicial protection against the abuse of the executive branch is hardly disputable, but the successful solution of the "dumping" of tasks imposed on public administration is just as important an interest as the legal control of the operation of the whole organisation. Zoltán MAGYARY's reform programs, the laws of the first half of the 20th century on such things as the simplification of administrative procedure, arrangement of public administration, decrease of the system of forums, introduction of the one-instance system of appeal, supplement of the 1896 one-instance Court of Administration with lower judicial forums etc. These were all initiatives where the requirement of lawfulness was in the background.

The determination of the manner in which public administration lawfully operates is tied up with the active organisation of public administration. Since the activity of the Court lies in the judicial reviews of administrative decisions of public administration, determination of what cases and of decisions on what instance can be submitted to it, basically influences both the administrative forum system and the procedure.

8. The topic of administrative judicature is connected one more tenet of administrative science which is well worth of taking into consideration.

It is a commonly held opinion that the **separation of public administration from the administration of justice** was accomplished with Act IV of 1869. This reasonably implies that the two branches of power may not interfere with each other's competence. And it is perhaps

the most important constitutional consequence independent courts may only do the administration of justice. However, slowly it also became clear that the question of competence, which had been thought clearly defined and separated, could be solved only theoretically. Every experiment revealed that there always remained groups of issues, which were not worth of making subject of contradictory procedures of them. These are the so-called miscellaneous issues: trespasses which are committed against the public administration and constitute the forms of punishable acts of minor weight, just bordering on criminality, that is petty affairs. These are judged in shared competence – with some simplification – by the district courts. And that the above-cited theorem would not be injured; appeals against administrative decisions might be lodged with the district court.

It was due to this legal situation that what is termed **administrative penal law** in the contemporary European literature as against the judicial penal law was born. The result of the state punitive power shared under parliamentary authorisation brought about a particular above-outlined procedural-law situation. Its theoretical evaluation was consequent in the bourgeois age, but so in the present age, a fact that is hall-marked by a Constitutional Court resolution on this subject.

The present-day lessons that can be drawn from the debate on administrative history can be best expressed by CONCHA's arguments. He was definitely against the role of administrative courts in the **judgement of trespasses**. Namely, administrative judicature is intended to annul or amend the unlawful acts of administrative courts.

In the course of judging over "trespasses", perpetrators of acts infringing on the order of administration are called to account, with the possibility of lodging an appeal against the decision with ordinary courts.

This is **a quasi judicature of different quality,** thus not an administrative judicature, but a sanctioning proceeding based on legislative authorisation. The argumentation – which is also included in the mentioned Constitutional Court resolution – that the decision made by an administrative organ forms an administrative decision and as such can be contested before a court is only formal logically true. Since **this procedure of different quality should be excluded from the administrative court procedure**. To be correct, however, it should be noted that the original text of the 1896 Act on the court of administration supported our present-day legislative system of judicial evaluation. But in the hot debate over the bill, the scientific "arsenal" deployed by Győző CONCHA, Viktor MAJZIK could fully disregard the standpoint represented by Károly NÉMETHY and István EGYED.

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Zusammenfassung

Historische Merkmale der ungarischen öffentlichen Verwaltung in der bürgerlichen Zeit.

Die Studie behandelt die Organisationsfragen des ungarischen bürgerlichen Rechtsstaates. Sie beschäftigt sich mit den Organisationsprinzipien des Staates, mit dem Verhältnis Regierung/Selbstverwaltung. Sie richtet besonderes Augenmerk auf das Budgetrecht, auf das Strafrecht der öffentlichen Verwaltung und auf die gegenwärtigen Lösungsmodalitäten der Rechtssprechung in der öffentlichen Verwaltung.

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Die Lanzensymbolik der legis actio sacramento in rem

In der wohlbekannten Beschreibung *der legis actio sacramento in rem* erwähnt Gaius, dass die Römer im Laufe des Verfahrens statt der Lanze den Stab als Symbol des rechtmäßigen Eigentums gebrauchten, weil sie gerade das am meisten als ihr Eigentum betrachteten, was sie vom Feinde erworben hatten: *„Festuca autem utebantur quasi hastae loco, signo quodam iusti dominii; quod maxime sua esse credebant quae ex hostibus cepissent."*[1] Mit der Behauptung von Gaius stimmt die Feststellung von Verrius Festus überein, dass die Lanze die Verkörperung der höchsten Macht und Gewalt sei: *„Hasta summa armorum et imperii est."*[2]

In diesem Aufsatz wird anhand dieser zwei Testinomien eine Erklärung der Machtsymbolik versucht, um die Deutung der *legis actio sacramento in rem* als *duellum sacrum*[3] zu untermauern.[4] Nach einem kurzen Überblick der Machtsymbolik der Lanze – u.a. der *subhastatio* und der *hasta* des Imperators – werden der *lituus* der Auguren und einige griechische Parallele des Stab- und Lanzensymbols in die Analyse hineingezogen. (**I.**) Neben der Untersuchung der Rolle der Lanze im Marskult werden wir manche Feststellungen über die Verbindung der Quirites mit der Lanzensymbolik machen (**II.**), um dann schließlich einige Parallele zwischen dem *ius fetiale* und der *legis actio sacramento in rem* aufzuzeichnen, die dem rituellen Lanzen-, bzw. Stabgebrauch beider Zeremonien entnommen werden können. (**III.**)

I. Mit großer Wahrscheinlichkeit kann vorausgesetzt werden, dass die Lanze als Waffe ursprünglich nichts anderes war, als ein langer, spitzer aus hartem Holz gefertigter und im Feuer gehärteter Stock.[5] Und da die *hasta* die Waffe war, mit der man im Laufe des Krieges Beute, Anerkennung und somit Macht erlangen konnte, können wir uns nicht wundern, dass

1 Gai. inst. 4, 16.

2 Fest. 55, 3.

3 Zur Literatur der *legis actio sacramento* siehe A. FÖLDI – G. HAMZA: *A római jog története és institúciói.* (Geschichte und Institutionen des römischen Rechts) Budapest 2006.[11] 167ff.

4 T. NÓTÁRI: Comments on the Origin of the legis actio sacramento in rem. *Acta Juridica Hungarica* 47, 2006. 133–155.

5 Cic. *Verr*. 4, 125; Plin. *nat*. 16, 65; Hdt. 7, 71; Tac. *ann*. 2, 14; Prop. 4, 1, 28; Amm. 31, 7, 12.

sie bald zum Machtsymbol wurde.[6] Dies bezeugt auch die Definition *„hasta summa armorum et imperii est"*,[7] und wenn man das Imperium – besonders im Zusammenhang mit der Lanze – erwähnt, darf man nicht dessen, in die sakrale Sphäre gehörigen, magisch-religiösen Charakter vergessen. Das Imperium bezeichnet in erster Linie die tatsächliche Befehlsgewalt, bezieht sich aber auch auf die religiöse Sphäre; im Falle des *auspicium* dominiert das religiöse Element, beinhaltet aber gleichzeitig das zur Verwirklichung benötigte Recht.[8] Wagenvoorts Einsicht nach besaßen in der römischen Gedankenwelt bestimmte Personen eine eigene und außerordentliche *Mana*: so war zum Beispiel dem Imperator – wenn wir den Ursprung des Wortes betrachten – die Kraft des Erschaffens und des Befruchtens eigen, und wenn er als Feldherr seinen Soldaten die Eroberung eines feindlichen Lagers befahl, so weckte er mit seinen magischen Worten die zur Umsetzung des Befehles benötigte Kraft in ihnen. Somit ist das Imperium nichts Weiteres als eine Form der Übertragung geheimnisvoller Kräfte. Der militärische und religiöse Führer (beide Posten belegte bei den Römern ursprünglich der *rex*) verfügt über *Mana*, dies verleiht ihn zum Beispiel die Fähigkeit die Fruchtbarkeit des Bodens zu steigern, wie wir das aus ethnologischen Beispielen entnehmen können. Dementsprechend bedeutete *imperare* nach Wagenvoorts Definition ursprünglich nichts anderes, als *ins Leben rufen, befruchten*,[9] da der Feldherr – der seinen Soldaten den Befehl zur Einnahme eines feindlichen Lagers oder einer feindlichen Stadt erteilte (*imperabat*) – das zur Ausführung des Befehles notwendige Potenzial mit der magischen Kraft seines Wortes erschuf, ins Leben rief. Das heißt, dass das Imperium nichts anderes ist, als die Fähigkeit der Übertragung, der Erschaffung einer geheimnisvollen Kraft.[10] Als das Spezifikum des Imperiums erwähnt Thomas Köves-Zulauf, dass *„als besondere Merkwürdigkeit der Sache parere* (*gebären*) *ein typisch femininer Begriff sei, während über Imperium ausschließlich Männer verfügten"*.[11]

Nicht zufällig bezeichnet der Ausdruck *subhastatio* den Verkauf der durch Waffengewalt vom Feind ergatterten Beute – wie auch von Gaius erwähnt[12] – und insbesondere die Veräusserung der Kriegsgefangenen,[13] sowie im Weiteren die Versteigerung im Allgemeinen.[14] Schon den Römern selbst war der Ursprung dieses Brauches bewusst;[15] häufig erschien der Ausdruck in einem Kontext mit den Begriffen *praeda* und *spolia*,[16] *hasta* wurde zum Symbol des

6 F. J. M. De WAELE: *The Magic Staff or Rod in the Graeco-Italian Antiquity.* Gent, 1927. 172.

7 Fest. 55, 3.

8 W. PÖTSCHER: 'Numen' und 'numen Augusti. in *Hellas und Rom*. Hildesheim, 1988. 462.

9 A. WALDE – J. B. HOFMANN: *Lateinisches etymologisches Wörterbuch I–II*. Heidelberg, 1938. I. 683.

10 H. WAGENVOORT: Wesenszüge altrömischer Religion. in *Aufstieg und Niedergang der römischen Welt* I. 2. Hrsg. V. H. Temporini, New York–Hildesheim, 1972. 371f. *Sehen wir richtig, so bedeutete das Zeitwort imperare ('befehlen', 'herrschen') ursprünglich 'zum Leben erwecken', 'befruchten'; der Feldherr, der seinen Soldaten befahl (imperabat), ein feindliches Lager zu berennen, erzeugte in ihnen durch sein magisches Wort die Kraft zur Erfüllung seines Auftrages. Imperium ist also eine Form der Übertragung geheimnisvoller Kraft.*

11 Th. KÖVES-ZULAUF: *Bevezetés a római vallás és monda történetébe.* (Einführung in die Geschichte der römischen Religion und Sage) Budapest, 1995. 31.

12 Gai. *inst*. 4, 16.

13 Fest. 55, 9. *Quam ob rem viri fortes ea donantur et captivi sub eadem veneunt quos Graeci doryalőtous et doryktçtous vocant.*; 90, 19. *Hastae subicebant ea, quae publice venundabant, quia signum praecipuum est hasta.*

14 C. 10, 3, 1. 2. 5. 6; Liv. 2, 14, 1–4; Dion. Hal. 5, 34, 4; Val. Max. 3, 2, 2; Cic. *off*. 2, 27. 83; *Phil*. 2, 64. 103; Varro *rust*. 2, 10, 4; Sen. *suas*. 6, 3. C. 4, 44, 16. Vgl. A. ALFÖLDI: Hasta – Summa Imperii. The Spear as Embodiment of Sovereignty in Rome. *American Journal of Archeology* 63, 1959. 3. 8; P. KOVÁCS: Adatok a hasta mint hatalmi jelvény használatához. (Angaben zum Gebrauch der hasta als Machtinsignie) *Antik Tanulmányok* (Antike Studien) 47, 2003. 261ff.; WAELE 1927. 172.

15 Liv. 2, 14, 1ff.; Dion. Hal. 5, 34, 4.

16 Cic. *off.* 2, 27, 8; Liv. 4, 29, 4; Suet. *Iul.* 50, 2; Sen *dial.* 6, 20, 5.

Verkaufs[17] – daraus entwickelte sich auch die Zusammensetzung *ius hastae*[18] –, für die staatlichen Verkäufe wurde der Begriff *hastam ponere* verwendet,[19] und bei zahlreichen Anlässen stand die *hasta* als Symbol für das ganze Rechstgeschäft.[20] Seneca bezeichnet die Lanze in dieser Funktion als *hasta civilis*, Cornelius Nepos als *hasta publica*, Iuvenalis als *domina hasta*; den Ort der *hasta* nennt Tertullian *hastarium*,[21] und der Brauch der Aufstellung der Lanzen blieb während der ganzen Kaiserzeit erhalten.[22]

Pomponius verwendet in der Beschreibung der Institution der *decemviri stlitibus iudicandis* den Begriff *hasta praeesse*,[23] der nichts anderes bedeuten kann, als die Führung des *iudicum centumvirale,* das jedoch hundert Jahre nach der Datierung von Pomponius (242–227 v. Chr.) entstand.[24] Zwar wird Pomponius Glaubwürdigkeit aus geschichtlicher Sicht in diesem Punkt zweifelhaft, es wird jedoch eindeutig belegt, dass in der Frage des *legitimum dominium* ausschließlich ein *magistratus cum imperio* zum Entscheiden berufen war.[25] Das Abzeichen des in der Mitte des 2. Jahrhunderts v. Chr. gegründeten *iudicum centumvirale* war die sog. *hasta centumviralis* – das praesidiale Amt dieses Gerichtshofes belegten gegen Ende der Republik (mit Rücksicht auf die überlasteten Praetoren) die Proquaestoren.[26] Augustus setzte als Aufseher erneut einen Praetor an die Spitze des *iudicum centumvirale*,[27] Novellius Torquatus Atticus war der erste, den Namen nach bekannte *praetor hastarius*, bzw. *praetor ad hastam*, der diese Aufgabe erfüllte.[28] Mit dieser Verfügung setzte Augustus vermutlich kein neues Gesetz in Kraft, sondern rief ein Älteres wieder ins Leben.[29] Insofern der Gerichtshof in mehreren Abteilungen tagte, benutzte der Mann, der vom *praetor hastarius* aus den Decemviren auserwählt, und mit dem ad hoc Vorsitz beauftragt wurde, im *iudicium* seine eigene Lanze.[30] Dies wird auch dadurch belegt, dass Quintilian im Falle der zweigeteilten Tagung des *iudicum centumvirale* über *duae hastae* berichtet, und Seneca erwähnt die *hasta*, die die oberste Macht darstellt, als die *hasta* des mit *imperium* ausgestatteten Praetors.[31] Das vom *praetor hastarius* beaufsichtigte und in Erbschaftsangelegenheiten zuständige *iudicum centumvirale* tagte im Allgemeinen in vier Sektionen in der *basilica Iulia*.[32]

Die *hasta pura – pura*, weil sie nicht aus Metall gefertigt wurde –, bzw. die *hasta donatica* galten als militärische Auszeichnungen, wie wir das aus dem *Aeneis*-Kommentar von Servius entnehmen können.[33] Die für den Heldenmut der Soldaten verliehene Lanze – vermutlich eine Imperatorenlanze, oder deren Kopie – war dazu berufen, dass der Träger der Auszeichnung auch selbst würdig wäre einen führenden militärischen Posten zu belegen.[34] Neben dem Adler und

17 Cic. *Phil.* 2, 103.
18 Tac. *ann.* 13, 28; C. 10, 3.
19 Cic. *off.* 2, 29. 83; *Phil.* 2, 64; *agr.* 2, 53.
20 Sen. *dial.* 6, 20, 5; Prud. *Psych.* 873; C. 10, 3, 1. Vgl. KOVÁCS 2003. 269.
21 Sen. *dial.* 3, 2, 1; Nep. *Att.* 6, 3; Iuv. 3, 33; Tert. *apol.* 13; *nat.* 1, 10.
22 C. Th. 10, 17; C. 10, 3. Vgl. KOVÁCS 2003. 269.
23 Pomp. D. 1, 2, 2, 29.
24 Th. MOMMSEN: *Römisches Staatsrecht I–III.* Berlin, 1887–1888. I. 275.
25 ALFÖLDI 1959. 9.
26 Suet. *Aug*. 36, 1; Stat. 4, 4, 41.
27 MOMMSEN 1887–1888. II. 225; ALFÖLDI 1959. 9.
28 CIL 6, 1365, 13; 8, 22721, 5; ILS 950.
29 Mon. Ancyr. 8, 5.
30 ALFÖLDI 1959. 10.
31 Quint. *inst*. 5, 2, 1; 11, 1, 78; Sen *dial.* 12, 1–2.
32 Plin. *epist*. 5, 9, 1–2. 5; 6, 33, 2–5; Quint. *inst*. 12, 5, 6.
33 Serv. *in Verg. Aen*. 6, 760. Über die *hasta* als militärische Auszeichnung mit reichem Quellenmaterial siehe KOVÁCS 2003. 268ff.; 273ff.
34 WAELE 1927. 173.

einigen anderen heiligen Tieren war das am weitesten verbreitete Wahrzeichen des römischen Heeres die Lanze selbst, deren Spitze in zahlreichen Fällen die verschiedenen *dona militaria* schmückten, wie sie auch im Falle der Darstellungen der bildenden Künste zu beobachten sind.[35] Die *hasta* symbolisierte die Macht, bzw. die Befehlsgewalt, und ihre praktischer Funktion war auch nicht zu unterschätzen, da das Heer mit ihrer Hilfe die zu Bewegung der Truppen benötigte Zeichen empfing. Das *vexillum* war nichts anderes, als ein Textilstück, das unter der Lanzenspitze befestigt war. Unmittelbar vor dem Imperator wurde das *vexillum* von der Leibwache getragen, wie das auch an der Säule von Traian und Marc Aurel zu betrachten ist. Mit dessen Hilfe wurde das Militär zum Kampf aufgerufen, und das Zeichen für den Angriff sowohl auf die Land- als auch auf die Seeschlacht erteilt.[36] Die Lanze war gleichzeitig ein Symbol der *manipuli,* deren Begriff Ovid als ein auf einem langen Stab befestigtes Heubündel erklärt.[37] Der Gebrauch dieses Bündels ist weniger aus praktischen, eher aus sakralen Gründen zu rechtfertigen, und höchstwahrscheinlich standen diese Grasbündel in Beziehung zu den *sagmenta* des Capitols.[38] Diese Argumentation wird auch dadurch unterstützt, dass nicht nur dem Adler, sondern auch anderen Heeressymbolen kultische Verehrung zu Teil wurde.[39]

An den Darstellungen ist der oben leicht gebogene Stab in der Hand des Auguren, der *lituus* zu erkennen.[40] Der Ursprung des Wortes *lituus* ist gewissermaßen zweifelhaft, das etymologische Wörterbuch bringt es mit der krummen Form des Stabes in Zusammenhang,[41] Lattes Meinung nach kann auch ein etruskischer Ursprung nicht ausgeschlossen werden, da dieser Stab durch die *disciplina Etrusca* nach Rom gelangte.[42] Mit dem *lituus* markierte der *augur* den aus dem profanen Raum herausgeschnittenen, von den Göttern erwählten, heiligen Platz, das *templum,* sowie die Himmelsrichtung, bzw. den Teil des Himmels, woher er auf die göttlichen Zeichen hoffte, die er zu deuten wünschte.[43] (Der Tradition nach erfüllten auch Romulus und Remus die Aufgabe der Auguren, als sie das Recht zur Stadtgründung von dem Ergebnis der Vogelschau abhängig machten.[44] Einer anderen Sage nach ist die Gründung des Augurenkollegiums mit Numa Pompilius in Verbindung zu bringen;[45] man fand, dass die Regia um den *lituus Romuli* herum erbaut wurde.)[46] Wir müssen jedoch in Betracht ziehen, dass die Aufgabe der Auguren ursprünglich in erster Linie nicht in der Deutung göttlicher Zeichen, sondern – wie auch der Ursprung des Wortes, der sich aus dem Verb *augere* ableiten lässt, zeigt[47] – gerade in einer magischen Fähigkeit des Wachsens und Gedeihens bestand, die ihrer außerordentlich großen *Mana* zu verdanken war.[48] Dies scheint auch zu untermauern, dass der *lituus* als Übertragungsinstument der numinosen Kraft, der *Mana* gedient hat.[49] Der Ausdruck

35 ALFÖLDI 1959. 12.
36 Dazu siehe v. A. DOMASZEWSKI: *Die Fahnen im römischen Heere.* Wien, 1885; ALFÖLDI 1959. 13; Caes. *Gall*. 2, 20, 1; Plut. *Fab*. 15, 1; *Brut*. 40, 5; Caes. *civ*. 3, 89, 5; Dio Cass. 49, 9, 1.
37 Ov. *fast*. 3, 117. Vgl. Plut. *Rom*. 8, 7; Serv. *in Verg. Aen*. 11, 463.
38 Vgl. Liv. 1, 24, 4ff.; L. RENEL: *Cultes militaires de Rome les enseignes.* Paris, 1903. 238ff.
39 Tac. *ann*. 1, 39, 6; Tert. *apol*. 16, 8; *nat*. 1, 12, 14; Serv. *in Verg. Aen*. 8, 1.
40 Serv. *in Verg. Aen*. 7, 190; Liv. 1, 18, 7; Cic. *div*. 1, 30.
41 WALDE – HOFMANN 1938. I. 815.
42 K. LATTE: *Römische Religionsgeschiche.* München, 1967. 157f.
43 Varro *ling*. 7, 7. Dazu siehe M. ELIADE: *A szent és a profán.* (Das Heilge und das Profane) Budapest, 1999. 65ff.; WAELE 1927. 169.
44 Cic. *div*. 1, 48. 107; Cic. *rep*. 2, 16; Dion. Hal. 2, 22, 3.
45 Liv. 1, 18, 6.
46 Cic. *div*. 1, 30; Plut. *Rom*. 22; *Cam*. 32.
47 WALDE – HOFMANN 1938. I. 83.
48 WAGENVOORT 1972. 367.
49 WAELE 1927. 171.

numen wird – besonders wenn man die Quellen der frührömischen Literatur untersucht – in Verbindung mit den Göttern, dem Senat, dem römischen Volk sowie im übertragenen, philosophischen Sinne mit dem menschlichen Geist erwähnt. *Numen* ist allein zwar als übermenschliche, am häufigsten jedoch eine, mit einer Person in Beziehung stehende Kraft.[50] Rose definiert diesen Begriff gänzlich mit dem Bedeutungsinhalt der Quellen übereinstimmend: *"Numen signifies a superhuman force, impersonal in itself but regulary belonging to a person (a god of some kind) or occasionally to an exceptionally important body of human beings, as the Roman senate or people."*[51] *Numen* bezeichnet also (insbesondere nach der mit Wagenvoorts Namen geprägten dynamistischen Richtung) eine Art – um diesen polynesischen Begriff zu benutzen – *Mana,* dh. eine, in einer Sache, bzw. einer Person liegende, geheimnisvolle Kraft.[52]

Trogus Pompeius nach – wie dies Iustinus überliefert – trugen die Könige der urrömischen Zeit keinen Kopfschmuck, sondern eine Lanze mit sich, die dem griechischen *skēptron* entsprach.[53] Mit dem Inhalt dieser Quelle stimmt die bezügliche Stelle des Werkes *De magistratibus* des Ioannes Lydus überein.[54] Um die griechischen Vorbilder kurz zu überblicken: Homer spricht zum ersten Mal vom *skēptron* des Argamemnon, das Hephaistos ursprünglich für Zeus anfertigte, doch Zeus anschließend Hermes, Hermes Pelops, Pelops Atreus schenkte, und Thyestes es schließlich von Atreus, und Argamemnon von Thyestes erhielt.[55] Wenn auch mehrere dazu geneigt waren, im *skēptron* des kretisch-mykenischen Zeitalters eine Art Überrest des ägyptischen Königszepters zu sehen, scheint es nicht auszuschließen – da wir ja für den direkten Einfluss keine Beweise haben –, dass in der griechischen und prehellenischen Kultur das Zepter, bzw. der Stab als Machtsymbol ohne fremde Einwirkungen entstand.[56] Der König ist der Besitzer des *skēptron*, der *skēptoukhos* par excellence, das *skēptron* ist das höchste Symbol seiner Macht.[57] Der König kann seinen Boten beauftragen, statt ihm in irgendeiner wichtigen Sache vorzugehen, und in diesem Falle ist der Bote berechtigt das königliche *skēptron* an sich zu nehmen, als Zeichen dafür, dass er in der Angelegenheit und im Namen des Königs handelt. Der erboste Akhilles empfängt auch nur aus jenem Grund mit Achtung Argamemnons Gesandten, da sie das *skēptron* mit sich gebracht haben,[58] und die Trojaner und Achaien verfolgen so den Kampf des Hektor und des Akhilles als Vertreter der herrschaftlichen Macht mit, das *skēptron* ihres Königs in den Händen haltend.[59] Sowie bei den *„sub hasta"* Institutionen der Römer die Lanze als Smybol der obersten Macht in Erscheinung trat, bezeichnete auch der in der *Ilias* zu lesende *hypo skēptrō* Begriff die Herrschaft des Zeus und des Königs.[60]

II. Im *Aeneis*-Kommentar von Sevius können wir über die folgende Zeremonie lesen: *„Is qui belli susceperat curam, sacrarium Martis ingressus primo ancilia commovebat, post hastam simulacri*

50 Dazu siehe T. NÓTÁRI: On Some Aspects of the Roman Concept of Authority. *Acta Juridica Hungarica* 46, 2005/1–2. 95ff.

51 H. J. ROSE: Numen and mana. *Harward Theological Review* 44, 1951. 109.

52 KÖVES – ZULAUF 1995. 29.

53 Iustin. 43, 3. *Per ea adhuc tempora reges hastas pro diademate habebant, quas Graeci sceptra dixere: nam ab origine rerum pro diis immortalibus veteres hastas ... coluere ob cuius religionis memoriam adhuc deorum simulacris hastae adduntur.*

54 Lyd. *Mag.* 1, 8. 37. Vgl. KOVÁCS 2003. 267.

55 *Il*. 2, 100ff.

56 WAELE 1927. 109.

57 *Il*. 1, 267; 2, 86; *Od*. 2, 231; 3, 411; 4, 64; 5, 9; 8, 41ff.

58 *Il*. 1, 334.

59 *Il*. 7, 277ff.

60 *Il*. 6, 159; 9, 154ff.; zu den weiteren Quellen siehe Alföldi 1959. 17ff.

ipsius, dicens: Mars vigila!"[61] Das Ebenbild der Gottheit konnte nicht übermäßig alt sein, da die Römer ihre Götter ursprünglich nicht auf bildhafter Weise darstellten.[62] Auch die Erklärung von Servius geht auf Varro zurück, gleich wie Plutarch inhaltlich identische Mitteilung:[63] *„en de te Rhegia dory kathidrymenon Area prosagoreyein."*[64] Varro gerät scheinbar in Widerspruch mit jener Überlieferung, die über mehrere Lanzen im *sacrarium* des Mars berichtet;[65] diese Lanzen könnten die der Salier gewesen sein, die sie zusammen mit den Schilder im *sacrarium Martis* aufbewahrt haben.[66] Die Mehrzahl der Schilde ist nicht überraschend, da Numa Pomponius – wie wir das der aitiologischen Sage, welche die Errichtung des Priesterstandes der Salier erörtert, entnehmen können – weitere elf Exemplare der *ancile* anfertigen ließ, um zu verhindern, dass das Original gestohlen wird. Anlässlich ihrer Prozessionen trugen die Salier ihre *ancile* in ihrer Linken, auf die sie mit einem lanzenartigen Stab einschlugen, bzw. einklopften.[67] Diese Lanzen waren in ihrer Form nicht mit jenen allgemein verbreiteten, im klassischen Zeitalter auch als Waffe benutzten Lanzen identisch, sondern bewahrten, wie auch die Schilder der Salier, ihre archaische Gestalt. Sie waren ohne die Anwendung von Metall ausschließlich aus Holz gefertigte, sogenannte *hastae purae*,[68] und ihr Bewegen, das ohne jede menschliche Mitwirkung im *sacrarium* erfolgte, wurde als Prodigium interpretiert.[69]

Die Lanzen der Salier müssen wir jedoch von der Lanze des Mars unterscheiden, die mit einem der Gottheit gebührenden Kult umgeben wurde.[70] Das Verehren der Götter in Form von Gegenständen war auch bei den Römern keine Ausnahmeerscheinung, und kann mit dem Begriff des Person-Bereichdenkens erklärt werden.[71] (Das Person-Bereichdenken war für den antiken Menschen eine eigenartige Weise die Dinge zu erfahren, in dem er die Wirklichkeit, den Gegenstand, den Vorgang, den Zustand als Sache und zugleich auch als göttliche Person erlebte.[72] Die Sache und die Gottheit wurden mit dem gleichen Wort bezeichnet – bei textkritischen Arbeiten kann es bedeutende Schwierigkeiten bereiten, ob z.B. im gegebenen Fall *themis* oder *Themis*,[73] *fortuna* oder *Fortuna*, *terminus* oder *Terminus* zu schreiben sei: für welche Schreibweise sich der Herausgeber auch immer entscheidet, die jeweilige andere Bedeutung, der unausgesprochene Teil des Begriffes ist häufig als dazu zu verstehen. Die Bezeichnung mit dem gleichen Wort erweckt äußerlich zwar den Eindruck der Parallelität, doch tatsächlich geht es um die Einheit der Person und des von ihr vertretenen Bereiches, der von ihr erfüllten Funktion: in jener Einheit steht mal der eine, mal der andere Aspekt im Vordergrund.[74])

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61 Serv. *in Verg. Aen.* 8, 3.

62 August. *civ*. 4, 31; Plut. *Numa* 8; Latte 1967. 150; H. HERTER: Zum bildlosen Kultus der Alten. *Rheinisches Museum* 74, 1925. 164ff.

63 E. NORDEN: *Aus altrömischen Priesterbüchern.* Leipzig, 1939. 173ff.

64 Plut. *Rom*. 29, 1.

65 Gell. 4, 6, 1–2.

66 G. WISSOWA: *Religion und Kultus der Römer.* München, 1912. 556.

67 Plut. *Numa* 13, 7; Dion. Hal. 2, 70.

68 Serv. *in Verg. Aen*. 6, 760.

69 Liv. 40, 19, 2; *Obseq*. 6. (60); 19. (78); 36. (96); 44. (104); 50. (110)

70 Arnob. 6, 11. (coluisse) *pro Marte Romanos hastam, Varronis ut indicant Musae*; G. DUMÉZIL: *L'héritage indo-européen à Rome.* Paris, 1949. 60.

71 WISSOWA 1912. 144; Latte 1967. 114ff.; Scholz, U. W.: *Studien zum altitalischen und altrömischen Marskult und Marsmythos.* Heidelberg, 1970. 29; Pötscher 1988. 457f.

72 Ohne den Begriff der *Person-Bereicheinheit* zu erwähnen, bzw. zu erschaffen schreibt Spengler höchst zutreffend über dieses Phänomen. Vgl. O. SPENGLER: *Der Untergang des Abendlandes*. München, 1991. 518f.

73 Zu diesem Fragekreis siehe R. HIRZEL: *Themis, Dike und Verwandtes.* Leipzig, 1907. 156f.

74 Vgl. W. PÖTSCHER: Das Person-Bereichdenken in der frühgriechischen Periode. *Wiener Studien* 72, 1959. 24.Bezüglich des Kriegsgottes siehe W. PÖTSCHER: Ares. *Gymnasium* 66, 1959. 4ff.

Iustinus beschreibt in der *Epitoma Pompei Trogi*, dass die Lanze am Anfang gewissermaßen mit einem göttlichen Kult umfangen wurde.[75] Varro zitierend berichtet Servius darüber, dass zu Beginn des Krieges bei der Zeremonie nach der Bewegung der *ancilia*, auch die *hasta*, dh. das Symbol der Gottheit (*simulacrum ipsius*) bewegt wurde. Bei diesem Akt wurde mit dem Ruf *„Mars vigila!"* Mars und damit – wenn wir Mars als Einheit des Personen-Bereichdenkens auffassen – auch der Krieg selbst erweckt.[76] Es bedarf keiner ausführlicheren Erklärung, damit wir in diesem sakralen Akt den, von Wagenvoort erkannten manaistischen, numinosen Zug erkennen können.[77] Die Ableitung des Namens des Quirinus aus dem sabinischen Wort *quiris-curis* ist auch bei mehreren Autoren zu finden, und genauso wird der Name Iuno Quiritis erklärt.[78] Nicht zufällig gibt Thormann den Namen der *Quirites*, der römischen Bürger äußerst treffend mit dem Ausdruck *Speermänner* wieder.[79] (Dem Zeugnis der Quellen nach musste die *hasta* unbedingt unter den Waffen der *Quirites* eine Rolle spielen.[80])

Die Bedeutung der archaischen Jupiter-Mars-Quirinus-Trias erkannte Dumézil, der das indoeuropäische Gesellschaftsbild forschend, zu der Einsicht gelangte, dass die Gesellschaft in drei, sich übereinander lagernde Schichten gegliedert ist, denen drei Funktionen, die Herrschaft, die Kraft und die Fruchtbarkeit entsprechen.[81] Diese knüpfen aber wieder an drei gesellschaftliche Schichten (Könige, Krieger, Bauern), bzw. drei spezifische Gottheiten (in Rom zum Beispiel zu Jupiter, Mars und Quirinus) an. Indien arbeitete dieses Dreierschema auf kosmologische Weise aus und die Römer historisierten den Mythos, wie das aus dem erstem Buch des livianischen *Ab urbe condita* zu entnehmen ist: Romulus und Numa sind als die zwei, sich gegenseitig ergänzenden Seiten der königlichen Macht zu betrachten werden, das kriegerische Prinzip vertritt Tullus Hostilius und die, das alltägliche Leben befruchtende, schaffende und handelstätige Produktivität Ancus Martius. (Diese Dreiheit wurde unter der Herrschaft der etruskischen Könige, vorzugsweise der Tarquinii, von der capitolinischen Jupiter-Iuno-Minerva-Trias abgelöst. In das Zentrum des demzufolge entstandenen Capitols kam der Tempel des Jupiter Optimus Maximus.[82] Zweifelsohne ist es aber, dass ursprünglich nicht nur Jupiter Feretrius einen Tempel auf dem Capitolium hatte, sondern – wie wir das von Varro erfahren können – auch zahlreiche andere Gottheiten, unter ihnen auch Mars.[83])

An den sich mit Mars verbindenden Lanzenkult knüpft die von Plutarch erzählte Legende an, nach der Romulus seinen Dörlingspeer so vom Aventin warf, dass die Lanze sich so tief in die Erde bohrte, dass sie niemand herausziehen konnte, und sie mit der Zeit Wurzel schlug und zu einem großen Baum heranwuchs. Diesen als heilig verehrten Baum umgaben die Römer mit

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75 Iustin. 43, 3, 3. *Nam ab origine rerum pro diis immortalibus veteres hastas coluere.*

76 Serv. *in Verg. Aen.* 8, 3. *Est autem sacrorum: nam is qui belli susceperat curam, sacrarium Martis ingressus primo ancilia commovebat, post hastam simulacri ipsius, dicens „Mars vigila".*

77 Vgl. WAGENVOORT 1972. 352ff.

78 Ov. *fast*. 2, 475ff.; Marc. *Sat*. 1, 9, 16; Dion. Hal. 2, 48, 2–4; Plut. *Rom*. 29, 1; Fest. 43, 5; *Curitim Iunonem appellabant, quia eandem ferre hastam putabant*.; 55, 6. *Iunonis Curitis ... quae ita appellabatur a ferenda hasta, quae lingua Sabinorum curis dicitur.*

79 K. F. THORMANN: *Der doppelte Ursprung der mancipatio, ein Beitrag zur Erforschung des frührömischen Rechtes unter Mitberücksichtigung des Nexum.* München, 1943. 32; 80ff.

80 Fest. 238.

81 Diesen Gedanken siehe u.a. G. DUMÉZIL: *Jupiter, Mars Quirinus: essai sur la conception indo-européenne de la société et sur les origines de Rome*. Paris, 1941; *L'Idéologie tripartie des Indo-Européens*. Bruxelles, 1958; *Rituels indo-européens à Rome*. Paris, 1954; *Déesses latines et mythes védiques*. Bruxelles, 1956; *La Religion romaine archaïque*. Paris, 1966.

82 Vgl. Liv. 1, 55, 1f. Zu diesem Prozeß siehe C. KOCH: *Der römische Juppiter*. (Frankf. Stud. 14.) Frankfurt am Main, 1937. 90ff.

83 Liv. 1, 10, 5f.; August. *civ*. 4, 23. 29.

einer Mauer; der Baum starb erst, als infolge der Erbauung der *scalae Caci* in den Zeiten Caligulas seine Wurzeln verletzt wurden.[84] Die Geschichte weist darauf hin, dass die Lanze von Romulus nichts Weiteres, als die *hasta Martis* war, die sich einer solch großen kultischen Verehrung erfreute, weil die Römer meinten, dass der Wohlstand des Staates von dessen Zustand abhinge. Analog zu Romulus Lanzewurf ist der rituelle Akt, mit dem *pater patratus* bei der Kriegserklärung die Lanze auf das feindliche Gebiet warf – doch lässt sich zugleich ein wesentlicher Unterschiede zwischen den beiden Handlungen entdecken.[85] (Kurt Lattes Meinung nach bedeutet die Handlung der Fetialen nicht den magischen Anfang des Krieges, bzw. des Angriffes, sondern stellt auch eine Art Besitzergreifung des feindlichen Gebietes dar.)[86]

Bei den römischen Hochzeitsriten wird die Vorstellung der durch die Lanze symbolisierten Kraft (*numen*) in der Gedankenwelt der Römer sowohl mit Mars als auch mit Quirintus in Zusammenhang gebracht, aber die exakte Definition dieses Zusammenhanges wird durch die Tatsache überhaupt nicht erleichtert, dass die uns zur Verfügung stehenden Quellen diese numinose Kraft nur noch im Falle der *hasta Martis* erwähnen.[87] Es stellt sich die Frage, warum ein Stab (*festuca*) statt der *iustum dominium* symbolisierenden Lanze im symbolischen Kampf der *legis actio sacramento in rem* gebraucht wurde. Laut van den Brink sind *festuca* und *hasta* Teile von zwei völlig separaten Symbolwelten: die Lanze wird als indoeuropäisches Machtsymbol gedeutet, während der Stab zum mediterranen Kulturkreis gehört.[88] Er lässt gleichzeitig unbeachtet, dass die Unterschiede zwischen Lanze und Stab in der damaligen Zeit der Symbolbildung höchstwahrscheinlich noch nicht vorhanden waren, denn beide wurden aus Holz angefertigt und gewisse Unterschiede konnten höchstens in der Größe und in der Festbrennung des als Gewähr benützten Stabes bestanden haben.[89] Die Tatsache, dass die *hasta* gleichsam von der *festuca* der Zeremonie der *vindicatio* vertreten, quasi dargestellt wurde, kann durch die Anordnung ausreichend erklärt werden, dass man schon zeitig bemüht war, den Gebrauch der Lanze innerhalb des Pomeriums zurückzudrängen und nur auf die nötigsten Riten zu beschränken.[90]

III. Aus dem Vergleich des *ius fetiale* mit dem *ius privatum* können zahlreiche wertvolle Parallen sowohl bezüglich der Struktur der *clarigatio,* bzw. *rerum repetitio* und der *legis actio sacramento in rem*, als auch im Bezug auf den rituellen Gebrauch der Lanze gezogen werden.[91] Die stark sakralen Normen des *ius fetiale* weisen enge Verbundenheit mit zahlreichen Institutionen des römischen Rechtswesens auf, denn für die Menschen der archaischen Zeit

84 Plut. *Rom*. 20, 5ff.

85 SCHOLZ 1970. 31; A. CARANDINI: *Die Geburt Roms.* Düsseldorf–Zürich, 2002. 508; KOVÁCS 2003. 265.

86 Vgl. Serv. *in Verg. Aen*. 3, 46. *Romulus captato augurio hastam de Aventino monte in Palatinum iecit*.; 11, 52. *Duces cum primum hostilem agrum introituri erant, ominis causa prius hastam in eum agrum mittebant, ut castris locum caperent.* Dazu siehe Latte 1967. 122. *Der Akt scheint nicht allein eine magische Eröffnung des Angriffs, sondern eine Form der Besitzergreifung zu sein.*

87 ALFÖLDI 1959. 19; SCHOLZ 1970. 162. F. BÖHMER: Ahnenkult und Ahnenglaube im alten Rom. *Archiv für Religionswissensschaft*, Beih. 1. 1943. 111ff. Zu den Hochzeits-, Fruchtbarkeits- und Geburtsriten, mit denen Mars des öfteren in Verbindung gebracht wird siehe E. SAMTER: *Geburt, Hochzeit und Tod*. Leipzig–Berlin, 1911; Th. KÖVES-ZULAUF: *Römische Geburtsriten.* München, 1990.

88 H. v. d. BRINK: Staff laying. in *The Charm of Legal History.* Amsterdam, 1974. 68ff.

89 WAELE 1927. 172.

90 ALFÖLDI 1959. 4.

91 G. DONATUTI: La „clarigatio" o „rerum repetitio" e l'instituto paralello dell' antica procedura civile romana. *Iura* 6, 1955. 31ff.; E. VOLTERRA: L'instituto della „clarigatio" e l'antica procedura delle „legis actiones". in *Scritti Carnelutti.* Padova, 1950. 251ff.

war wahrscheinlich kein *vinculum*, das von stärkerer Bindekraft ist, vorstellbar, als der – auch die Selbstverfluchung beinhaltende – Schwur.[92] (Laut Dahlheim verzichtet das *ius fetiale* infolge seiner stark rechtlichen und magisch-religiösen Determiniertheit auf jeglichen moralischen Hintergrund,[93] dieser Ansicht ist aber nicht beizupflichten, denn juristischer Formalismus und juristische Ethik sind keine Komponente, die einander ausschließen würden.)[94] Die zwischenstaatlichen Beziehungen wurden im archaischen Rom vom zwanzigköpfigen Kollegium der *fetiales* verwaltet: zu ihren Aufgaben gehörte es Bündnisse (*foedera*) zu schließen, die Friedensbedingungen festzulegen, sowie den Krieg zu erklären – ein Krieg konnte erst dann als *bellum pium ac iustum* gelten, wenn der den Regeln des *ius fetiale* entsprechend erklärt und eingeleitet wurde.[95] (Nur interessenhalber soll man es bemerken, dass der Grundsatz des Schutzes der Gesandten für die Römer ein unantastbares Prinzip war. Während bei den Griechen die Trennung des unter sakralem Schutz stehenden *kēryx* und des, dank der politischen Vereinbarung unantastbaren *presbeis* recht früh von statten ging, genossen bei den Römern die *fetiales*, beziehungsweise im Nachhinein auch die anderen Gesandten – auch wenn sie nicht zu den *fetiales* gehörten – sakralen Schutz, sogar zu Kriegszeiten.)[96]

Das *foedus* – hinsichtlich seiner Etimologie zum Ausdruck *fides* gehörig[97] – ist der mit Einhaltung der vorgeschriebenen Formalitäten geschlossene römische Saatsvertrag,[98] das im Gegensatz zum *hospitium*,[99] zur *amicitia*,[100] zur *societas* und zur *pax* nicht den Inhalt der Vereinbarung,[101] sondern dessen Form bedeutet – dabei bildete das wichtigste Element der vom Vertreter des *populus Romanus* abgelegte, feierliche Eid.[102] Über die Zeremonie des *foedus* wird uns von Livius berichtet, dass der durch die für diesen Anlass bestimmten Gebetstexte und die Berührung mit dem heiligen Grasbündel (*sagmina*) zum *pater patratus* geweihte Priester, der aus den Reihen der *fetiales* erwählt wurde, nach Vortragen des Vertragstextes einen Eid ablegte.[103] Im Schwur rief er Jupiter, den *pater patratus* des Vertrag schließenden Volkes und das Volk selbst als Zeugen auf, dass die vorhin verlesene Vereinbarung keine Arglist beinhaltete, und dass das römische Volk nicht als erstes vom Vertrag abweichen wird, insofern es das trotzdem täte – und hier folgt der selbstverfluchende Teil des Eides – so solle Jupiter das

92 K.–H. ZIEGLER: Das Völkerrecht der römischen Republik. in *ANRW* I. 2. Hildesheim–New York, 1972. 78; C. PHILLIPSON: *The International Law and Custom of Ancient Greece and Rome.* London, 1911. II. 315ff.; E. PÓLAY: *Differenzierung der Gesellschaftsnormen im antiken Rom*. Budapest, 1964. 100ff.

93 W. DAHLHEIM: *Struktur und Entwicklung des römischen Völkerrechts im dritten und zweiten Jahrhundert v. Chr.* München, 1968. 173.

94 ZIEGLER 1972. 79.

95 MOMMSEN 1887–1888. II. 675; SAMTER: Fetiales. *RE* VII. 2. 1912. 2260ff.; WISSOWA 1912. 551; ZIEGLER 1972. 102; LATTE 1967. 121ff.; Cic. *leg*. 2, 21; Dion. Hal. 2, 72, 4; Cic. *off*. 1, 36; *rep*. 2, 31; 3, 35; Varro *ling*. 5, 86.

96 Vgl. Marci. D. 1, 8, 8, 1; Liv. 38, 42, 7; Pomp. D. 50, 7, 18.

97 WALDE-HOFMANN 1938. I. 494; LATTE 1967. 126ff.

98 MOMMSEN 1887–1888. I. 246ff.; K. NEUMANN: Foedus. *RE* VI. 2. 1909. 2818ff.; A. HEUSS: Abschluß und Beurkundung des griechischen und römischen Staatsvertrages. *Klio* 27, 1934. 166ff.; P. FREZZA: Le forme federative e la struttura dei rapporti internazionali nell'antico diritto romano. *Studia et Documenta Historiae et Iuris* 4, 1938. 363ff.

99 Zum *hospitium* siehe ausführlicher P. LEONHARD: Hospitium. *RE* VIII. 2. 1913. 2493ff.; FREZZA 1938. 397ff.; P. CATALANO *Linee del sistema sovrannazionale romano*. Torino, 1965. I. 192.

100 Zur *amicitia* siehe A. HEUSS: *Die völkerrechtlichen Grundlagen der römischen Außenpolitik in republikanischer Zeit*. Klio Beiheft 31. Leipzig, 1933. 12ff.

101 Vgl. Dahlheim 1968. 163ff.; D. KIENAST: Entstehung und Aufbau des römischen Reiches. *ZSS* 85, 1968. 334ff.

102 ZIEGLER 1972. 90.

103 Liv. 1, 24, 4–7.

römische Volk so bestrafen, wie er jetzt das Opferschwein einschlägt; und somit erstach er das Opfertier.[104] Festus berichtet über eine gewissermaßen andere Formel, nach der der Priester, nachdem er das Schwein mit einem Stein erschlagen hatte, Jupiter darum bat, insofern er auf arglistige Weise vorginge – während Jupiter die Stadt verschonen möge – ihn selbst aus seinem Hab' und Gut zu werfen, so wie er jetzt den Stein wegwirft, den er in seiner Hand hält.[105] Polybios erwähnt den ersten Staatsvertrag zwischen Rom und Karthago als eine *per Iovem lapidem* geschlossene Vereinbarung,[106] Cicero zählt die *per Iovem lapidem* Schwurformel zum *ius civile*.[107]

In Verbindung mit dem *ius fetiale* ist hervorzuheben, dass die Römer die ersten waren, die den Krieg als Rechtsinstitut definierten und den – bis heute wirksamen – Begriff des *bellum iustum* ins Leben riefen.[108] Nicht jeder mit Waffen ausgetragene Konflikt galt als Krieg, *bellum* war nur zwischen Völkern (*populi*) möglich, als *hostis* galt nur der Gegner, der über ein organisiertes Staatswesen verfügte.[109] Dementsprechend konnte Cicero feststellen, dass einer nur von dem dem Feind geleisteten Eid verpflichtet ist, von dem den Räubern geleisteten aber nicht.[110] Auch im Falle der Kriegserklärung können wir von der livianischen Beschreibung ausgehen. Der *pater patratus* macht an der Grenze des Staatsgebiets des Volkes, von dem er Genugtuung (*rerum repetitio*, bzw. *clarigatio*[111]) verlangt, eine Äußerung, dass er als Gesandter des römischen Volkes und unter Wahrung des göttlichen Gesetzes seinen Anspruch vorträgt, und er ruft Jupiter, die Grenzen (*fines*) und das göttliche Recht (*fas*) als Zeugen auf, dass insofern er wiederrechtlich und mit dem göttlichen Recht im Gegensatz stehend (*iniuste impieque*) die Übergabe der benannten Menschen, bzw. Dinge forderte, ihm die Rückkehr in seine Heimat verweigert werden soll. Dies äußert er bei der Überschreitung der Grenze, mit kleineren Veränderungen dem ersten Menschen, der ihm entgegenkommt, beim Durchschreiten des Stadttores und bei der Ankunft am Hauptplatz.[112] Insofern ihm innerhalb von dreiunddreißig Tagen das von ihm Verlangte nicht übergeben wird – Dionysios von Halikarnass[113] erwähnt ein dreissigtägiges Zeitintervall –,[114] meldet er, nachdem er Jupiter, Ianus Quirinus, sowie alle anderen Götter als Zeugen herbeiberufen hat, dass er seine Forderungen widerrechtlich nicht bekam, und dass er der Wiederankunft in Rom folgend darüber zu beraten wünscht, auf welche Weise das römische Volk sich Genugtuung verschaffen könnte; d.h. er kündigt den möglichen Krieg an (*testatio*, bzw. *denuntiatio belli*).[115] In Rom angekommen trug der Gesandte den Vätern die Angelegenheit vor, und wenn die Mehrheit zugunsten des *purum piumque duellum* entschied, brachte der *pater patratus* eine mit einer Eisenspitze versehene, oder eine

104 Liv. 1, 24, 7–9.

105 Fest. 239. *Si sciens fallo, tum me Diespiter salva urbe arceque bonis eiciat, ut ego hunc lapidem.*

106 Polyb. 3, 25, 6ff.

107 Cic. *fam*. 7, 12, 2. Vgl. Latte 1967. 122f.

108 Cic. *leg*. 3, 9; Liv. 1, 32, 12. Vgl. ZIEGLER 1972. 101; F. LAMMERT: Kriegsrecht. *RE* Suppl. VI. 1935. 1351ff.

109 Cic. *Phil*. 4, 14; Ulp. D. 49, 15, 24.

110 Cic. *off*. 3, 107–108.

111 Anstatt der livianischen *rerum repetitio* gebrauchen Plinius (*nat*. 22, 3, 5) und Servius (*ad Verg. Aen.* 9, 52; 10, 14) den archaischen Begriff der *clarigatio*. Vgl. Quint. *inst*. 7, 3, 13.

112 Liv. 1, 32, 6–8.

113 Dion. Hal. 2, 72, 8. Vgl. R. M. OGILVIE: *A Commentary on Livy.* Oxford, 1965. 131; F. BERNHÖFT: *Staat und Recht in der römischen Königszeit im Verhältnis zu verwandten Rechten.* Amsterdam, 1968. 221f.

114 Vgl. KASER 1949. 22; H. HAFFTER: Geistige Grundlagen römischer Kriegführung und Außenpolitik. in *Römische Politik und Römische Politiker.* Heidelberg 1967. 23.

115 Liv. 1, 32, 9–10.

hartgebrannte Lanze (*hasta ferrata aut praeusta sanguinea*) zur Grenze des Feindes, und erklärte dort sich auf die wiederrechtlich verweigerte Erfüllung seiner Forderung berufend ihnen den Krieg, und warf die Lanze in das feindliche Gebiet hinein.[116] Demzugrunde war die unmittelbare *causa* des Krieges das wiederrechtliche Verhalten des feindlichen Volkes, nach dem es den Römern die von ihnen verlangten Dinge, bzw. Personen nicht zugesagt hatte.[117]

Natürlich bedurfte es einer solchen Kriegserklärung nicht, wenn der Feind in römisches Territorium einbrach; in diesem Fall konnten die Römer sofort und mit sämtlichen Mitteln den Gegenangriff beginnen. Die durch die *fetiales* vollzogene Kriegserklärung war also nur im Falle einer seitens der Römer initiierten, offensiven Kriegshaltung von Bedeutung. Das archaische Zeitalter kannte natürlich die Institution der Privatrache – die offizielle Kriegserklärung übten die Römer aber nur in dem Krieg, den sie im Namen der gesamten Gemeinschaft, des *populus* gegen ein anderes Volk austrugen, der sich klar und deutlich von den bewaffneten Konflikten einzelner Herrschaftsgruppen trennte.[118]

Infolge seiner Ausdehnung hatte Rom nicht in jedem Falle die Möglichkeit diese zeremonielle Ordnung einzuhalten – deswegen wurden mit Hilfe einer Fiktion des den Römern höchst eigenen Formalkonservativismus folgende Varianten ausgearbeitet: sie ließen ein Gebiet von einem Kriegsgefangenen im circus Flaminius kaufen, damit der *pater patratus* seine Lanze dorthin werfen kann, und später wurde neben dem Bellona-Tempel eine Säule zu diesem Zweck errichtet.[119] Dem Feinde trugen jedoch bereits die Legate des Senats die Forderungen vor, und sie kündigten auch den Krieg an, in dem sie zwei kleine *tesserae* verschickten, von denen auf der einen die *hasta* als eingraviertes Kriegssybol zu sehen war. (Manchmal kam es vor, dass dem Volk, dem die Römer den Krieg erklären wollten, eine Lanze zugesandt wurde.[120]) Das Kriegsritual der *fetiales* trug jedoch nicht im geringen Maße zu der Forderung bei, gemäß welcher der Krieg über eine *iusta causa* verfügen musste. Auch der unter dem Einfluss der stoischen Philosophie stehende Cicero, der die Theorie vom gerechten Krieg formulierte, brachte die *aequitas belli* nicht durch Zufall in Zusammenhang mit dem *ius fetiale*.[121]

Aufmerksamkeit gebührt der von Livius erwähten *hasta ferrata aut praeusta sanguinea*, die die Bedeutung einer in Feuer hartgebrannten, oder mit einer Eisenspitze versehenen Lanze trägt.[122] Wir wissen jedoch nicht, wann die Lanze mit der Eisenspitze den hartgebrannten Holzspeer ablöste, bzw. sich zu ihr gesellte, da in Italien die Eisenzeit bis auf die Wende des neunten zum achten Jahrhundert v. Chr. zurückreicht.[123] Es kann dennoch vermutet werden, dass im rituellen Gebrauch die Lanze mit einer Eisenspitze erst dann den ihrem Alter nach früheren, gänzlich aus Holz gefertigten Speer ablöste, als jene auch in ihrem alltäglichen Gebrauch die Ausschließlichkeit erlangte. Der Ausdruck *sanguinea* ist zugleich höchst problematisch. Das Wort selbst kann sowohl *im Blut geweiht*, wie auch *mit Blut gefärbt* wiedergegeben werden. Wenn wir es als die Bezeichnung der Holzart auffassen, so bedeutet es den Ast des Dörlings, die *sanguineae virgae*, der Dörling als Hartholz einen äußerst geeigneten

116 Liv. 1, 32, 11–14.

117 S. ALBERT: De vetere iure Romano, de lege duodecim tabularum atque de iure fetiali. *Vox Latina* 34/132, 1998. 218.

118 ZIEGLER 1972. 103.

119 Serv. *in Verg. Aen.* 9, 52. Dazu siehe P. de FRANCISI: Appunti e considerazioni intorno alla „columna bellica". *Atti della Pontificia academia romana di archeologia.* Ser. III. Rendiconti 27, 1951–1954. 1899ff.; Gell. 20, 27, 3–4. Vgl. DAHLHEIM 1968. 175ff.; KOVÁCS 2003. 262.

120 Fest. 90. *Carthaginienses cum bellum vellent, Romam hastam miserunt.*

121 Cic. *off.* 1, 36. Vgl. H. HAUSMANINGER: „Bellum iustum" und „iusta causa belli" im älteren römischen Recht. *Österreichische Zeitschrift für öffentliches Recht* N. F. 11, 1961. 341ff.

122 Liv. 1, 32, 12.

123 WAELE 1927. 173ff.

Rohstoff für die Lanze lieferte.[124] (Nicht nur seine Konsistenz, sondern auch seine Farbe prädestinierte den Dörling dazu, Waffen aus ihm gefertigt werden zu können. Seine rote Farbe ließ sich nämlich mit dem Blut und der Bestimmung der Lanze, d.h. dem Blutvergießen assoziieren, das – dem magisch-analogen Denken gemäß – die sichere Möglichkeit der Tötung des Feindes schon in sich trug.)[125] Ammianus Marcellinus bemerkt in Verbindung mit der Lanze der *fetiales*, dass das Beschmieren mit Blut bei ihrer Anfertigung eine äußerst wichtige Rolle spielte.[126] Die aus Dörling gefertigte Lanze des *ius sacrum* galt als *arbor felix*, die zur Kriegserklärung verwendete Lanze war jedoch eine *hasta impura*, d.h. eine den Göttern der Unterwelt geweihte *arbor infelix*.[127] Wenn auch nur die Lanze der *fetiales* ursprünglich tatsächlich mit Blut gefärbt, oder aus blutrotem Dörling angefertigt wurde, wurde die einstige *hasta praeusta sanguinea* später jedenfalls von der *hasta ferrata sanguinea infecta* abgelöst.[128]

Der *fetialis* prognostisierte rituell bereits zu Beginn des Krieges den Ausgang des Kampfes, weil er damit, dass er mit der den Göttern der Unterwelt geweihten *hasta impura* das Gebiet des Feindes gewissermaßen in Besitz nahm, den Feind – den seiner Meinung nach um die rechtliche Grundlage seiner Existenz gebrachten *hostis impius* – den Kräften der Zerstörung übergab.[129] (Angesichts dessen wird die Rolle der *evocatio* gänzlich verständlich – die von den Römern vor dem Angriff durchgeführt wurde – mit der sie die Götter des ohnehin schon dem Untergang geweihten Feindes nach Rom zu locken wünschten.[130])

Die starke Textbezogenheit des *ius fetiale* und der *legis actio sacramento* ist gebührend bekannt: wir wissen, dass derjenige, der auch nur den kleinsten Fehler im Text machte, verlor den Prozess.[131] Obwohl wir in Verbindung mit dem *ius fetiale* keine Kenntnisse über solche Konsekvenzen besitzen, kann mit gutem Grund vermutet werden, dass sich die Römer auch in diesem Falle nicht die kleinste Abweichung genehmigten, da diese ihrer Meinung nach die Wirkung der Worte außer Kraft gesetzt, und damit das Ergebnis des mit übernatürlicher Hilfe geführten *bellum iustum* gefährdet hätte.[132] Der Schwur war unverzichtbarer Teil des *ius fetiale*, einerseits die Selbstverdammung des *pater patratus* für den Fall, wenn er mit widerrechtlichen Forderungen im Namen des römischen Volkes auftreten würde, andererseits der Ruf der Götter als Zeugen zur gerechten Vorgehensweise der Römer und zum ungerechten Verhalten der Feinde. Im Falle des *legis actio* entspricht der Schwur dem *sacramentum*.[133] Den Eidcharakter des *sacramentum* zeigt bereits die ursprüngliche Bedeutung des Wortes eindeutig, gleichzeitig schließt es aber auch des Momentum mithinein, dass die Aussage der schwörenden Partei (z.B. die des Klägers) der Wahrheit entspricht, und somit die Behauptung seines Gegners (des Beklagten) falsch ist. Wenn es sich schließlich bestätigen würde, dass die Aussage des Klägers nicht Stand hält, so wird eindeutig, dass er einen falschen Schwur abgelegt, und somit seine *devotio sui* vollzogen hat.[134] (Auch Kaser macht glaubhaft, dass das *sacramentum* zu Anfangszeiten an das Gottesurteil angeknüpft war, hält dies jedoch für die Periode, aus der wir bereits über schriftliche Quellen verfügen, für nicht ausreichend belegbar.[135] Es bleibt dennoch eine Tatsache, dass man dem Gottesurteilswesen der *legis actio*

124 Macr. *Sat*. 3, 20, 3; Plin. *nat*. 16, 176; 19, 180; 24, 73.
125 Verg. *Aen*. 3, 23ff. Dazu siehe WAELE 1927. 175.
126 Amm. 19, 2, 6. *Hastam infectam sanguine ritu patrio ... coniecerat fetialis.*
127 Macr. *Sat*. 3, 20, 2. Vgl. Scholz 1970. 32.
128 SCHOLZ 1970. 32.
129 LATTE 1967. 122; SCHOLZ 1970. 32.
130 LATTE 1967. 125; V. BASANOFF: *Evocatio.* Paris, 1947.
131 Gai. *inst*. 4, 11. 30.
132 Liv. 21, 10, 5; 39, 36, 12; 44, 1, 10f. Vgl. ALBERT 1998. 220.
133 KASER 1949. 21.
134 WALDE-HOFMANN 1938. II. 459ff.; KASER 1949. 18; ALBERT 1998. 222.
135 M. KASER: *Das römische Zivilprozeßrecht.* München, 1966. 62.

sacramento in rem auch an diesem Punkt – mit Hilfe bestimmter analoger Folgerungen – auf die Spur kommen kann. Auf die Rolle des Eides im Prozess können wir nicht nur in literarischen, sondern in Spuren auch in späteren juristischen Quellen Andeutungen finden.)[136]

Als weitere Parallele erscheint, dass sowohl die *rerum repetitio*, als auch die *legis actio sacramento in rem*, die ursprünglich auf die friedliche Zurückerlangung der unrechtmäßig in Besitz genommenen Dinge, bzw. auf jene, die Eigenmacht und den Kampf unter sakrale und staatliche Aufsicht stellende und dadurch auf eingeschränkter Weise abgewickelte Zurückerhaltung abzielt.[137] Gleichzeitig zeichnet sich als klarer Unterschied ab, dass ehe sich die Parteien während der *legis actio sacramento in rem* dem Urteil und der Kontrolle eines von beiden Seiten akzeptierten Richters unterordnen, fehlt im Falle des *ius fetiale* aber diese Einrichtung, was dadurch eindeutig erklärt werden kann, dass sie sich bei zwischenstaatlichen Fällen nicht auf die Zuständigkeit eines Gerichtes einigen konnten – dieser Tatsache kann auch bei dem Verfahren, dem das *ius fetiale* zugrunde liegt das Fehlen eines *apud iudicem* Abschnittes zugeschrieben werden. Mit großer Wahrscheinlichkeit kann vermutet werden, dass die Römer den Richter, der zum Entscheid im Konflikt zwischen den beiden Völkern berufen wäre, gerade in den so oft als Zeugen herbeigerufenen höheren Mächten zu finden glaubten.[138]

Das *ius fetiale* ist eindeutig ein Normen-, bzw. Verfahrenssystem sakraler Art, wie darauf die mehrfache Erwähnung der darin fungierenden Personen und Götter weist, aber auch das unter die Instituten des *ius privatum* eingereihte *legis actio sacramento* zeigt enge Verbindungen mit dem *ius sacrum*. Anfänglich wurde das Verfahren der *legis actio* vor dem *rex* vorgenommen, der bereits seiner Person und seiner Legitimation zufolge als Repräsentant der sakralen Sphäre anwesend war. Später ging der *in iure* Abschnitt des Prozesses vor dem Magistrat *in concreto* vor dem *praetor* von statten, der mit Rücksicht auf seinen Aufgabenbereich auf dem Gebiete der Jurisdiktion als Erbe des Königs betrachtet werden konnte.[139] Der streng wortgetreue Schwur richtetete sich ebenfalls an die Götter, was die enge Verbindung der *legis actio sacramento* zum *ius sacrum* untermauert.[140] Wie es bereits erwähnt wurde, besteht die Handlung der *fetiales* Lattes Meinung nach nicht bloß darin dem Krieg einen magisch-religiösen Anfang zu setzen, sondern stellt auch eine Art Inbesitznahme des feindlichen Gebietes dar.[141] (Zwischen den Regeln des *ius fetiale* und den Verfügungen des Zwölftafelgesetzes lassen sich auch zahlreiche Parallelen entdecken.[142] So standen zum Beispeil dem Schuldner dreißig Tage zur Verfügung seinen Verpflichtungen gegenüber dem Gläubiger nachzukommen – dem Bericht des Dionysios von Halikarnass nach hatte der *pater patratus* nach Einreichen seiner Forderung dreißig Tage mit der *denuntiatio belli* zu warten. Der Sinn beider Verfügungen ist darin zu suchen, dass in dieser Zeitspanne noch die Möglichkeit einer friedlichen Regelung der strittigen Frage offengelassen werden sollte.[143] Sowie die diesbezüglichen Stellen des Zwölftafelgesetzes auch die Verfügung treffen, dass der Schadensverursacher in *noxa* gegeben werde[144] – auch unter den

136 Ulp. D. 4, 3, 21; 47, 52, 27; Verg. *Aen*. 8, 262ff. *Panditur extemplo foribus domus atra revolsis, / abstractaeque boves abiurataeque rapinae / caelo ostenduntur.*

137 KASER 1949. 22.

138 ALBERT 1998. 222.

139 FÖLDI-HAMZA 2006. 18; E. MEYER: *Römischer Staat und Staatsgedanke*. Zürich–Stuttgart, 1964. 38. 117; J. BLEICKEN: *Die Verfassung der römischen Republik*. Paderborn, 1975. 76f.

140 P. NOAILLES: *Du Droit sacré au Droit civil*. Paris, 1949. 18ff.

141 Serv. *in Verg. Aen*. 3, 46. *Romulus captato augurio hastam de Aventino monte in Palatinum iecit.* 11, 52. *Duces cum primum hostilem agrum introituri erant, ominis causa prius hastam in eum agrum mittebant, ut castris locum caperent.* Vgl. LATTE 1967. 122.

142 DONATUTI 1955. 31ff.; HAUSMANINGER 1961. 338; BERNHÖFT 1968. 221ff.; ALBERT 1998. 224.

143 *XII tab.* 3, 1; Dion. Hal. 2, 72, 8. Vgl. *XII tab*. 1, 6.

144 *XII tab.* 8, 6. (Ulp. D. 9, 1, 1 pr.); 12, 2. b (Gai. *inst*. 4, 75–76); KASER 1949. 185.

Forderungen des *ius fetiale* ist die Bestimmung zu finden, dass derjenige, der eine auf Rom schädliche Handlung begeht, ausgeliefert sein sollte.)[145]

Als Grundlage für die Entwicklung des *ius fetiale* und der *legis actio sacramento* diente die Absicht, den Zustand des *bellum omnium contra omnes* zu verhindern, die infolge der rechtswidrigen Handlungen zwischen einerseits den Bürgern ein-und-desselben Staates untereinander, andererseits zwischen den einzelnen Völkern, bzw. Staaten in Erscheinung tretende unkontrollierbare Eigenmacht und Eigenrache in Schranken zu weisen, und die Regelung des Streites von einem gemeinsamen, höheren Forum überwachen zu lassen.[146]

Aus dem obrigen ist eindeutig festzustellen, dass die Lanze und der Stab im griechisch-römischen Kulturkreis als ein allgemein verbreitetes Machtsymbol fungierte nicht nur bei der Zeremonie des in den Kreis des *ius privatum* gehörigen *legis actio sacramento in rem*, sondern auch bei zahlreichen Verfahren und Instituten, die zu dem Kreis des *ius publicum* und des *ius sacrum* gezählt werden können. Im archaischen Denken jedoch galt dieses Symbol nicht als eine, der Deutung bedürftigen Bildhaftigkeit, sondern als die Wahrheit, die den bezeichneten Begriff, oder die Tatsache selbst bedeutete – so auch die im Grenzgebiet des Rechtes und der Sakralität zu befindende *hasta* und *festuca*, die den Begriffen *iustum dominium* und *imperium* Ausdruck verliehen. Das oben erörterte trägt unseres Erachtens Wesentliches dazu bei, die Deutung der *legis actio sacramento* als *sacrum duellum*, d.h. als durch ursprünglich tatsächlichen – im Laufe der Zeit symbolisch gewordenen – Zweikampf ausgetragenes Gottesurteil zu untermauern.

SUMMARY

The spear as symbol in the ceremony of legis actio sacramento in rem

Traces of private fight and arbitrary action are shown by the origins of the term *vindicatio* as well as by the rod used in the procedure instead of a spear. All the more so, as Gaius also explains this with the fact that what the Romans considered truly their own was the goods taken from the enemy; i.e., obtained by fight. Besides the connection between *iudicium centumvirale* and the *hasta,* the close relation between the spear and the cult of Mars also deserves special attention, as the hasta also carried a very important semantic load. The structure of *ius fetiale*, which regulated the law of war and of peace in the archaic age, a typical example of the intertwining of peaceful and martial elements, and *rerum repetitio* as well as *clarigatio* show remarkable parallel with *legis sacramento in rem.*

At the end of the study, the following conclusions can be drawn: The sacred element of legis actio sacramento in rem can be clearly traced in the *vindicatio* procedure in the requirement of the verbatim recital of both the oath, the *sacramentum* and the *carmen*. The motif of the fight appears both in the etymology of the word *vindicatio* and in the employment of the spear. However, it is precisely the *hasta* that carries a religious extra semantic load in Roman imagination (this becomes evident from its role played both in Mars's cult and in the declaration of war, which is a part of *ius sacrum*) which cannot be disregarded in the case of archaic civil law trial. Based on all these, it can be rightly assumed that originally there was an *ordalium*, fought with weapons, that brought *legis actio sacramento in rem* to its form known today.

145 Vgl. Liv. 8, 39, 14; 9, 8, 6; 9, 10, 2ff.; Cic. *Caecin*. 98; *De orat*. 1, 181; 2, 137; *off*. 3, 108.
146 Siehe auch KASER 1966. 19; KASER 1949. 15.

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Authorities for equal treatment and opportunities between women and men in Hungary and in EU

In this essay I would like to examine the relevant regulation which determines the effectiveness of the Hungarian Equal Treatment Authority's work compared with other EU members' authorities results of which seem to be convincing.

Powers and independence

Act CXXV. of 2003 on equal treatment and the promotion of equal opportunities in Hungary (hereinafter: Act) establishes a public administrative body (hereinafter: Authority) with the overall responsibility to ensure compliance with the principle of equal treatment. In article 14 there is a taxation of Authorities' tasks. Accordingly the Authority shall

a) based on an application or in cases defined herein, conduct ex officio an investigation to establish whether the principle of equal treatment has been violated, and make a decision on the basis of the investigation;

b) pursuant to the right of claim enforcement in the public interest, initiate a lawsuit with a view to protecting the rights of persons and groups whose rights have been violated;

c) review and comment on drafts of legal acts concerning equal treatment;

d) make proposals concerning governmental decisions and legislation pertaining to equal treatment;

e) regularly inform the public and the Government about the situation concerning the enforcement of equal treatment;

f) in the course of performing its duties, co-operate with the social and representation organisations and the relevant state bodies;

g) continually provide information to those concerned and offer help with acting against the violation of equal treatment;

h) assist in the preparation of governmental reports to international organisations, especially to the Council of Europe concerning the principle of equal treatment;

i) assist in the preparation of the reports for the Commission of the European Union concerning the harmonisation of directives on equal treatment;

j) prepare an annual report to the Government on the activity of the Authority and its experiences obtained in the course of the application of this Act.

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 inserts the following article (8a) in the amended directive:

„1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

(a) without prejudice to the right of victims and of associations, organizations or other legal entities referred to in Article 6(3), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;

(b) conducting independent surveys concerning discrimination;

(c) publishing independent reports and making recommendations on any issue relating to such discrimination."

Taking the cited article of the Act into consideration it can be stated that the Authority has been empowered with those scopes of authority which are considered inevitable to protect the principle of equal treatment by the directive concerned. Moreover according to article 13(3) the Authority cannot be directed at the exercise of duties defined in the Act so the independency required in the directive is ensured – from the point of view of professionalism.

However it must be mentioned that the Authority' s budget forms an independent title at the budgetary chapter of the Prime Minister's Office, and according to the Government Decree No. 362 of 2004 (XII. 26.) on Equal Treatment Authority and the detailed regulations of its procedure (hereinafter: Decree) issued upon the authorization included in article 64 of the Act the President of the Authority is appointed and relieved by the Prime Minister on the proposal of the minister of justice and law enforcement and the minister of social affairs and labour (hereinafter: Minister) and the employer's rights are exercised by the Minister. Constitutional and operational rules of the Authority submitted by the President shall be approved by the Minister in accordance with the article 4 paragraph (1) of the Decree. So the Authority is not independent in financial and constitutional respect from the executive power which is also supervised by the Authority, what's more, article 15 paragraph (5) of the Act states that the Authority shall also proceed ex officio[1] in cases where the principle of equal treatment is violated by the executive bodies if there are no procedures under way in the particular matter before any other public administration bodies. Consequently in case of the Authority independence from the executive power is not full-scale in contrast to the status of its partner institutes called Parliamentary Commissioner for Civil Rights and Parliamentary Commissioner for the National and Ethnic Minorities Rights.

It must be mentioned that the Authority shall perform its duties set out in article 14 paragraph (1) subparagraph c)-j) in co-operation with an advisory body whose members have

1 In accordance with article 4 paragraph (1) a)-d) and article 15 paragraph (5) of the Act the Authority is entitled to conduct ex officio an investigation to establish whether the principle of equal treatment has been violated, and make a decision on the basis of the investigation in case of the Hungarian State, local and minority governments and all bodies thereof, organisations exercising powers as authorities, armed forces and policing bodies.

extensive experience in the protection of human rights and in enforcing the principle of equal treatment, and have been invited by the Prime Minister to join the aforementioned body. This body – among others – has issued a commentation[2] in connection with burden of proof in order to clear what party whose measure is said to be discriminative by the applicant shall prove before the Authority if injured party or the party entitled to assert claims of public interest has proved that the injured person or group has suffered a disadvantage, and the injured party or group possessing characteristics defined in article 8 of the Act.

Practice

It is more interesting to examine the relevant practice of the Authority in order to decide whether the Authority has been proved to be efficient in the struggle for realization of the principle of equal treatment between women and men compared with other EU members' authorities entrusted with same or similar tasks. Making easier to complete this examination article 16(1) of the Decree orders that the Authority shall be obliged to publish regularly and continually its reports, proposals, and relevant information in connection with its activities on its webpage in order to inform the society in a proper way.

With a view to discrimination on the grounds of sex on the official website of the Authority there are no more than six cases based on applications which are in connection with employment in five out of them there was a condemnatory decision reviewed in the followings.

1. In this case a woman from a village was recommended two jobs by the local Labour Court because she had been unemployed for a long time. One of the jobs was at the local mayor's office where an executive was wanted, the other place was an elementary school. Both places reasoned their negative answers in the same way: the employment was refused because the woman planed to have a baby and participated in a test-tube program. The Authority found that the mayor office violated the principle of equal treatment, but the school didn't. The reasoning of the school for the negative answer is acceptable because the job needed such qualifications that the woman did not have and she could not have taken a full-time job of continuous presence with disabled children. The Authority prohibited the mayor's office to continue the violation of equal treatment, it appreciated however that later the office offered the woman another, suitable job but that time she was already pregnant.

2. The next case from 2006 is also in connection with motherhood, pregnancy. The client had concluded fixed-term employment contract with a primary school which contract expired 15th of august 2005. In may of 2005 the client informed her employer that she was pregnant. Three days before the expiration of the contract the employer told her that the contract would not be extended, and the employer concluded a new fixed-term contract with another employee to occupy the job at the same month. According to the client her contract was not be extended because of her pregnancy and that is why she applied to the Authority. The employer explained its steps by the need of specialized educator to ensure high-level education in the school, and definitely the lack of necessary degree and qualification was the reason why the employer was not willing to extend her contract. After deliberation the Authority stated that with regard to the qualifications and the current studies of the client in accordance with the Act the argument of the employer could not be considered as reasonable explanation

2 According to the merit of this commentation charged party shall prove that in respect of the relevant relationship he was not obliged to observe the principle of equal treatment or there is no casual correspondence between the disadvantage and the protected characteristic.

directly related to the relevant relationship which explanation based on the general exemption rule implied in the article 7 paragraph (2) of the Act could have justify the legality of the employer's measure. (It should be noted that article 22 of the Act contains special exemption rules in connection with employment so it is not really understandable that why the decision did not refer to these rules instead of the general one, although the application of the proper law obviously would have not resulted in difference of decision.) The Authority also referred to the judgement of the Court of Justice of the European Communities (hereinafter: CJEC) in the case of Maria Luisa Jimenez Melgar v. Ayuntamiento de Los Barrios (C-438/99) in which the CJEC stated that where non-renewal of a fixed-term contract was motivated by the worker's state of pregnancy, it constituted direct discrimination on grounds of sex, contrary to Article 2 paragraph (1) and 3 paragraph (1) of Council Directive 76/207/EEC. The Authority applying the sanctions implied in article 16 paragraph (1) subparagraph b)-c) prohibited the further continuation of the conduct constituting a violation of law, and ordered to publish its decision stated the violation of law. Publishing the decision on the official website of the Authority and in the maintainer of the primary school was intended to prevent the further violation of law and to ensure more successful implementation of law.

3. In the background of this case there was sexual harassment. According to the client in her former workplace she was not employed longer after probation because she complained of the rough and obscene jokes and ambiguous remarks of her direct superior and her humiliating position arose from them. Manager of the unit concerned took part in the investigation and the result of the internal examination justified the client's statements. The Authority found the realization of harassment implied in article 10 paragraph (1) and the breach of the principle of equal treatment on the grounds of sex and other characteristic implied in article 8 subparagraph a), t). Reference to article 8 does not seem to be reasonable because there is a special rule of retribution according to which retribution is a conduct that causes infringement, is aimed at infringement, or threatens infringement, against the person making a complaint or initiating procedures because of a breach of the principle of equal treatment, or against a person assisting in such a procedure, in relation to these acts. Regarding real co-operation of the employer the Authority only prohibited the further continuation of the conduct constituting a violation of law.

4. In another case the Authority found out that ministry concerned and its organ had breached the principle of equal treatment by means of their order in which only women was given holiday benefit on the occasion of public holidays twelve-thirteen times in the year examined. The Authority refused the reference to the Hungarian traditions and prohibited the further continuation of the conduct constituting a violation of equal treatment.

5. In this case the Authority established that the employer charged with discrimination had violated the principle of equal treatment by means of paying lower wage to the injured party compared with the applicant's male colleagues performing work to which equal value is attributed in the same scope of activities. The Authority prohibited the further continuation of the conduct constituting a violation of equal treatment and obliged the employer to pay fine[3] in amount of 1 million HUF.

Questions of efficiency

Looking over the relevant practice of the Authority low number of the cases is so remarkable. During one and a half decade only six decisions were born altogether. In Netherlands the *Equal*

3 The fine shall be payable to the budgetary appropriation of the Republican Equal Opportunities Programme.

Treatment Commission which has similar functions made 87 decisions on the merits in the year of its establishment and in the following year, and the number of the applications filed for the Commission amounted to 122.[4] In the year of 2002 101 decisions were made. As far as the realization of the principle of equal treatment is concerned it is hard to believe that Hungary would have outrun Netherlands at this rate with regard to the available statistics. Therefore it is necessary to find out whether the difference in the practice is due to the difference in the relevant rules. In addition it is worth examining the Finnish and the Sweden equality law in this respect because many exemplary rules have been acted by these member-countries to maximize the effectiveness of those authorities which are responsible to monitor the compliance of equal treatment, what's more equal opportunities.

Lack of information

There is a considerable obstacle in the way of requisition of legal aid: in many cases the lack of information prevents people or groups who consider themselves wronged because the principle of equal treatment has not been applied to them to exercise their rights. It can easily happen that person whose rights have been violated simply is not aware of the fact that he or she has become victim of discrimination. This is not caused only by the ignorance of the law but the absence of knowledge in connection with the relevant data (e.g. pay, working conditions etc.) of the person who is in comparable situation with the victim but does not have the characteristic which serves as the basis of discrimination. Executing the task implied in article 14 paragraph (1) subparagraph g) as cited above may involve the preliminary review of the law but obviously does not comprehend the collection and information of relevant data prior to the procedure.[5]

Equality plan

At this point it is easy to see the importance of equality plan. Directive 2002/73/EC inserts the following article (8b) in the amended Council Directive 76/207/EEC:

"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

4 It must be mentioned that pressure groups may also file complaints to the Commission independently. However, they can only file complaints if they are organizations or societies that were officially founded to promote the interests of the people to whom the regulations for equal treatment apply. Works councils and service committees may also file complaints to the Commission. However, their complaints must be about unequal treatment within their own company or organization. In addition, employers or organizations may submit their own regulations to the Commission, requesting an assessment of whether these comply with the legal regulations. This is referred to as a request for „assessment of one's own actions request for an assessment of one's own actions.

5 In accordance with article 68 paragraph 2 of the Act XXII of 1992 on the Labour Code shop-steward' s committe shall be informed by the employer in all question regarding compliance with principle of equal treatment.

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.

4. To this end, employers should be encouraged to provide at appropriate regular intervals employees and/or their representatives with appropriate information on equal treatment for men and women in the undertaking.

Such information may include statistics on proportions of men and women at different levels of the organization and possible measures to improve the situation in cooperation with employees' representatives."

In accordance with Article 36 of the Act budgetary organs and legal entities in state majority ownership employing more than fifty employees are obliged to accept the equal opportunities plan under Article 70/A of Act XXII of 1992 on the Labour Code (hereinafter: LC). In pursuance of Article 76/A the equality plan which must help employers to realize the importance of equal treatment according to the preamble of the Act shall be created in co-operation with the trade union represented in default of which with the works council. Equality plan covers the survey of employee groups in disadvantageous position, for instance position of women – especially their pay, working conditions, promotion, vocational training, advantages as regards child-care and maternity. The plan shall imply annual purposes of the employer in connection with realization of equal opportunities indicating those tools, measures which are intended to serve these purposes namely the different programs with reference to vocational training, industrial safety, working conditions. In accordance with the preamble of the Act the measures mentioned shall promote the gradual increase of the representation of people in disadvantageous position, the elimination of the differences in wages for the same work or work of equal value within the employer, the fulfilment of the equal treatment in all areas of employment. Restriction of the employers' circle obliged to make equality plan and the lack of detailed rules in connection with official supervision obviously reduces the effectiveness and the importance of the plans.

Employers are not obliged to draw up equality plans in Dutch Equal Treatment Act (hereinafter: ETA), rules in reference with the operation, and decision-making of the Commission however – as we are going to see – compensate this deficiency to a certain extent.

According to the amendments of the Finnish Act on Equality between Women and Men taken effect from the beginning of 2005 workplaces employing 30 or more employees are 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 and taking these guidelines into consideration is recommended for the employers because Ombudsman is empowered to order them to recreate the plans if there is no other solution and the employers shall co-operate under pain of fine. Upon request, the employer shall without delay provide any employee or jobseeker who considers that he or she has been subject to discrimination (in connection with engaging or selecting a person for a particular job or training,[6] terms of payment or employment, working

6 In this case the report shall indicate the grounds for the employer's choice, the education and training, work and other experience of the person chosen, and any other clearly demonstrable qualifications and considerations that have influenced the employer's choice.

conditions, sexual harassment, victimization, termination of employment, giving notice, transferring or laying off the employee) with a written report on his or her procedure. The employer shall provide an employee with a report on the grounds for his or her wages and other necessary information concerning the employee on the basis of which it can be assessed whether the prohibition on wage discrimination has been observed. The shop steward or, according to what has been agreed upon at the workplace, other employee representative shall have independent right of access to information on the wages and the employment relationship of an individual employee with the latter's consent, or of a group of employees, or as agreed in the collective agreement for the branch, if there is reason to suspect wage discrimination on the basis of sex. If the information concerns the wages of only one individual, the person concerned shall be informed about disclosure of the information. The shop steward or other employee representative shall not disclose information on wages or employment relationships to others.

In Sweden the employer shall each year prepare a plan in relation to the employer's work for equality. The plan shall contain a survey of the measures (with reference to working conditions, reconciling employment with parenthood, sexual harassment, or harassment resulting from a complaint about sex discrimination, recruitment, distribution of works and positions) which are required at the workplace and shall indicate which of such measures the employer intends to commence or to implement during the coming year. A report concerning how the planned measures have been implemented shall be included in the plan for the following year. This plan shall also imply a summary report of the plan[7] of action for equal pay which contains the results of an annual survey and analysis in connection with regulations and practice concerning pay and other terms of employment that are applied with the employer, and pay differentials[8] between women and men who perform work which is regarded as equal or of equal value with the purpose to discover, rectify and prevent unwarranted pay differentials and other terms of employment between women and men. The employer shall supply an employees' organization in relation to which the employer is bound by a collective bargaining agreement, with the information that is necessary to enable the organization to collaborate in the survey, analysis and preparation of a plan of action for equal pay. The obligation to prepare these plans shall not apply where the employer had less than ten employees at the end of the immediately preceding calendar year, but all employers shall prepare the survey and the analysis abovementioned. Supervision falls within the competence of the Equal Opportunities Ombudsman. In addition there is a special rule for jobseeker and employees in Sweden: a job seeker who has not been employed, or an employee who has not been promoted or selected for training for promotion is entitled, upon request, to obtain written information from the employer in respect of the nature and scope of the training, professional experience and other comparable qualifications of the person of the opposite sex who got the job or the training position.

PUBLICITY

From aspect of equal treatment the publicity is of crucial importance. Apart from the social dialogue and co-operation with social and representative organizations it is necessary to be in

7 This equal pay plan shall state what pay adjustments and other measures are necessary to be implemented to attain equal pay for work which is to be regarded as equal or of equal value. The plan shall contain a cost computation and a time schedule with the aim that the pay adjustments that are necessary shall be implemented as soon as possible and at the latest within three years.

8 The employer shall assess whether the pay differentials prevailing are directly or indirectly connected to sex.

contact with employees directly in order to – among others – call their attention to the opportunities ensured by law. It must be not enough to operate an official website – as required of the Authority by article 14 subparagraph e) of the Act and article 16 paragraph 1-2 of the Decree – to provide broad publicity. On the other hand some occasional actions beyond legal obligations must be mentioned which are to fulfil this requirement like taking part of a nation-wide programme called "Sziget Fesztival".

In accordance of ETA the Commission may forward its findings to the ministers concerned, and to such organizations of employers, employees, professionals, public servants, consumers of goods and services and relevant consultative bodies as it believes appropriate. Commission shall issue an annual report of its activities, which shall be published. It shall forward this report in any event to the ministers and to the advisory bodies concerned. Every five years, calculated from the entry into force of ETA, the Commission shall draw up a report of its findings on the operation in practice of ETA and the Equal Opportunities Act. It shall forward this report to the Minister of the Interior. Besides the rules the Commission in considerable cases makes a statement to the press. Many professional legal periodicals publish selection from the decisions of the Commission often with comments of experts. The Commission has its own professional periodical in which current cases, follow-up of cases settled by decision and other important activities are published. Chairman of the Commission frequently appears in television, radio or press to report on the current revolutionary cases.

Victimization

Further obstacle in the way of legal aid is the fear from the employer's retribution called victimization.[9] Definition of retribution is implied in article 10 paragraph (3) of the Act which means the violation of the principle of equal treatment in pursuance of article 7 paragraph 1).[10] Apart from the general prohibition of victimization as a special legal consequence ETA states that termination of employment is invalid if an employer terminates an employee's employment in contravention of the prohibition of discrimination or on the grounds of employer's complaint about failure of application of equal treatment. An employee may invoke this rule within two months of being given notice of termination of employment or within two months of termination of employment if the employer has terminated it other than by giving notice. The invalidity of the termination of employment shall be invoked by notifying the employer. Termination of employment shall not render the employer liable for compensation. All claims by the employee in connection with the invocation of invalidity of termination of employment under this rule shall lapse after six months.

9 According to article 7 of Council Directive 76/207/EEC and article 5 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women Member States shall take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and pay.

10 In accordance with article 100 of the Hungarian Labour Code injured employee shall be employed further in her/his original job on her/his request, if termination of the employment relationship violates the principle of equal treatment. In this case employer is not entitled to apply for omission of the rehabilitation by means of redemption.

Scope of investigation

Limits of official investigation obviously influence efficiency of steps taken to counter discrimination. As we could see in the overview of the Authority's powers procedure mainly starts on an application, the Authority however is entitled to conduct ex officio investigation in case of the Hungarian State, local and minority governments and all bodies thereof, organisations exercising powers as authorities, armed forces and policing bodies if there are no procedures under way in the particular matter before any other public administration bodies.

The Commission beyond applications may also conduct an investigation on its own initiative to determine whether such discrimination is systematically taking place in the public service or in one or more sectors of society, and publish its findings. This kind of investigations may be conducted ex officio in connection with private sector provided condition abovementioned is fulfilled.

The Finnish and the Sweden Ombudsman are entitled to conduct ex officio an investigation against any kind of employers in individual cases and comprehensive survey as well.

Legal consequences

Finally it is worth mentioning the sanctions from aspect of the efficiency. In all condemnatory decisions the Authority prohibited the further continuation of the conduct constituting a violation of law. In only one case a fine in amount 1 million HUF was imposed, and in another case the authority ordered to publish its decision on the official website of the Authority and in the maintainer of the employer.

In accordance with Directive 2002/73/EC *"Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination, in a way which is dissuasive and proportionate to the damage suffered; such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration".*

As far as the legal consequencies are concerned the Authority is not entitled to order employers to pay damages for violation of the principle of equal treatment. Fine which is applicable in pursuance of the Act may be suitable in respect of the requirement of proportionability, however it cannot be applied to restore the equality between the parties,[11] so it does not mean a proper compensation for people who consider themselves wronged because the principle of equal treatment has not been applied to them. Consequently it is simply not

11 The Greek Supreme Court has applied the rules of contractual law when a job-seeker who was completely suitable for the conditions required in the public process of recruitment was not employed violating the principle of equal treatment. So the call for tenders was considered as an offer and the results of the job-seeker achieved in the competition was regarded as an acceptance of the offer consequently the employment contract was concluded. In this case the sanction is the automatic engagement starting of which coincides with the beginning of the victorious applicant's employment. From this day injured person has the right to claim for payment, its interests and also damages.

worth initiating a procedure for the victims of discrimination before the Authority. Apart from the effectiveness dissuasive effect of fine is also doubtful.[12,13]

The Commission's decisions have a high moral authority but are not legally binding. The Commission cannot force the party who has been found guilty of discrimination to comply with its decision by means of any kind of sanctions. However, in practice, its decisions are usually accepted and followed. After procedure of Commission parties quite rarely appeal to court.[14] The Commission usually recommends employers taking particular measures in order to prevent further violation of equal treatment beyond reparation of the concrete infringement. After a decision has been made, the Commission often follows up a case. For example, it may talk to representatives of the branch of industry in which the case occurred in order to build up good communication channels, which may also prevent similar cases occurring in the future.

Both the Sweden and the Finnish equality law ensure the possibility to order employer to pay damages and fine.

According to the Finnish Act on Equality between Women and Men an employer who has violated the prohibition on discrimination shall be liable to pay compensation to the affected person. Compensation shall be claimed by legal action brought at the court within one year of the prohibition on discrimination being violated. The compensation payable shall amount to no less than EUR 2 820 and to no more than EUR 9 380. The compensation may be reduced beyond the minimum amount stipulated above, or the liability to pay compensation may be lifted completely, if this is deemed reasonable in view of the employer's financial situation, the employer's attempts to prevent or eliminate the effects of the action or other circumstances of the case. When the amount of compensation is being determined, the nature and the extent and duration of the discrimination shall be taken into account. If the nature and the circumstances of the discrimination provide grounds for so doing, the maximum amount may be exceeded. The maximum may be doubled at the most. So in the Finnish law in contrast with Directive 2002/73/EC cited compensation is restricted by the fixing of a prior upper limit which may reduce efficiency of the sanction. In order to enforce the duty to provide information or to present a document needed in order to supervise observance of this act, the Equality Ombudsman shall have the right to impose a conditional fine. The Equality Board may prohibit anyone who has acted contrary to the provisions concerned of this act from continuing or repeating the practice under penalty of a fine.[15]

If a job seeker or an employee is discriminated against by the employer breaching the prohibitions contained in the Sweden Equal Opportunities Act (direct and indirect discrimination, harassment, sexual harassment), the employer shall pay damages to the person

12 According to the Parliamentary Commissioner for the National and Ethnic Minorities Rights prohibitive and restrictive sanctions which affect directly activities of employer violated the principle of equal treatment seem to be more effective compared with fines for instance withdrawal of permit, temporary suspension of activity, withdrawal of subsidies and favours, restriction of permitted activity.

13 In respect of another field of discrimination it is worth mentioning about the general policy recommendation N°7 on national legislation to combat racism and racial discrimination of European Commission against Racism and Intolerance which states that the law should provide for effective, proportionate and dissuasive sanctions for discrimination cases. Apart from the payment of compensation for material and moral damages, sanctions should include measures such as the restitution of rights which have been lost. For instance, the law should enable the court to order re-admittance into a firm or flat, provided that the rights of third parties are respected. In the case of discriminatory refusal to recruit a person, the law should provide that, according to the circumstances, the court could order the employer to offer employment to the discriminated person.

14 In certain cases it is not possible to avoid judicial proceedings (e.g. action for compensation).

15 Payment of the conditional fine and the penalty shall be ordered by the Equality Board.

discriminated against for the violation caused by the discrimination. In case of sex discrimination the employer shall also pay damages to the employee for the loss that arises for her or him. If an employer who becomes aware that an employee considers her or himself to have been exposed to sexual harassment by another employee, does not investigate the circumstances surrounding the said harassment or the measures that may reasonably be required to prevent continuance of the sexual harassment are not implemented the employer shall pay damages to the employee for the violation caused by the omission. If it is reasonable, however damages can be reduced or lapse completely. If the employer does not comply with a request of the Equal Opportunities Ombudsman to provide the information concerning the circumstances in the employer's operation that may be of importance for monitoring by the Ombudsman or to allow the Ombudsman access to the workplace for investigations that may be of importance for the monitoring, the Equal Opportunities Ombudsman may order the employer to do so subject to a default fine. An employer who fails to comply with any of the provisions in connection with its obligations to conduct goal-orientated work in order to actively promote equality in working life set forth in this act may be ordered[16] to fulfil her or his obligations subject to a default fine upon application by the Equal Opportunities Ombudsman or, if the Ombudsman has declared that the Ombudsman is not willing to make an application, by a central employees' organisation in relation to which the employer is bound by a collective bargaining agreement. The Ombudsman shall, in the application, indicate what measures the employer should be ordered to undertake, the reasons invoked in support of the application, and what investigation has been carried out.[17] The Equal Opportunities Commission may order the employer to implement other measures than those requested in the application, provided these measures are not manifestly more onerous for the employer. In the order, the Commission shall indicate how and within what time the measures of the employer shall be commenced or implemented. So in Sweden law there is an opportunity to oblige the employer to implement concrete measures which are considered proper to restore the equality between the parties of the concrete case.

Taking the lack of entitlement to imposing damages into consideration it seems that fine is not enough, similarly the Sweden solution the Authority therefore should be entitled to oblige the employers to take particular measures in order to eliminate discrimination under discussion and to avoid further breach of equal treatment.

Conclusion

As we could see above number of cases does not depend exceptionally on law. The Commission is not vested with surplus powers, what is more, its decisions are not legally binding, so it does not impose any sanction. It is obvious that there are many rather effective and useful legal constructions for example in the Finnish or Sweden equality law which constructions should be adopted to the Hungarian law in order to supervise properly the compliance of principle of equal treatment. However it is not enough to establish a proper legal environment. It is inevitable to change employers' mentality as far as women's social role, abilities, opportunities, needs and rights are concerned. It must be considered as a revolution. So the Authority cannot be only an "authority" which imposes fine at most. It should take a rather active part in

16 Such an order shall be issued by the Equal Opportunities Commission.

17 When an employees' organisation has made an application, the Equal Opportunities Ombudsman shall be afforded an opportunity to present its views.

realization of equality between sexes by means of cooperation and counselling in connection with content of equality plans and creation of proper job-evaluation system in order to eliminate and prevent unwarranted pay-differentials, follow-up of cases, continuous communication with trade unions and employers' organization, increased presence in media, publication of good practice. It is a nationwide "education" aim of which is gender mainstreaming: equality between men and women is made part of the company culture and gender equality perspective is incorporated in all policies, at all levels and at all stages.

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Zusammenfassung

In meiner Arbeit versuche ich auf die Rechtsstellung, auf die Funktion der ungarischen Gleichbehandlungbehörde massgebende Recht aus der Perspektive ihrer Wirksamkeit gegen die geschlechtiche Diskrimination in der Welt der Arbeit, verglichen mit den hollandischen, finnischen und schwedischen rechtlichen Lösungen in dem Spiegel des europäischen Kollektivsrecht zu untersuchen.

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Voting Pattern on Hungarian Parliamentary Elections in 2002–2006

Legislative elections is constitutional democracies everywhere reflect different variables of voting motivations determined by multiple factors. The most frequently observed causes are education, economic status, political orientation, religion, gender and psychological determinants often cutting across geographical areas which significantly differ from other regions.[1] The process of voting expresses citizens' sentiments primarily through political parties: the voting preferences mirror historical-economic-cultural and other determinants of political behavior.

In the post-communist transitional era, Hungarian elections show diverse results among various areas, raising the question if there are firmly embedded differences between some parts of the country. In the light of the elections returns between 1985–2006, it appears that there is more or less definite pattern. This study will examine the 2006 legislative returns and compare the results with the previous trends and especially the 2002 data, testing the validity of the findings indicating the presence of some fairly constant regional standards of voting. As a main indicator of past trends we use mostly the territorial (party) lists which provide more accurate picture of voting preferences that individual districts which in runoffs carry an indirect distortion of voters' primary preferences by other considerations.[2] For a deeper analysis of the recent 2002 and 2006 elections, we will compare the first run individual district voting outcomes, as they give the more accurate picture of the voters' real preferences.

1 For purposes of elections, generally the following regional identifications are used. There are 20 self-governing administrative units in Hungary, 19 counties („megye") and Budapest. Center: Budapest, Pest. Plainland (East): Bác-Kiskun, Békés, Csongrád, Jász-Nagykun-Szolnok. Transdanubia (West): Baranya, Fejér, Győr-Moson-Sopron, Komárom, Somogy, Tolna, Vas, Veszprém, Zala. North: Borsod-Abaúj-Zemplén (BAZ), Heves, Nógrád. Northeast: Hajdú-Bihar, Szabolcs-Szatmár-Bereg. The full names of the counties originate in the post-Trianon border changes which cut across county lines; these traditional names are still used.

2 For an in-depth discussion of regional voting patterns, see Barnabas RÁCZ: „Regional Voting Trends in Hungarian National Elections 1985-2002, East European Quarterly XXXVII, No. 4, January 2004, pp. 439-459.

1. The Background: From Reform-Communism to System Change (1985–1990)

The early signs of geographical diversity in voting appeared on the last one-party elections. The emerging voting pattern proved to be a precursor of later more steady trends on the political map of the transition. Although the 1985 election took place still under the one-party system, it became meaningful because the new Parliament became the system-changing legislature surrendering the monolithic party power in 1989–1990.[3]

The 1983 III Electoral Law prescribed a compulsory multi-candidate contest and candidates could be nominated against the official Patriotic People's Front (PPF)[4] lists. Seventy-eight of seven hundred sixty-six independent candidates, who still had to pledge to the party platform were endorsed by local electoral meetings competing with the PPF preferred delegates. Of this slate, 43 won; most of them were Hungarian Socialist Workers' Party (HSWP)[5] members.

Nonetheless the personality characteristics of there new legislators and their interpretation of the party platform reflected an increasingly emerging reform orientation within the ruling party, still dominated by party conservatives.

The electoral data about close contents and runoffs highlighted marked differences between the western part of the county (Transdanubia) and other regions with the former displaying more „independent" initiatives. This result was an early appearance of later trends on subsequent elections in a very different political atmosphere. The traditional East-West contrast or more precisely, the South-West/North-East voting axis already surfaced this time. The meaning of the modest appearance if „independents" at this juncture, however, was subdued: it claimed to reflect an attitude which „only wanted to move as far away from the party-state determined life as circumstances permit" but still stayed within the system.[APPENDIX I]

Although the 1985 multi-candidate voting displayed the appearance of territorial differences, the first multi-party democratic elections in 1990 revealed distinct territorial diversification. The „negotiated revolution" and compromise between competing elites resulted in the cornerstone Election Law (1989: XXXIX Law) which remained in force through 2006 with only minor modifications.[6] The March 1990 territorial lists reflect the embryonic trends already presents in 1985 and produced the first right-of-center conservative coalition government with the Hungarian Democratic Forum (HDF) Independent Smallholders Party (ISP) and Christian Democratic People's Party (CDPP).[7] The horizontal diversification of party preferences show that in the majority of the provinces in the West (Transdanubia), out of nine, five were won by the

3 Barnabas RÁCZ: The Hungarian Parliament in Transition (The Carl Beck Papers, Pittsburgh, 1989). See also „L'Ungheria al bivio: II recambio delle institutione politiche" in B. RÁCZ, R. TŐKÉS and I. SZELÉNYI: Partiti, Parlamento e Societa nell Ungheria post-Communista (Rome: Centro Studi di Politica Internazionale, 1990), pp. 13-32.

4 Hazafias Népfront, the front mass organization of the communist party.

5 Magyar Szocialista Munkáspárt - MSZMP.

6 Generally recognized satisfactory, the electoral law is one of the most complex systems in Europe. Citizens have two votes: one for the individual district candidates and one for 152 territorial (party) lists. Since parliament has 386 seats, the remaining 58 mandates are derived from the „fragment votes" on the basis of complex mathemaitcal formulae favorable to the entrenched party elites. For complete text of the amended law, see Magyar Közlöny (Official Gazette) 1994, 7, 20 January 1994, pp. 288-295; for a full analysis see Barnabas RÁCZ and István KUKORELLI; „The Second Generation Post-Communist Elections in Hungary in 1994; Europe-Asia Studies 47, No. 2 (1995), pp. 251-279.

7 Magyar Demokrata Fórum (MDF), Fügetlen Kisgazda Párt (FKGP), Keresztény Demokrata Néppárt (KDNP).

Associate of Free Democrats (AFD) and only three by the HDF while in all other northern and eastern areas the HDF scored pluralities. It is noteworthy in this respect that the AFD, this time was a liberal anti-communists party and their alliance with the socialists followed only a few years later in the 1994 elections.[APPENDIX II]

The highest percentage of the left votes on territorial lists and individual districts also emerged in the north and on the Plainland but not in Transdanubia. Not surprisingly, the distribution of the communists vote also conformed to the national trend. The eastern and northern parts of the country delivered more HSWP II later named the Workers' Party)[8] votes than the Transdanubian provinces and the strongest support was in Budapest with almost one-quarter (43,000) of their total.

Perceptions about the horizontal factors and their meaning vary: factual differences are palpable between the two major regions and were recognized by historians.[9] The major vote return profiles show very graphically on the electoral map of the lists. The liberal AFD and the nationalist center-right HDF color the west of the Danube area decisively but not the east and center. Average returns for the liberals were between 17% and 30%, for the Forum 23-28% and for the socialists only 9%-18% in the broad region. Both front runners scored lower in the east where socialists were relatively stronger with 10-14%.

2. The Return of the Left (1994) and Right Backlash (1998).

A tectonic change took place in 1994 with the return of the Left in governance. The reborn Hungarian Socialist Party (HSP) scored absolute majority in 1994 (54%) and entered into coalition with the liberals (AFD).[10] Once again the horizontal schisms were observable on the political map. On all 20 territorial lists the HSP came on top and the AFD second and the margin of voting for non-leftist lists generally was still higher in the west. Likewise in individual districts candidates ofther than the socialists did better in the western areas but only in one province (Vas) did the Liberal AFD gain overwhelmingly. In three (other) Transdanubian provinces, however, right-of-center candidates won more mandates proportionately, while the socialists retained their overall controlling position (Győr, Veszprém and Zala) but on the average their winning margins in these areas were smaller.

The voting returns show the HSP relatively weaker in the southwest (Vas, Veszprém, Zala) and stronger in the east. The AFD retained strength in the west especially in the southwest corner. The total balance in a more muted way still reflects the already familiar pattern of earlier regional dissimilarities.[APPENDIX III]

The pro-Left trend reversed itself in 1998 with the Fidesz-ISP-CDPP alliance's clever electoral maneuvering. While the HSP won on the lists (32,92%) against the Fidesz (29,47%),

8 Magyar Szocialista Munkáspárt II. (MSZMP) later named Munkáspárt (MP).

9 Mihály VAJDA, philosopher referred to this on election night on TV Budapest, as the „South-West-North-East axis", see Heti Világgazdaság (HVG) 6 April 1990, pp. 72-74. The concept is not quite accurate: the southwest in Transdanubia is a conservative corner, but the North-East ti pof the arch is left-dominated in BAZ province. In the middle the Budapest region is mixed. Nonetheless it is approximately correct that „north" of this axis the country is more developed while „south" of the arch is less so. The former mostly was free of the 16-17 Century Turkish occupation while the areas „south" of the arch were controlled by the Ottomans. Yet the reference to this „axis" is a helpful orientation point.

10 Magyar Szocialista Párt (MSZP), Association of Free Democrats – Szabad Demokraták Szövetsége (SZDSZ).

the runoffs and individual districts put the Fidesz alliance in power. APPENDIX IV The formerly liberal platform Fidesz underwent of a 180 degree change: it became a nationalist-conservative alliance with the ISP and CDPP and with Hungarian Justice and Life Party (HJLP)[11] background support. The relative youth of the party, the (re)discovered nationalist appeal so far hidden under the surface proved to be a strong potion for voters affected by the previous government's radical economic restructuring plan.[12]

The vote return ratios show that in the far west corner the Fidesz-CP dominated and generally in Transdanubia the Fidesz margins were higher than elsewhere. In the close race the HSP scored higher in Budapest, the north and east but the Fidesz was also stronger in the south. Overall the 1998 results reflect similar geographic tendencies observed previously in 1985, 1990 and 1994, but the configuration of the political map changed: the preference for parties which are „further from the post-communist and/or social democratic forces" became stronger in the west and in many areas elsewhere.

3. 2002: The Second Socialist-Liberal Coalition

Since the regime change, the political confrontation between Left and Right reached its climactic pinnacle in 2002. The right-of-center coalition gradually succumbed to the pressure of the dominant Fidesz-CP. Both the Independent Smallholder's Party and the Christian Democrats disintegrated as autonomous parties and were absorbed by the Fidesz-CP, which on common tickets with the HDF, stood alone in the 2002 showdown against the Left coalition. The voting results were almost the opposite mirror images of the previous 1998 pattern: the HSP narrowly outvoted the Fidesz-CP on the territorial lists but the individual districts and runoffs proved insufficient to reverse the outcome in favor of Fidesz-CP: the left coalition ended up with a narrow ten seat majority in the Parliament; the rift between the two opposing camps were the highest ever.[13]

The regional voting patterns were blurred but once again reflect ideological-economic factors. Participation was exceptionally high (70,53%) and there were regional differences: in the west there was an average of 70-75%, in Budapest 77% and the rest of the country only 65-70%. The runoffs resulted in even heavier voting: nationally 73,50%, in Transdanubia 71-77% while in the east and north-east only 65-70%. The arch of higher voting extrends from the south-west in north-east direction (Vas, Veszprém, Zala) to Borsod-Nograd over 66% to 91%. This compares favorably to the center (Plainland) and western provinces typical 51-65% or lower.[14]

The HSP party territorial list results show low returns in Transdanubia and in the Center (16-30%) except Budapest. Higher percentages were present in the north-east (BAZ, Heves, Nográd 60-80%), similar in main lines to 1998. The WP has no viable concentration except in the north-east and very low, while the AFD has some clusters in Budapest and East but polled lower in the eastern areas than in 1998.

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11 Magyar Igazság és Élet Pártja (MIÉP).

12 The economic „shock programme", submitted by Lajos BOKROS finance minister in 1995, introduced radical measures reducing actual wages and increasing taxes to provide a solid foundation for an economic recovery. Partly successful, it gave powerful ammunition for the opposition against the government.

13 Consult Barnabas RÁCZ: „The Left in Hungary and the 2002 Parliamentary Elections" Europe-Asia Studies, Vol. 55, No. 5, 2003, pp. 747-769.

14 The 1988 party lists show a similar pattern, see Jozsef MÉSZÁROS – István SZAKADÁR: Magyarország Politikai Atlasza (Hungary's Political Map) (Gondolat Kiadó, Budapest 2005) Map 26.

The Fidesz-HDF lists show strength comparable to the 1998 figures: the strongest presence was in Transdanubia especially in the west (56-70%) competing neck to neck with the HSP. The HJLP was the loser in this election – but still scored 4,51% nationally. They were weak across the map; their 1998 returns were higher and involved more votes in some central and eastern pocekts.[15] Nine out of twenty provinces preferred the HSP and AFD (popular vote 2,675,081) and eleven of the Fidesz-CP/HDF (2,306,763): the popular vote majority of the left was significant. With the exception of two (Baranya and Komárom), all left voting provinces were in the east and the Fidesz carried five in the center and east (Bács, Csongrád, Hajdu-Bihar Pest and Szabolcs).

The fluidity of voter preferences between the two rounds was corroborated on the October 2002 self-governmental and local elections when a substantial shift materialized in the Left's favor. The right conservative forces lost their lead in many areas where they prevailed in April but essentially they were still able to retain control in three western provinces (Győr, Vas, Zala); in all other areas the HSP and AFD gained the upper hand signaling again the consistency of historical trends. The reasons are varied and they are related to already mentioned economic and cultural development levels.[APPENDIX V]

4. EU Elections: 2003–2004

The European Union elections were not legislative elections but they were nationwide and thus the regional pattern is noteworthy. The 2003 accession referendum showed that 40% of Fidesz supporters but only 20% HSP voters stayed at home.[16] The outcome was substantially influenced by the right oppositions rhetoric: „The referendum is indirectly a report card on the socialist-liberal government." The national participation ratio was 45,62% with 83,76% „yes" votes.[17] Thus Hungary's voting was lowest among the ten joining countries but the approval rate was average. The regional picture shows the Transdanubian provinces (Baranya Győr, Vas and Zala) with higher than average turnout, but this did not translate into proportionately increased approval.

The participation was highest in Budapest (52,25%) and the west Transdanubia provinces of Győr (50,56%) and Vas (50,45%), the lowest in the northeastern agricultural areas, Szabolcs (36,21%) and Hajdu (36,88%). However these western provinces barely cas affirmative votes over the national average, 83,76% (Győr 85,16%, Vas 85,25% and Zala 84,25%) which should have been higher if the right side had supported the accession more. In contrast, the eastern low participating districts had higher than average „yes" votes out of the pool of fewer active voters (Hajdú 84,39%, Szabolcs 87,30%, and Borsod 86,32%). In summary, the accession referendum did not deviate significantly from the traditional regional pattern.

The spread of voting is not significantly different on the 2004 European parliamentary elections. In west Transdanubia the HSP scores were low (below 20-25%) while in south Transdanubia higher (50%), surpassing this in the nort-east (BAZ, Heves, Nogard). Unusually, in the center the HSP was also low this time as it was in the eastern areas bordering Romania. Comparing to the 2002 party lists the pattern is similar but the percentages are significantly

15 Ibid, Map. 4

16 Szonda-Ipsos Poll 15 April 2003. The same polls also indicate that 54% thought that the HSP and only 21% that the Fidesz did the most for Hungarian EU membership.

17 See National Election Committee (OVB) final report Magyar Közlöny (Official Gazette) 18 April 2003, pp. 19-24. A summary survey of relevant data about all joining countries in Népszabadság 10 April 2003.

lower.[18] The Fidesz-CP was the winner across the board, capturing all provincial capitals. Correlating to the HSP results, the south-Transdanubia, Fidesz numbers are somewhat lower as well a sin areas where the HSP was stronger, Budapest and north-east similar to 2002.

The HDF scored better in west Transdanubia as expected and also in two more clusters in Transdanubia and in the Plainland;[19] the HJLP did not show higher percentages anywhere.

5. 2006: Continued Left Renaissance vs. Return of the Right

The parliamentary election campaign was an even more negative confrontation than in 2002. Since then the country remained sharply divided between the right/left political camps, each including only one main force and several minor satellite parties. Because of the narrow majority of the socialist-liberal coalition, legislative and political confrontations remained on a peak for four years. The widening alienation in the society came to a showdown: the voters finally had to decide in which direction to move. The coalition gradually lost support after a good beginning: the less than cautious wage increases combined with international economic trends had a negative effect on the Hungarian GDP. The weakening of the HSP under prime minister Medgyessy was reversed in the „last minute" (2005) by Ferenc Gyurcsány's energetic socialist leadership challenging Viktor Orbán's charisma on the right. The conservative-nationalist forces still pursued an „anti-communist" platform, a nostalgic foreign policy, took critical positions both against the US and EU and interfered in minority policies abroad. This populist position reinvigorated nationalistic appeals in the electorate which, however, at the end rejected this path.

Since the outcome of the elections resulted in a stronger socialist-liberal coalition and weaker right-of-center, the latter was expected to refrain from the excessive hostility displayed in the aftermath of the 2002 defeat, but this optimism proved to be groundless. The stakes were raised very high on both sides: according to the Fidesz expectations, a victory would have meant a final defeat of „communists and their descendents" while the left hoped if they lose, the right will have to redefine themselves. The outcome resulted in a more pragmatic and internationalist governance which ought to balance the excesses to the populist conservative side.

There were several parties competing but only four passed the legally required 5% threshold of national vote to enter Parliament. We concentrate only on these: the Hungarian Socialist Party (HSP) and the Association of Free Democrats (AFD) on the left, and the Alliance of Young Democrats-Citizens' Party (Fidesz-CP)[20] and the Hungarian Democratic Forum (HDF) on the right. To explore the political spectrum more accurately, we will also include for analysis the long standing extra-parliamentary reform communist Worker's Party (WP) and the significant far right Hungarian Justice and Life Party (HJLP/Jobbik)[21]; also the Centrum Party which gained over 1% but remained below 5% in 2002 and all of which failed to pass the 5% in 2006.[22] We will disregard all other minor parties with votes cast below 1% on both elections.

18 The Fidesz took a more skeptical position on the referendum, consult MÉSZÁROS – SZAKADÁR: Magyarország … Map 30.

19 Ibid, Maps 27, 28.

20 Fidesz ran in electoral alliance on common tickets with the Christian Democratic People's Party – in Hungarian KDNP.

21 The HJLP ran on common ticket with the smaller right radical „Jobbik" party.

22 The Centrum and WP were below 1% in 2006.

On the April 9 first round, the socialists on territorial lists won by a narrow 1% over the Fidesz (43,21% and 42,04%), the Liberals followed with 6,50% and the Forum with 5,04% respectively. These four parties are the only ones in the new Parliament; the HJLP/Jobbik gained a respectable 2,20%, while the WP (0,41%) and Centrum (0,32%) suffered humiliating defeats. In individual districts the socialists and liberals were leading in more districts than Fidesz and after the political maneuvering for the runoffs on April 23, a clear socialist-liberal coalition win firmed up and resulted in a comfortable parliamentary majority for them albeit short of the two-thirds vote needed in important constitutionally defined questions. The HSP Parliamentary faction had 190 mandates of the total 386, the coalition partner AFD 20, Fidesz-CP/CDPP 164, HDF 11 mandates, and there is 1 independent (Somogyért).

TABLE 1: Voter Population Bases in % of Territorial List Votes

Left				**Center**	**Right**					
	1998	2002	2006	2002		1998		2002		2006
HSP	32.92	42.05	43.21	Centrum 3.90	Fidesz	29.47	Fidesz-CP/HDF	41.07	Fidesz /CP/CDPP	42.03
WP	3.95	2.16	0.41		ISP	13.15		0.75		—
SD	0.08	0.02	—		HDF	3.12				5.04
ADF	7.58	5.57	6.50		CDPP	2.59			—	—
					HJLP	5.48		4.37		2.20
	44.53	49.80	50.12	3.90		53.81		46.19		49.27

Source: Magyar Közlöny (Official Gazette) Budapest No. 59, 6 May 2002 and No. 56, 15 May 2006.

TABLE 2: The Distribution of Parliamentary Mandates 2006

Party	Seats
Hungarian Socialist Party	190
Association of Free Democrats	20
Hungarian Democratic Forum	11
Fidesz CP	141
Christian Democratic People's Party	23
Somogyért (Independent)	1
	386

Source: OVB (Election Committee), Népszabadság, 12 May 2006, p. 10.

The participation was somewhat lower than in 2002: nationally on the first round 67,83%, while on the runoffs only 69,39% (in 2002 70,53% and 73,50%). In regional spread, the voting participation conforms to the already established historical pattern and highlights traditional differences between west and east. The higher average voting took place mostly in the western provinces and Budapest while the lowest remained, as always, in the east. With a few exceptions, the figures are similar to the 2002 numbers.

TABLE 3: Participation on National Elections on Territoral Lists in %'s

	2002	2006		2002	2006
Budapest	77.52	74.25	Jász-Nagykun Szolnok	66.65	62.58
Baranya	71.82	68.00	Komárom-Esztergom	70.98	67.68
Bács-Kiskun	64.95	63.92	Nógrád	69.29	67.05
Békés	66.89	64.26	Pest	70.60	68.68
Borsod-Abauj-Zemplén (BAZ)	68.03	63.89	Somogy	67.96	65.21
Csongrád	67.33	66.26	Szabolcs-Szatmár-Bereg	65.83	65.51
Fejér	69.61	66.85	Tolna	68.53	66.61
Győr-Sopron-Moson	73.89	70.74	Vas	74.17	69.82
Hajdu-Bihar	65.96	64.66	Veszprém	72.61	68.87
Heves	70.12	66.52	Zala	70.74	67.42

Sources: Magyar Közlöny, No. 59, 6 May 2002 and No. 56, Vol. 2, 15 May 2006.

The territorial party list division among left-right parties does not register substantive deviations from the historically emerged model: the west is more dominated by right-of-center parties and vice versa the east by the left. To wit: Budapest, Baranya, BAZ, Csongrád, Heves, Jász-Nagykun-Szolnok, Komárom-Esztergom, and Nograd were left controlled in both years; the right was stronger in Bács-Kiskun, Fejér, Győr, Hajdu-Bihar, Pest, Sopron, Szabolcs, Tolna, Vas, Veszprém, and Zala, while Somogy moved from left to right column in 2006.

The electoral map numbers on the provincial level underwent only minimal changes between the two election years. As compared to 2002, about 5-10% increase is registered for the left in Csongrád only but two other provinces recorded significant decreases: Fejér which went over to the right and Nográd. There was somewhat more dynamics in the right votes: in Budapest, Békés, Hajdu-Bihar, Jász-Nagykun-Szolnok, Pest, Somogy, Tolna, and Zala. On the average there were about 5% more right votes in these areas and the only meaningful loss was in firm conservative Vas from 56,54% to 52,66%. While these changes appear to boast right successes, these numbers correlated to the national returns showing that the rights was (soundly) defeated.

TABLE 4: Territorial List Returns in 20 Electoral Units (provinces) in %'s in 2002 and 2006

	Left		Right	
	2002	2006	2002	2006
Budapest	55.48	56.68	38.54	43.31
Baranya	53.77	54.69	41.68	44.67
Bács-Kiskun	41.93	42.02	53.46	56.79
Békés	50.39	49.27	44.66	49.44
Borsod-Abauj-Zemplén (BAZ)	54.06	54.81	41.47	44.31
Csongrád	46.44	50.24	46.83	48.32
Fejér	48.90	43.83	46.75	50.11
Győr-Sopron-Moson	41.84	43.08	54.41	56.54
Hajdu-Bihar	45.09	43.67	50.47	55.12
Heves	58.47	54.32	41.12	44.60
Jász-Nagykun-Szolnok	54.30	53.14	41.64	46.76
Komárom-Esztergom	56.54	56.07	39.45	43.93

	Left		Right	
	2002	**2006**	**2002**	**2006**
Nógrád	54.07	50.28	42.48	43.22
Pest	48.50	48.77	46.69	50.22
Somogy	48.66	46.78	47.32	52.15
Szabolcs-Szatmár-Bereg	46.79	48.76	47.80	50.26
Tolna	48.30	45.10	48.01	54.41
Vas	39.02	41.35	56.54	52.66
Veszprém	44.02	46.03	51.38	53.96
Zala	42.62	42.34	53.25	57.54

Source: Author's compilation based on National Election Committee (OVB) reports, Magyar Közlöny, no. 59, 6 May 2002 and No. 56, Vol. 2, 15 May 2006

It appears then that the historical „south-west/north-east axis" is still firmly cemented and there is not much fluidity on the regional level. This is not necessarily a negative phenomenon in a democratic system, but it does need analysis and campaign planning in the especial Hungarian context.

The participation and the breakdown of voting profiles in the geographical areas reflect ideological-economic factors influencing voter behavior. The configuration of these voting figures indicate that the disintegrated Independent Smallholder's Party (ISP) hidden votes went more in favor of the Fidesz-CP than the socialists.[23]

The individual districts' candidate preferences are also not significantly different between 2002 and 2006, however, as the following cluster analysis indicates, there was some fluctuation between the parties on the voting district level. In 2006 in West-Transdanubia, the right is dominating the individual districts while in the middle, the left prevails evening out the balance. In Budapest the selected cluster districts in Buda are right but the Pest units are colored left. The south of the country is again more conservative but the east and north, particularly BAZ, are as usual left; the total balance was tipped in favor of the left candidates. While the distribution is very similar in 2002, that time the result was in favor of the Fidesz-led coalition.[24]

Comparing some data of the 2002 and 2006 elections, we will focus on certain cluster areas and investigate if there was a significant change between the right-left ratios. For this purpose, the celected clusters are those provinces/districts which since 1990 demonstrated stable (typical) voting patterns. In the cluster analysis we used the following party classifications:

Left Parties	**Right Parties**
Association of Free Democrats	Alliance of Young Democrates-Citizens's Party
Hungarian Socialist Party	Hungarian Democratic Forum
Workers' Party	Hungarian Justice and Life Party[25]

The selected cluster areas are as follows:

Predominantly left dominated	**Mostly right dominated**
Budapest/Pest/VII and VIII districts	Vas
BAZ province	Zala
	Budapest/Buda/I, II and XII districts

23 For the complete election reports, see Országos Választási Bizottság (OVB) National Election Committee Report in Magyar Közlöny (Official Gazette of the Hungarian Public) 56, Vol. 2, 15 May 2006, pp. 4465-4629.

24 OVB Report Népszabadság, 25 April 2006, p. 7, and Mészáros Szakadár Maps 9-14.

25 Since the Centrum scored below 5% in both years, their votes could not be included in the comparative scales.

In south-west Transdanubia the two provinces (megye) Vas and Zala are traditionally conservative areas (each includes four districts). In the capital city the conservative areas are in Buda (I, II, XII city districts) while in Pest, among others, the VII and VIII city districts are typical left dominated. In the north-east of the country, Borsod-Abaúj-Zemplén (BAZ) province includes 13 individual districts with heavy left of center voting. The selection responds to the traditional south-west/north-east model, but by no means suggests that these areas are exclusively right or left, however, the predominant voting records indicate that these are the most stable regions showing little or no change since 1985.[26]

A closer assessment of the two voting outcomes in the selected clusters sheds some light on the prevailing political sentiments in these geographical areas. As Table 5 below shows, overall there were no decisive differences between 2002 and 2006 numbers in the predominantly left and right provinces/districts as a whole? The differences move within 1-3±-s and hence these are irrelevant politically. This however has a meaning in itself because it underlines the extremely rigid political culture in the clusters.

TABLE 5: Voting Results %'s in First Run Individual (Clusters) Districts 2002–2006

	Left		**Right**	
	2002	2006	2002	2006
Vas	39.60	40.47	57.03	58.17
Zala	33.69	39.17	54.22	55.57
Budapest I	46.68	44.31	48.09	55.10
Budapest II	45.37	46.99	49.15	53.07
Budapest XII	44.28	44.04	50.78	55.93
Budapest VII	58.62	59.53	36.27	41.76
Budapest VIII	57.98	57.24	37.83	42.27
BAZ	51.59	55.06	41.31	44.32

Source: Author's compilation based on OVB reports in Magyar Közlöny, NO. 59, 6 May 2002 and No. 56, 15 May 2006.

Some experts foresaw the possible shift in certain cluster areas as a result of changing economic/social conditions, but this failed to materialize.[27] On the contrary, statistically meaningful changes took place mostly in favor of the left and respectively the right clusters, further solidifying their homogeneous composition. We identified two clusters showing around 5% or more voter preferences in the first round for the left as compared to 2002: in Zala 33.69% to 39.17% and in BAZ 51.59% to 55.06%. These figures are based on the cumulative province-wide percentages and we disregarded the final outcome on the runoffs because the political maneuvering inbuilt in the Electoral Law distorts the original motives of voters: lower ranking candidates can „withdraw" „in favor" of potential preferred winners.

In the right clusters the combined figures of the candidates on the first round generally did not change significantly but in the Budapest districts I, II, and XII – all dominated by the right in both years – the right candidates further increased their voting share: in District I from

26 There are some others we could use for illustration purposes but we found more fluctuations elsewhere.

27 György FISCHER, „Sikerek és Kudarcok"… (Successes and Failures in Election Forecasts) in J. MÉSZÁROS and I. SZAKADÁR: Magyarország Politikai … pp. 17–37. Also János László LAZÁNYI: „A 2002-es országgyűlési képviselőválasztás térképen" in: KURTÁN – SÁNDOR – VASS: Magyarország Politikai Évkönyve (Demokrácia Kutatások 2003), Vol. II, pp. 1028–1042.

48.09% to 55.10%, in District II from 49.15% to 53.07%, and in District XII from 50.78% to 55.47%. In these areas the numbers prove that close support to the right-of-center parties increased instead of decreased, despite the lower national averages, meaning an even more strict adherence to their views and their strong resentment of left („communist") choices.

These differences are 5% or more but sometimes fall below 5%, yet the change is noteworthy. In the left dominated Budapest VII and VIII districts, some gains appeared in favor of the right while losing the election nationally and locally as well: in District VII from 36.27% to 41.76% an din District VIII from 37.23% to 42.27%. These cases are intriguing because the overall national right-wing share declined as compared to 2002 (see Table 1); the districts were won by leftist candidates, yet the rights votes increased – meaning that a right oriented radicalization took place in spite of economic and existential hardships, poverty and jog insecurity.

A more detailed inquiry into the cluster areas on the voting district level (subclusters) provides some interesting information about the fluctuating voting preferences between 2002 and 2006. The left voting ratios did not change significantly in Vas and Zala provinces, nor in any of the Budapest districts. On the other hand, in BAZ province in about half of the 13 electoral districts the left candidates' increased their share between 5-10% in already left dominated areas (Districts 1, 2, 5, 9, 11 and 12). This is compatible with the overall left dominance in the province. Interestingly, the right wing candidates increased their share in Zala where they dominate anyway. In Buda the right increased their presence in the I, II and XII city districts but surprisingly, also in the left dominated Pest VII and VII city districts in all electoral units – yet lost to the left on the individual district level. This can be seen as a right oriented drift by some formerly left voters in the direction of nationalist conservatism. Similar phenomena also appeared in 2006 as compared to the former elections in BAZ province, where in six individual districts out of 13 the right advanced between 5-10% (Districts 1, 2, 4, 7, 10 and 11) but lost on the province level – this is a similar phenomenon observed above. These changes albeit minimal and only on the local (district) level, are still meaningful because they indicate the possibility of softening the rigid party faithfulness and these local results run contrary tot the national trend where the right declined in comparison to 2002.

6. Conclusions

In constitutional democracies horizontal divergences are more the rule than the exception in voting preferences and the examples are too numerous to cit.[28] The phenomenon is a natural one and it is an expression of the essence of democratic pluralism and diversity of political culture. The analyses in this study point to several factors causing the relatively steady voting patterns in certain regions. First, historical traditions seem to have influence on voting preferences. This is apparent in the 1985 results and can be also traced back to voting patterns in the 1945-1947 period. The Christian nationalist traditions were stronger in the west and this translated in 1990 and 1998 in a HDF and respectively Fidesz preference, partly because the region was a „winner" in the economic transformation.

On the average between 1994 and 2002, the left was stronger in the less developed areas than in some modernization driven provinces. Within the capital city in the typical worker class districts, the left retained dominance while in Buda in the affluent communities of both old and new elites, the HDF, Fidesz and the right radical HJLP prevailed. The right conservative parties retained some strongholds in 1998, 2002 and 2006 in the far western

28 E.g. most states and regions (South) in the US, Spain and Italy.

region with solid majorities. The economic playing field for Hungary being limited, the right parties advocate left principles in right packaging and the apparent conflicts often boil down to ideological confrontations instead of pragmatic alternative economic policies.

The findings about the selected clusters in this study indicate that basically the voters' preferences remained static over a long period of time. This is also related to the standard participation ratios among different areas in the country. The relationship between participation, geographical profiles and voters' motivation falls outside of the perimeters of this study and is difficult to research because of the legal constraints about privacy in voting; consequently we rely on survey data and relate these to empirically available territorial factors.[29] The observed shifts in our cluster areas do not point to a weakening of the political coherence of these concentrations of left/right forces, on the contrary, our data convey the strengthening of the ratios especially in the right camp. The phenomenon underlines the significance of the rigid confrontation of the main political ideologies in the country and we cannot conclude that there is definitely a move away from the traditional clusters. Nevertheless it is worth to note that on the sub-cluster level there were movements both for and against the continued dominant cluster status quo.

There is no space here for a detailed sociological analysis of clusters but some characteristics ought to be stated. In the Transdanubian right dominated provinces of Vas and Zala, there are deeply embedded religious traditions where Christian (Roman Catholic) values and mentality still have a broad mass basis.[30] The proximity of the area to the West, to the Austrian border, the former Habsburg influence and the absence of Turkish occupation in the 16th-17th century may also be regarded as historically influencing voter choices more in favor of national conservatism than social democracy and liberalism.[31]

In the capital city, the left-bank clusters are typical former worker-class districts where in spite of economic-social problems and concomitant unemployment, the left remained dominant and aside of some infra cluster shifts, maintained their socialist/liberal profiles. The Buda administrative districts include the affluent communities of both old and new elites and as our analysis proves, they are center-right and radical dominated; in these clusters the right vote shares even increased in 2006.

The left cluster BAZ province was historically more protestant influenced and in the post-WWII are it became the favored location of the newly developed socialist industrial centers. Because worker migration and economic improvements in the party-state era, the population basis is understandably left leaning: not only is the HSP strong but it also gave the relatively highest votes for the former reform-communists: The Workers' Party.[32] The infra-cluster numbers on the local level prove, however, that the province is not quite homogeneous and includes relatively strong right voter sub-clusters.

The assessment of these clusters must be related to the broader contex of the 2006 elections. The contest between the two sides of the political divide remained as sharp, if not sharper, than in 2002 and the confrontation continues. The balance of votes remained extremely close but it

29 See for a discussion of these issues Robert ANGELUSZ and Robert TARDOS: „A választási részvétel hazai atlaszához" (Election Participation) in MÉSZÁROS - SZAKADÁR: Magyarország Politikai Atlasza, (Gondolat Kiadó, Budapest, 2005), pp. 67-83.

30 For a political-sociological analysis of Tolna, Vas, Veszprém and Zala provinces, see György SZOBOSZLAI: Parlamenti Választások 1990 (MTA Társadalomtudományi Intézet, 1990), pp. 345-414.

31 See also Robert ANGELUSZ - Robert TARDOS, „A választási részvételi hazai atlaszához" (The electoral participation on the political map) in J. MÉSZÁROS – I. SZAKADÁR: Magyarország politikai … pp. 67-83. (Authors refer to the Iván SZELÉNYI research project about the status-consciousness in society as electoral determinant.)

32 Barnabás RÁCZ: The Far-Left in Postcommunist Hungary: The Workers' Party (The Carl Beck Papers, University of Pittsburgh 1998)

is better for the left than in 2002 and the parliamentary majority is definitely more in favor of the winners. Both sides of the political map conducted their campaign as it would be an either/or choice an the „political survival or death" of Hungary would depend on the outcome. While this appears to be an overstement, there is a grain of truth in it. At risk was the future trajectory of the country for a longer period of time. In case of the Fidesz allies' victory, the outcome would have been cast in the colors of the „ultimate defeat of communism and post-communism". Re-emerging past historical nostalgias, Hungaro-centrism and radical nationalism could have caused a deteriorating relationship with the surrounding countries and the international community at large, especially the EU and the US.

The prevailing left political forces – at least in their self-image – promise a smoother, more moderate internationalist and cooperative policy instead of confrontation. The outcome may lead to a critical self-assessment of the right policies and possibly a more effective major force could emerge on the right. The socialist-liberal victory formed the III. coalition and proved that the left policies are a stady stream in Hungary and not just an aberration originating in the party-state system. If they would have failed, the right would have put the focus on this claim and taking the governance the third time since 1990 would have played out the role of a permanent ruling force.[33]

Looking at the regional electoral map and within it, the clusters, it is obvious that in individual districts the first round voter choices were extremely close. Approximately half of the voters are leaning toward the national conservative views depicting a divided insecure society. Thus the survival and success of the III. socialist-liberal coalition depends on their ability to avoid major mistakes as well as the right parties' success in their recovery and refom.[34] The new governments' task is not easy: significant restrictive steps are needed to balance the budget for continued financial confidence of international investors; there is need to secure GDP growth, manage the entry into the Euro-zone and simultaneously to cope in substance with key institutional reforms (healthcare, welfare, and pensions).[35]

Thus the future success of the new/old left, leaning toward the Blair-Giddnes conspet of social democracy, depends primarily on the economy and on cooperation in society as well as by a „reformed" right – the future is wrought with serious uncertainties.[36] A positive outcome could dampen the deep ravine splitting society and conversely a failure would deepen the abyss and probably cause further radicalization.

The lessons of 20 years electoral patterns suggest that regional dissimilarities are deeply rooted in past traditions and cultural influences and urban-rural differences tied to relatively low population mobility.[37] It could be reasonably expected that with Europeanization, further economic growth especially in the current underdeveloped ares,[38] the breakup of traditionally homogeneous communities might speed up. Such trends combined with generational changes, public administration reforms and the replacement of the entire electoral system[39] could offset

33 Francoise FEJTŐ: "The Voters Rejected the Populist Alternative" Népszabadság 29 April 2006, p. 5.

34 "Orbán and Leadership Crisis", Népszabadság 3 May 2006, pp. 1-3.

35 Péter BIHARI: "Therapies After the Elections", Hétvége 6 May 2006, p. 2.

36 Péter N. NAGY: "Politikai Cooltura" Népszabadság-Hétvége 6 May 2006, p. 1, and Iván VITÁNYI "Mi történt?" ("What happened?") Ibid, p. 3.

37 A major migration from rural to urban areas, from agriculture to industry took place by the 1970's, see Lewis A. FISCHER and Philip UREN, The New Hungarian Agriculture (London: McGill-Queen's University Press 1973), especially Ch. Six, pp. 93-103.

38 For questions of horizontal and vertical mobility, see Zsuzsa FERGE: „The Strata in Our Society" in Társadalmunk Rétegeződése, (Budapesti Közgazdasági és Jogi Könyvkiadó, 1983).

39 For Bureaucratic and Administrative Reforms, see Oszkár FÜZES: "Changes 2007" Hétvége 29 April 2006, see also "System Reform" István Tanács, Népszabadság 18 May 2006, pp. 2-4.

deeply rooted both left and right dominance in some regions. Likewise, the seemingly ossified political party system may also undergo mutations and could ferment in unexpected ways, possibly including a stronger center party.[40]

Taking these factors into account, the identified major voting patterns, including the clusters, ought to serve as a compass in future campaigns. The clusters together provide twenty-eight individual mandates in Parliament, which could have serious significance in close elections. If the major political forces aim at changing the geographical status quo, they ought to put in place effective policies for substantive developments of hitherto losing regional areas in the transition process. This would also conform to the EU integration expectations.

APPENDIX I.

Correlated Percentages of Run-Off Elections and Close Races by Geographic Distribution (1985)

No. of Seats	Country run-offs	No. of close races	No. of Percentage	Combined and above	35%
14	Baranya	3	2	35.7	Transdanubia
20	Bács	1	3	20.0	
15	Békés	1	5	40	Plainland
26	Borsod	4	5	34.6	
67	Budapest	6	15	31.3	
16	Csongrád	3	4	43.7	Plainland
13	Fejér	2	2	30.7	
15	Győr	3	5	53.3	Transdanubia
18	Hajdu	3	3	33.3	
12	Heves	0	3	25.0	
10	Komárom	1	4	50.0	Transdanubia
8	Nógrád	1	4	62.5	North
29	Pest	4	5	31.0	
12	Somogy	0	1	0.8	
20	Szabolcs	2	6	40.0	North-East
15	Szolnok	2	3	33.3	
9	Tolna	1	3	44.4	Transdanubia
10	Vas	1	2	30.0	
13	Veszprém	2	3	38.4	Transdanubia
10	Zala	2	3	50.0	Transdanubia

Comments: Out of the 10 counties with above 35%, 7 are in Transdanubia and the North and 3 are in the Plainland and North-East.

Source: 'Az Országgyűlési Választások Eredményei'; data computed on basis of Election Results Reports, Népszabadság, 10 June 1985, pp. 2-3

40 The III socialist-liberal coalition programme in the Summer of 2006 calls of the replacement of the county (megye) system and organization of seven administrative regions instead. The plan is sweeping, needs 2/3 majority vote in Parliament and the approval of the opposition is uncertain.

APPENDIX II.

Territorial List Results (1990)

Territorial Lists	A) First Round Totals:	B) First Round Totals Budapest
Hungarian Democratic Forum (HDF)	24.73%	28.38%
Alliance of Free Democrats (AFD)	21.39%	27.13%
Smallholders Party (ISP)	11.73%	5.06%
Hungarian Socialist Party (HSP)	10.89%	12.90%
Alliance of Young Democrats (FIDESZ)	8.95%	11.52%
Christian Democratic Party (CDPP)	6.46%	5.71%
Hungarian Socialist Workers Party (HSWP)	3.68%	4.13%
Hungarian Social Democratic Party (HSDP)	3.55%	3.54%
Agrarian Alliance (AA)	3.13%	N.A.%

Sources: Magyar Hirlap, 28 March 1990; Magyar Közlöny, 13 May 1990, pp. 1082-83.
Note: Only parties which scored above 3% are listed. 4% was needed for entry to the legislature.

APPENDIX III.

The Highest Scoring Parties on the Territorial Lists (1994) (Percentages)

	HSP	AFD	HDF	ISP
Budapest	35.15	20.77	14.94	4.60
Baranya	32.09	21.75	10.27	8.48
Bács	26.70	18.07	12.82	12.36
Békés	31.93	19.35	9.75	12.40
Borsod	40.12	16.26	9.60	6.93
Csongrád	26.88	20.64	10.64	11.38
Fejér	33.37	19.52	9.85	10.42
Győr	26.75	22.21	12.68	10.89
Hajdu-Bihar	35.47	17.49	10.49	9.91
Heves	34.61	20.84	9.68	7.45
Jász-Szolnok	34.97	19.39	9.57	10.27
Komárom	38.72	22.89	8.64	8.37
Nógrád	34.79	16.61	10.41	6.23
Pest	29.88	20.69	12.00	9.62
Somogy	40.60	15.42	9.03	12.37
Szabolcs	32.64	16.25	12.00	8.79
Tolna	31.25	18.07	10.65	8.88
Vas	25.83	25.63	12.31	11.32
Veszprém	29.00	22.31	12.23	10.44
Zala	29.37	18.87	12.35	13.91

Source: János Kecskes, György Németh (eds.), Országgyűlési Választások (Parliamentary Elections 1994) (Press and Print Lapkiadó, Kiskunlacháza 1994), pp. 393-403.

APPENDIX IV.

Territorial List Returns (1998)

HSP	32.92%	HJLP	5.48%
FIDESZ-CP	29.47%	WP	3.95%
ISP	13.15%	HDF	3.12%
AFD	7.58%	CDPP	2.59%

Source: National Election Committee (OVB) reports 25-30 May 1998

APPENDIX V.

Territorial List Returns of Three Left Parties and FIDESZ/HDF (2002)

Combined left HSP-AFD-WP votes (Highest-Lowest % Returns)

	Highest Vote Range		Lowest Vote Range
Budapest	55.47%	Bács	41.92%
Baranya	54.26%	Győr	41.82%
Borsod	54.06%	Vas	39.01%
Szolnok	54.29%	Veszprém	44.02%
Komárom	56.54%	Zala	42.61%

FIDESZ-CP/HDF votes (Highest-Lowest % Returns)

	Highest Vote Range		Lowest Vote Range
Bács	49.83%	Budapest	31.57%
Győr	57.14%	Borsod	37.80%
Vas	53.48%	Heves	36.68%
Veszprém	48.07%	Szolnok	37.96%
Zala	49.48%	Komárom	36.34%

Source: Author's compilation based on National Election Committee reports Magyar Közlöny, 6 May 2002, No. 59, pp. 3785-3952.
Comments: These seemingly contradictory results indicate that the left forces did not fare the best in the west but better in the rest of the country. On the contrary, even if the FIDESZ numbers are proportionately similar, their firmest stronghold still remained in the west, where they retained exclusive control over four counties (Tolna, Vas, Veszprém and Zala).

Zusammenfassung

In den Mehrparteiensystemen ist die Differenzierung der Abstimmungsmuster und der Wählerpräferenzen natürlich. Im ungarischen Kontext können – im Spiegel der geographisch-regionalen Abweichungen des Landes – ebenfalls gewisse mehr oder weniger dauerhaft erscheinende Merkmale beobachtet werden.

Die Seiten 1-8 fassen den geschichtlichen Hintergrund in breiter Perspektive zusammen: Es sind gewisse Unterschiede zwischen dem Westen (Transdanubien) und den anderen Landesteilen erkennbar. Die Südwest-Nord-Ost-Achse bleibt als ein mehr oder weniger charakteristisches Muster bestehen.

Wenn man die Daten von 2002 und 2006 vergleicht, ist das grundlegende Muster überwiegend unverändert. Außer einer kurzen politischen Analyse der beiden Wahlen, konzentriert sich die Studie auf die sog. Zyklusräume, die vom Forscher zur tiefer gehenden Untersuchung ausgewählt wurden.

Die Clusterdaten der beiden Wahlen weisen keine entscheidenden Differenzen auf, aber die Indexe zeigen an, dass in den Parteipräferenzen eine kleinere Bewegung eingetreten ist, obwohl diese das Endergebnis inhaltlich nicht gravierend geändert haben. Die Konklusionen fassen die Trends, bzw. deren historische/philosophische/soziologische Beziehungen zusammen.

Die Studie weist in die Richtung, dass evtl. zukünftige Änderungen, wie z.B. Regionalisierung vom Gesichtspunkt der EU her, des Weiteren Generations- und demografische Mobilität, die Verbreitung der Partei bzw. die der Wahlsysteme zur Auflösung der Gemeinschaften mit geschlossener Identität führen können.

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Certain Issues of the Codification of the New Hungarian Civil Code

This study ventures to discuss the draft Hungarian Civil Code's (HCC) historical antecedents and with certain questions of the established conception's jurisprudential background. The new Civil Code Conception was created on the basis of the Government Resolution Nr. 1050/1998. (IV. 24.) amended by the Government Resolution Nr. 1061/1999. (V. 28.), which was adopted by the Codification Head Committee on it's session 8th November 2001, later published in the Official Journal by the Government's Nr. 1009/2002. (I. 31.) Resolution. The Conception takes a direction towards the unified regulation of commercial and civil law (*monist system*),[1] aiming for the creation of the accord among Hungarian private law rules, and of the integrity of private law terminology. The Conception divides the new HCC. into 5 books, namely I. Persons, II. Family law, III. Law of things, IV. Law of contracts, V. Inheritance law. This study would like to give a summary of the features of the new HCC's codification and of the main questions arisen with the development of the conception.

1. Historical background

In Hungary in the 19th century the codification of private law was considered to be executed on the path set out by the French *Code Civil*, yet this struggle met assessable political and ideological opposition. After the freedom fights of 1848-49 the Austrian civil code (*ABGB*)

1 The establishment of the monist system is primarily characteristic in modern civil codes created in the second half of the 20th century, among which the civil code of the Netherlands was taken as an example by the Hungarian Codification Head Committee. See also: A. KISFALUDI: Hollandia új Polgári Törvénykönyvének tanulsága a Magyar Kodifikáció számára – Lessons of the new Civil Code of the Netherlands for the Hungarian Codification. Polgári jogi kodifikáció I/2. (1999) 25. pp.

was introduced in Hungary by the monarch's letters-patents in 1853. In 1861 the Lord Chief Justice Conference has adopted the Provisional Jurisdiction Rules, later the national assembly in 1865 resolved on the creation of the draft Hungarian civil code. To this end, in 1871 Pál HOFFMAN worked out the draft General Private Law Code, after which the second draft code pertaining to the general part of private law has been written by Elek GYŐRY in 1880. This was followed by the draft succession law codification, which was the creation of István TELESZKY, furthermore the works[2] of László SIPŐCZ, Benő ZSÖGÖD[3] and Lajos KRÁLIK on the field of family law. The first draft of the unified Hungarian civil code by Gusztáv SZÁSZY-SCHWARZ – which stood on Roman Law bases[4] – has been finished in 1900, and was followed by a second in 1913, a third in 1914 and a fourth draft in 1915. The greatest influence on private legal judicature practice had the fifth draft code, the 1928 Private Law Bill containing 2171 paragraphs. This bill processed the results of the Swiss civil code (ZGB) and the German BGB but – mainly because of political reason – was never passed. The 19th and 20th century Hungarian private law practically leaned on the achievements of German, Austrian and Swiss civil law, as in the preparation of bills, in jurisprudence and judicial practice.[5] After 1948 the Hungarian political system had been changed, the former agricultural structure has been modified by the dividing of middle and large estates, the industrial, commercial and financial enterprises have been nationalized, and a new governmental, centrally planned economy based on marxist ideology took their place while private property was pressed out of the economy. After Stalin's death this strictly centralized economic system was changed in several steps, the effects of which can be found in the Hungarian Civil Code and other private legal bodies.[6]

Beginning from 1990 on the path of political regime change a legal system based upon market economy took the place of the earlier economical mechanisms and public regulation changes made available the modifications and reforms of civil regulation into such directions.

Following the 2nd world war the Act IV of 1959 on the Hungarian Civil Code was passed by the Parliament in such a political environment. The HCC did not possess any general parts, only seven introductory provisions, its division being: persons, ownership, contract law, inheritance law and closing provisions. The Hungarian Civil Code was modified in depth in 1967 and 1977 with respect of the political and economical changes, later, after the regime change of 1989 numerous other amendments has been made with attention to the social system based on market economy.[7] The legal harmonization obligations in connection with

2 For later codification endeavours see also G. HAMZA: Beitrag zur Geschichte der Kodifikation des bürgerlichen Rechts in Ungarn. In: Hundert Jahre Bürgerliches Gesetzbuch. (Hgg.: G. Hamza) Budapest, 2006. 3skk.

3 E. WEISS: Grosschmid Béni. In: Magyar Jogtudósok. Harmadik kötet – Volume Three (Szerk.: G. HAMZA) 99 pp.

4 A. FÖLDI – G. HAMZA: A római jog története és institúciói. – The history and institutions of Roman Law Budapest, 200611. 145. pp.

5 G. HAMZA: Le dévéloppement du droit privé européen. Le rőle de la tradition romaniste dans la formation du droit privé moderne. – The development of European private law. The role of Roman traditions in the forming of modern private law. Budapest, 2005. 78sk.

6 For private law from this era see also: A. Harmathy: Die Entwicklung des ungarischen Privatrechts. – The development of Hungarian private law In: Hundert Jahre Bürgerliches Gesetzbuch. (Hgg.: G. HAMZA) Budapest, 2006. 56skk.

7 See also for Act XIV of 1991, Act XCII of 1993, Act CXLIX of 1997. Moreover: A Polgári Törvénykönyv magyarázata. – The explanation of the Civil Code I. vol.. A személyek joga – Law of persons. (Szerk.: G. TÖRÖK). Budapest, 2006. 72skk. While HCC had only 15 modifications in the 1980s, it had more than 30 in the 1990s.

the accession to the European Union proclaimed in 1994 by the European Agreement had an especially great influence on Hungarian private law.[8]

2. Changes in the field of private law at the end of the 20th century

In recent days we may witness the sway of public law upon private law, the continuous conquest of public norms and rules in the field of private law. The features of this process could be summed up in the followings:

– the invulnerability of ownership is increasingly forced into the background (see for example the environmental restrictions),[9]
– the contractual freedom is receiving more and more limitations (e.g. for the benefit of consumers, on the field of company law etc.),
– in the field of liability the objective responsibility gains ever more ground (e.g. for nuclear damages),[10]
– legal territories get mixed (crossed fields of law): e.g. social law, labour law, economic law, agricultural law, consumer protection law,[11] environment law etc.,
– public entities directly appear in private legal relationships (e.g. the state's role in the economy, public bodies, public endowments),[12]
– the process of honouring and assessing personal rights do change and leaps into the foreground.[13]

3. The conception of the new HCC

In the followings the presentation and examination of recent changes will follow in connection with the main issues to be changed in the new Hungarian Civil Code and certain other legal institutions.

8 See also A. HARMATHY: Jogrendszerünk átalakulása és az Európai Unió joga. – The transformation of our legal system and the law of the European Union In: Ius privatum – Ius commune Europae. Liber Amicorum Studia Ferenc Mádl Dedicata. Budapest, 2001. 125skk. L. KECSKÉS: A polgári jog fejlődése a kontinentális Európa nagy jogrendszereiben. – The development of civil law in the great legal systems of Europe. Budapest – Pécs, 2004. 480skk.

9 See G. TÖRÖK – I. SÁNDOR – T. SÁRKÖZY: A tulajdoni rendszer változásai a XX. század végére. – The changes of the property sytem until the end of the 20th century. Budapest, 2001. 38skk.

10 I. SÁNDOR – G. TÖRÖK: Az atomkárokért való polgári jogi felelősség szabályozása. The regulation of the liabilty of nuclear damages. Jogtudományi Közlöny 1997/10. 417skk.

11 I. SÁNDOR: A magyar fogyasztóvédelmi jog. - The Hungarian law of consumer protection Budapest, 2003. 24skk. W.T. VUKOWICH: Consumer Protection in the 21st Century. A Global Perspective. Ardsley, 2002. 94skk. I. SÁNDOR: The Regulation of Consumer Protection in Hungary. In: Studia Iuridica Caroliensia I. (Ed. M. KAPA) Budapest, 2005. 197sk. Az Európai Unió által a fogyasztói jogok terén meghatározott követelményeket az új Ptk.-ba kell beépíteni. – The requirements defined by the European Union in the field of consumer protection should be built into the HCC. L. VÉKÁS: Indító tézisek a polgári jog átfogó reformjához. Starting thesis for the general reform of civil law. Polgári jogi kodifikáció. I/2. (1999) 5. sk.

12 See also: T. SÁRKÖZY: A köztulajdon szabályozásáról az új Ptk.-ban. – On the regulation of public property in the new HCC. Polgári jogi kodifikáció I/2. (1999) 6skk.

13 T. LÁBADY: Alkotmányjogi hatások a készülő Ptk. szabályaira. – Constitutional effects on the HCC under preparation. Polgári jogi kodifikáció II/2. (2000) 17skk.

3.1. Introductory provisions

The Conception keeps the original **introductory provisions** too, the scope of which is changed partly, since the prohibition of abuse of rights, the litigation path, the principles of good faith and fairness keep their original places, but the obligation to cooperate found its way into the part of contract law, and the legal protection of property and personal rights guaranteed by the Constitution is not regulated separately, nor the requirements of generally expected conduct and due use of rights is not declared. Thus the new HCC would not be pandect-like, i.e. the general part would not be built into the code,[14] but the legal principles of civil law would be retained.[15]

3.1.1. Good faith and fairness

Article 4 of the HCC declared the obligations of good faith, fairness and cooperation and the generally expected conduct in a particular situation.[16] All three principles aim to that private subjects at law should not only follow and formally fulfil positive legal rules, and the obligations, conditions set out by them for every special legal relationships, but to respect and adjust their conduct to social and moral rules as well. From this legislation intent, the filling of these principles with content could be done mainly in the knowledge of the actual economy and social relations, thus the interpretational role of the court of justice is especially significant, since only with the factual information and facts of the case can the conduct of the subjects of law in a concrete case be judged.

The principles good faith and fairness were entered by the Act XIV of 1991 into the HCC – originally in the wording of „good faith and honour", later by the modification of Act III of 2006 the legislator made it clear from 1st March 2006 that this definition is the same as the German *Treu und Glauben* principle. Thus the good faith and fairness should not be viewed as two separate notions, but as one, and this is the reason why Point (1) § 4 of HCC changes the wording from plural to singular: from „according to these requirements" to „according to this requirement".

Point (1) § 4 of HCC raises the requirement of good faith and fair conduct in an objective sense, which is filled with content through proper use of rights,[17] the fulfilment of the cooperation and information obligations of the parties[18] and the prohibition of the abuse of rights. Fundamentally, good faith receives a subjective interpretation in the field of *ius in rem* (e.g. the kinds of acquisition of ownership).

3.1.2. The prohibition of abuse of rights

The prohibition of the abuse of rights represents the „*chicane*" regulation in the Hungarian legal order. The regulation pertaining to the abuse of rights happens in three parts, thus Point

14 See also Z. CSEHI: Van-e általános része a magyar magánjognak? – Is there any general part of Hungarian private law? Polgári jogi kodifikáció II/1. (2000) 23skk.

15 See also L. KECSKÉS: Az új Polgári Törvénykönyv alapelvi rendelkezései. – The provisions of principles in the new Civil Code. Polgári jogi kodifikáció III/1. (2001) 3skk. For principles and general clauses see also T. Lábady: A magyar magánjog (polgári jog) általános része. – The general part of Hungarian private law (civil law) Pécs, 1997. 130skk.

16 See also A. FÖLDI: A jóhiszeműség és tisztesség elve. – The principles of good faith and fairness Intézménytörténeti vázlat a római jogtól napjainkig. Frameworks of institutions from Roman Law till our days. Budapest, 2001. 100skk.

17 Case Nr. 1995/216.

18 Case Nr. 1996/364., Case Nr. 1996/485.

(1) of § 5 of the HCC stating the prohibition with a general validity, Point (2) interpreting the contents of the abuse, while Point (3) deals with a concrete example of it's appearance in practice, the substitution of a legal statement.

The abuse of rights is materialized through two conjunctive conditions, namely the usage of rights is necessary, and that the subject at law would not use that right in accord with its intended social purpose. The delimitation of the abuse of rights and the rightful use of rights causes difficulties in many cases. Herein the use of a right means that the subject at law acts or refrains from an action which is in fact allowed by legal regulations, or has a right to act in such a way, or has a base upon factual conditions, furthermore that legal act does not stand under a concrete prohibition, interdiction. Such can be the practice or realization of a personal right or claim or a right or claim in rem, or a right based on any other obligation. The definite right's social purpose should be taken into account, meaning the abuse of right can only materialize if the legal subject wishes to use the right otherwise at his disposal for an aim which does not fall into accord with the social intent of that right. In this sphere the examination of the legal regulation origin of that right and of the social purpose on which ground this right is secured is necessary. The limitations of rights are thus craeted by the formal right's teleological bond to its purpose. Originating from viewpoint of the accord with its social purpose the concrete right being the source of the formal law, i.e. the concrete legal rule should be examined and applied to the concrete case. The HCC specifies four main sphere of cases, which are:

- The damaging of the national economy means in this case that during the use of the right public assets are injured, i.e. the use of the right results in the damage of the property of the government or local authorities.
- The use of rights directed to harass other persons is a case of the private sphere, which could be interpreted as a pair with the obligation of cooperation, visualizing only its narrowed form. Since the existence of a right does not include a total power over other persons, a creditor-debtor relationship cannot represent the total exposition of the debtor. In many cases even the legal regulation itself does declare the forbearance towards the debtor (e.g. the practice of the right of control of the houselord), but with the building in of the abuse of rights into the legal regulation it has a general characteristic.
- The impairment of legal interests of persons during the exercise of rights does represent the pretension of a mutual existence of rights and interests. The exercise of civil rights does not mean limitlessness in itself, the assertion of a definite right can only happen in accord with the legal interests of other legal subjects.
- The abuse of rights includes the case if a person would likes to assert his civil rights in a way that the benefits are incompatible with the social intent of that right, i.e. acquiring undue advantages.

A special case of the abuse of rights is when the passive conduct of a subject at law lead to the damage of other persons' interests. In compliance with this, HCC expressively mentions the abuse of rights by way of repudiation of a statement required by law. Every person is entitled to only make a legal statement if it is in a true accord with his own interests. However this right is pressed among boundaries, in case this conduct injures an important public interest or a particular substantial private interest, the court is entitled to substitute its judgment for the party's legal statement, provided there is no other way of averting the injury. In the case of repudiation of a statement there are two conjunctive conditions which should be present, thus:

- injury of an important public, or a particular substantial private interest, or the statement had been made contingent upon the bestowal of an illicit advantage,

– there is no other way of averting the injury. The averting of the injury being costly and difficult does not constitute an abuse of rights in itself, since it does not mean that it would have been otherwise impossible.[19]

In this case a court judgment may be substituted for a statement of the person abusing his rights, upon the written petition of the person interested in the making of the statement, in the final judgement of a civil process.

The new HCC's conception wishes to changes this regulation model, it does not wishes to narrow the content thereof by an exemplificative list, thus allowing free scope of judicial practice filling this legal institute with contents.

3.2. Law of persons

In the domain of the law of persons on the fields of natural and legal persons a new conception has been developed which results in modifications.

3.2.1. Artificial legal persons

The Conception in **book I.** aims to retain the constitutive force of registration pertaining to legal entities, generally introducing the pre-entity category after the example of pre-company from company law.[20] During the codification works the possibility arose that the whole legal regulation on companies should enter the HCC.[21] This motion has been dropped however, the draft code does not include such provisions and meanwhile the new act on business organizations has been adopted by Act IV of 2006, moreover by Act XLV of 2004 concerning the Societas Europa, and Act XLIX of 2003 European economic interest groups gained new regulations.[22] The conception keeps the company forms which were used until now, i.e. the unincorporated business associations, the unlimited partnerships and the limited partnership, moreover the limited liability companies and the companies limited by shares.[23] The new company act includes a significant part of American and Western European reform ambitions.[24] The regulation of foundations and societies is worked out more deeply than current provisions.

19 Case Nr. 1978/375.

20 For the regulation of legal entities, see T. SÁRKÖZY: Jogképesség – személyiség – jogalanyiság az embertöbbességek – csoportok – szervezetek körében. – Legal capacity – personality – legal subjects among humans – groups – organizations. Polgári jogi kodifikáció II/4. (2000) 3skk. For the conception of book I. see also: F. PETRIK: A Polgári Törvénykönyv „A személyek" című könyvének szabályozási koncepciója – The conception of regulation of the Civil Code's „Persons" book. (Vitaindító tézisek). Polgári jogi kodifikáció III/4-5. (2001) 14skk.

21 For a discussion of the advantages and disadvantages see: A. KISFALUDI: A társasági jog helye a jogrendszerben. – The place of company law in the legal system. Polgári jogi kodifikáció II/3. (2000) 3skk.

22 For this see: G. TÖRÖK: A magyar társasági jog alapjai. – The basis of Hungarian company law. Budapest, 2006. T. SÁRKÖZY (editor): Társasági törvény, cégtörvény 2006. – Company Act, Act on Companies. Budapest, 2006.

23 In connection with types of associations see I. SÁNDOR: A társasági jog története Nyugat-Európában. – The history of company law in Western Europe. Budapest, 2005. 123skk.

24 See e.g. G. FERRARINI – K. J. HOPT – J. WINTER – E. WYMEERSCH (ed.): Refoprming Company and Takeover Law in Europe. Oxford, 2004. J. N. GORDON – M. J. ROE: Convergence and Persistence in Corporate Governance. Cambridge, 2004.

3.2.2. Natural persons

The legal capacity of natural persons exists if **born alive** from the time of the **conceiving**. Originating from this rule of the HCC the human entity born alive is granted legal capacity, with retroactive effect. This also result in the conditional legal capacity of the nasciturus, i.e. the acquisition capacity of the nasciturus is conditional and uncertain. Many debates have been led in fields of legal expertise and politics on the collision of the right of self-determination and the right of life. This is reflected in the differences between theories of *pro life* and *pro choice*. The Constitutional Court has dealt with this issue in many of its resolutions. The CC resolution Nr. 64/1991. (XII. 17.) invalidated the decree level regulation of abortion rights, after which resolutions Nrs. 48/1998. (XI. 23.) and 22/2003. (IV. 28.) followed in this matter.[25]

It should be accentuated that on grounds of Point (3) of Paragraph 179 of Act CLIV of 1997 on healthcare an embryo coming into being outside of a human body shall be entitled for the legal status of the nasciturus from the day of its implantation, i.e. a nasciturus which came into being by way of artificial insemination enjoys the same legal status as the nasciturus conceived by a natural way from the day of the implantation into the mother's womb onward.

3.2.3. Protection of personality rights

In connection with the protection of personal rights the Conception wishes to modify the fiscal compensation with the introduction of the "impairment fee", which would take the place of the non-pecuniary compensation, with the use of compensations rules on the basis of a rule of reference, but without the obligation to prove the extent of the damages. The possibility of the new HCC governing the law of intellectual property, but this initiation has not received any support.[26]

3.3. Family law

The **second book** would provide on the field of family law, which would mean that the modification and elevation into the HCC of Act IV of 1952 on marriage, family and guardianship (hereinafter referred to as FA).[27] The Conception lays special emphasis upon the protection of children,[28] and determines its goal to provide on matrimonial property in great

25 See also G. JOBBÁGYI: Az élet joga. Abortusz, eutanázia, művi megtermékenyítés. – The right to life. Abortion, euthanasia, artificial insemination. Budapest, 2004. 215skk.

26 For this issue see Gy. BOYTHA: A szellemi alkotások joga és az új Ptk. – The law of intellectual property and the new HCC. Polgári jogi kodifikáció II/3. (2000) 13skk. V. Bacher: A szellemi tulajdon jogi védelme és a Ptk. – The protection of intellectual poperty and the HCC. Polgári jogi kodifikáció II/3. (2000) 23skk. M. Z. FICSOR: A szellemi tulajdon és a Ptk. (észrevételek és jaavslatok a polgári jogi kodifikációhoz). – The protection of intellectual poperty and the HCC (remarks and proposals for the codification of civil law). Polgári jogi kodifikáció III/2. (2001) 27sk.

27 For the conception of book III. see: E. WEISS: Családjog. A készülő Polgári Törvénykönyv családjogi könyvének a Kodifikációs Szerkesztőbizottság által elfogadott koncepciója. – Family law. The conception of the preparatory Civil Code's family law book as accepted by the Codification Committee. Polgári jogi kodifikáció III/4-5. (2001) 21skk.

28 E. WEISS: Az új Polgári Törvénykönyv és a családjogi viszonyok szabályozása. – The new Civil Code and the regulation of family relationships. Polgári jogi kodifikáció II/2. (2000) 5sk.

details in connection with family business activities.[29] With regards to the changes social habits, the partners in life legal relationship would receive a more detailed regulation, narrowing the distance between marriage and this institution, thus with the introduction of the right to alimony of the partner in life, furthermore the inheritance of the use of residence. In connection with the contact between child and parent, the legislators aimed to increase the rights of the parent living separately from the family.

3.4. Law of things

The third book is renamed from "Ownership" to "Law of things", which reflects the dogmatic approach of this field more properly. The Conception in accordance with demands arising from technical and scientific development would like to ease the thing-subject approach, moreover it aims to unambiguously draw the line between state and private property.[30] The Conception wishes to elevate the rules of condominium into the HCC, along which the regulation of fiduciary asset managements was also mentioned.[31] The ownership workgroup also examined the questions of treating animals and parts of the human body as things per law.[32]

In Western Europe the human rights of freedom worked out by the French revolution has gained emphasised ground after the Second World War. According to which in 1948 the 17th article of the Universal Declaration of Human Rights declared the freedom and security of property, to which additional provisions can be found in the 1950 European Convention on Human Rights (which was ratified by Hungary in 1992), and the International Covenant on Civil and Political Rights of the UN from 1966. The European supranational agreements expand ownership upon things, rights as well as authority licences, and upon certain enterprises' clientele, goodwill. In accordance with this the invulnerability of ownership has to manifest in its peaceful enjoyment. Restrictions to ownership may be set out only by statue law, with special regard to the question of expropriation, which may only happen with proportionate compensation and in cases of properties owned by foreign citizens, international regulations shall be applied as well.

In the European Union common law fundamentally does not intervene into the several national law of its member states, it only annihilates the restrictions of the four freedoms, moreover it provides prescriptions to avoid negative discrimination in connection with them. Thus the freedom of property receives protection within the frames of individual freedoms, foremost of all on grounds of international agreements on human rights.

In common law Article 295 of the Treaty of Amsterdam – Article 222 of the Treaty of Rome – practically fully prohibits any unified regulations on a European or a common law level, thus leaving the possibility for the member state to regulate it separately and autonomously. However this does not mean that the common law would not have created

29 For the reform of the joint estate of partners in life and marriage see: A. KŐRÖS: A házassági vagyonjog korszerűsítésének elvi kérdései. – The theoretic questions of the modernization of the law of marital property. Polgári jogi kodifikáció III/2. (2001) 7skk.

30 K. PÁZMÁNDI: A Tulajdoni (dologi jogi) Munkacsoport 2000. szeptember 13-i üléséről. – Of the session 13th September 2000 of the Property (law of things) Workgroup. Polgári jogi kodifikáció II/3. (2000) 38. o.

31 I. SÁNDOR: A vagyonkezelői jog szabályozása. – The regulation of asset management. Gazdaság és Jog 2000/3. 3skk., N. CSIZMAZIA – I. SÁNDOR: A bizalmi (fiduciárius) vagyonkezelés és a Ptk. reformja. – The confidential (fiduciary) asset management and the reform of the HCC. Polgári jogi kodifikáció 2002/4. 10skk.

32 See also: K. PÁZMÁNDI: Ülésezett a Tulajdonjogi munkacsoport. – The Property Law workgroup's session. Polgári jogi kodifikáció III/2. (2001) 31. o.

special regulatory spheres, which have an influence based upon legal harmonization obligations on the law of things regulations of member states.

On 26th May 1989 the European Parliament has adopted a Resolution (HL C 158., 1989.5.26., 400. p.) on the creation of a unified European civil code. Taking into attention that the differing legal systems' harmonization is needed for a unified common civil code, this could be a longer process. Undoubtedly the approach of private law and common law has begun on certain fields of law, especially on grounds of sanctions (invalid legal transactions, obligation for compensation, etc.) connected to common law regulations. Related to this are the Articles 100, 100A, 130R and 235 of the Treaty of Rome (Arts. 94, 95, 174 and 308 according to the numeration of the Treaty of Amsterdam) – widely interpreted – partly create a possibility for this, although the concrete legal ground is till missing. From the viewpoint of the law of things this could mean new regulatory enactments on certain parts of this field, since mostly only areas relevant to the four freedoms (thus contract law, damages independent of contracts) are in focus. In addition to this, the legal unification in contract law affects the area of the law of things as well, since the contract law unification – in connection with legal institutes important from the aspect of ius in rem – results in the "smuggling" of new rules into the field of ius in rem too (e.g. time-share use of real estates, questions of period of limitation regarding cultural goods, etc.).[33]

We should dedicate especially great attention to public law restrictions of ownership which appear as obligations of the owner towards the society. Ownership may only be restricted in special cases and in the public interest, thus every constitution is eager to circumscribe the options well thereof, nonetheless it is indisputable that in the latest period the scope of ownership – as the most important civil law – is shrinking. In addition to this private legal restrictions from olden times are also well known, these most of all appearing as neighbours' servitudes. The French *Code Civil* treats these as a kind of servitude, which was created by the owner of his own land by free will. In contrast to this the German and Swiss civil codes treats these rights not as servitudes, but places them among the rules of the ownership. In comparison with this a middle-way-system is defined when we don't talk about a restriction born out of the free will of the owner, neither about an *a priori* legal restriction, but about a legal prescription of *endurance*. We can see that in the case of undue use of rights' prohibition or at least its lack of support is an implicit restriction of ownership. Article 226 of BGB explicitly provides that the exercise of the right shall not be carried out if its sole purpose is to injure an other person. Article 2 of the Swiss ZGB prescribes that every person shall exercise his rights in good faith and the pronounced undue exercise of rights is not supported by law.

In connection with the public restrictions of the ownership a legislation question should deserve some attention, namely that how are *plena potestas* and ownership restrictions regulated on the levels of definition and its content. By WINDSCHEID's pandect law definition „Das Eigentum ist als solches schrankenlos, aber es verträgt Beschränkungen."[34] Highlighting a small part of the debate appeared in the 20th century in the Swiss and German technical literature, PETER LIVER has ascertained on the grounds of this definition that the ownership is limitless and total reign over a thing according to its definition, but not to its content.[35] The owner's right to use and dispose of his property can be realized with the restrictions of the legal system and it belongs also to its content. LIVER's formal-abstract ownership-definition was

33 I. SÁNDOR: A dologi jog története és legújabb fejlődési tendenciái. – The history and latest tendencies of the law of things. Állam- és Jogtudomány XL/3-4. 283. skk.

34 B. Windscheid – Th. Kipp: Lehrbuch des Pandektenrechts. – Manual of the pandect-law. 9. kiadás. Frankfurt a. M. 1906. 857. p.

35 H. Rey: Dynamisiertes Eigentum. – Dynamic property. ZSR NF 96 (1977) I. HB. 65. p.

domination for a longer time and from this ARTHUR MEIER-HAYOZ arrived to the conclusion in the 1966 *Berner Kommentar,*[36] that the ownership's definitions immanent feature is its fundamental limitability and not the many several special restrictions.[37] With this he renewed the forty year earlier published theory of immanency represented by ROBERT HAAB and ERWIN RUCK according to which the obligations that burden the owner on grounds of neighbour's servitudes and public regulations are the immanent components of the definition. Consequently the content and the restrictions of ownership belong to its definition. LIVER found the immanency theory false in a formal-logical approach, since according to his interpretation the fundamental contents of the definition is the use of the thing, the possession and the freedom of disposition, and not the denial of these, thus the restrictions do not belong to the definition.

From an other approach it seems that the restriction of ownership does not only appear in endurances, but in positive obligations as well. These obligations prescribing activities – let us think about e.g. building obligations for real estates – *eo ipso* set out active obligations. As a whole we can ascertain that we have to delimit from each other the one definition without restrictions, content and static and the other dynamic definition treating these restrictions as immanent parts. From REY's ideology we can arrive to the conclusion that the choice of definition in itself includes whether the legislator would realize a dynamic or static ownership conception, while if we choose the ownership construction with itemized restrictions, moreover with performance obligations, this prevents the legislator to realize newer, further restrictions in connection with the ownership.[38]

The most radical interference into the private autonomy of private property is the expropriation. According to Point (2) of Par. 13 of the Constitution of Hungary the ownership may be expropriated in special cases and in the public interest, for the reasons and in the manner prescribed by law and full, unconditional, and prompt compensation shall be made for expropriated properties. The expropriation is thus principally a constitutional question, since it represents the strongest possibility of restriction of the right to property, beyond which civil law only designates the detailed rules. Both in time and hierarchy the constitutional principles and guarantees should be realized firstly (set out by the Constitution and law-decree 24. of 1976 on expropriation) after which the civil law regulations can follow.

Pertaining to expropriation it bears a fundamental theoretic importance to designate the interest of which this very exceptionally measure can be made. According to the present regulation this can ensue because of public benefit, public interest. The appropriate compensation, that is the proportionate indemnification is an important question too, in connection with which beyond the owner we should not forget about third parties holding a right on the property. In relation to this problem we can found a general tendency that the expropriation creates an unencumbered ownership, meaning that third parties' rights on the property will be terminated as well. This shall apply for contractual rights pertaining to the property under expropriation.

3.5. Law of obligations

The law of obligations provisions is included in the **fourth book** of the Conception, which is divided into a general and a special part. In addition to the current HCC, the general part

36 A. Meier-Hayoz: Berner Kommentar. IV/1. Sachenrecht, System. Teil und Allgem. Bestimmungen. – Commentar from Bern. IV/1. Ius in rem, System. Part and General Concepts. Bern, 1966.

37 H. Rey: Dynamisiertes Eigentum. – Dynamic property. 66. p.

38 H. Rey: Dynamisiertes Eigentum. – Dynamic property 71. p.

includes facts being sources of obligations and rules pertaining to trade and commerce has been built in as well. Generally private autonomy is preferred, the state intervention becomes exceptional, this being implemented chiefly at exposed contractual positions (e.g. consumer contracts, employment contracts,[39] general terms of contracting). The rules of the obligation of cooperation, moreover the conclusion of contacts, contracts being null and void,[40] the breach of contract,[41] and the compensation for damages[42] is set out in the general part of this section. Consumer contracts and the characteristics of the electronic commerce contracts have been built into the general part as well.[43] The regulation of the reservation of the ownership as credit security has emerged too.[44] In the regulation of compensation for damages the option of exculpation is modified (it can only be applied if the damages were caused by an unavoidable reason and at the time of contracting it was not to be calculated with), and the „reasonable foreseeability" is built into when ascertaining the damages.

In the general part of the law of obligations the rules pertaining to consumer contracts between economic entities and natural persons are set out usually for the benefit of the later.[45] The special part of this section modernizes the several types of contracts, beyond which a few contract types which were developed by business life (e.g. leasing)[46] are quoted and provided upon here. Beyond which the material law of securities and liability for productions is included in the new HCC.[47]

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39 For this see Gy. KISS: Az új Ptk. és a munkajogi szabályozás, különös tekintettel az egyéni munkaszerződésekre. – The new HCC and labour law regulations with special attention to labour law rules and single employment contracts. Polgári jogi kodifikáció II/1. (2000) 9skk., A. KISFALUDI: A Polgári Jogi Kodifikációs Szerkesztőbizottság a munkajog és a Polgári Törvénykönyv viszonyáról. – On the relationship of the Civil Law Codification Editorcommittee and the Civil Code. Polgári jogi kodifikáció II/1. (2000) 20skk. T. Prugberger: Az új Ptk. és a munkajogi szabályozás, különös tekintettel az egyéni és a kollektív munkaszerződésre. – The new HCC and labour law regulations with special attention to labour law rules and single employment contracts. Polgári jogi kodifikáció II/2. (2000) 19skk.

40 L. VÉKÁS: Javaslat a szerződések általános szabályainak korszerűsítésére. – Proposal on updating the general rules of contracts. (Vitaindító tézisek az új Ptk. koncepciójához – I-II. rész). Polgári jogi kodifikáció III/3. (2001) 3skk. és III/4-5. skk. A. MENYHÁRD: A jóerkölcsbe ütköző szerződések. - Contracts in collision with good morals Budapest, 2004. 248skk.

41 Ld. ehhez A. MENYHÁRD: Felelősség szerződésszegésért. – Liability for contracts. Polgári jogi kodifikáció III/3. (2001) 25sk.

42 Ld. ehhez T. LÁDADY: Felelősség a szerződésen kívül okozott károkért és a biztosítási szerződés az új Polgári Törvénykönyvben. (Vitaindító tézisek). – Liability for damages independent of contract and the insurance contract in the new Civil Code. Polgári jogi kodifikáció III/4-5. (2001) 40skk.

43 Ld. ehhez J. BÁRTFAI – E. BOZZAY – Á. KERTÉSZ – L. WALLACHER: Új szavatossági és jótállási szabályok. Fogyasztóvédelmi jogharmonizáció a polgári jogban és a polgári eljárásjogban. – New warranty and express warranty rules. Harmonization of consumer protection rules in civil law and civil process law. Budapest, 2004.

44 O. SZEIBERT: A tulajdonjog-fenntartás mint hitelbiztosíték. Polgári jogi kodifikáció II/4. (2000) 10skk. – The retaining of title of ownership as a credit securement. For securing claims see also M. KAPA: Ha az adós nem fizet …, – If the debitor does not pay... Budapest, 2006. 23skk

45 I. KEMENES: A gazdasági szerződések követelményei és az új Ptk. – The requirments of economic contracts and the new HCC. Polgári jogi kodifikáció III/1. (2001) 9skk.

46 See also T. PAPP: Atipikus szerződések. – Atypical contracts. Szeged, 20062. 6skk.

47 For this theme see: L. SZÉCSÉNYI: Az anyagi értékpapírjog és az új Polgári Törvénykönyv I-II. – The material security law and the new Hungarian Civil Code I-II. Polgári jogi kodifikáció III/2. (2001) 18skk. és III/3. (2001) 14skk.

3.6. Inheritance law

The **fifth book** includes the succession provisions. According to the Conception the options of redemption of the widow rights of the surviving partner in marriage are increased. Furthermore, the testamentary freedom is granted a greater liberty, partly by the dilution of content restrictions, partly by erasing some formal requirements.

According to the Conception, in the course of the interpretation of the testament the principle of will gains ground with the importance of the will of the testator against formalities.

4. SUMMARY

The new Hungarian Civil Code's conception bearing in mind the codification examples of West Europe in the last 50 years could result in the creation of a private code appropriate for the conditions of a modern market economy. The new civil code will be a codex, which will secure some detailed regulations pertaining to certain legal fields beyond the most important private law principles. The codification process is at the preparation of the wording of the legal norms, thus as per expectations, after the necessary social negotiations it can soon arrive before the parliament as a bill of rights.

ZUSAMMENFASSUNG

Hypothesen über die Kodifikation des neuen ungarischen Zivilgesetzbuches

Die Schöpfer des Konzepts des neuen ungarischen Zivilgesetzbuches haben sich in den letzten fünfzig Jahren Kodifikationsmuster aus West-Europa vor Augen gehalten, die den Verhältnissen der modernen Marktwirtschaft geeigneten Lösungen enthalten. Das neue ungarische Zivilgesetzbuch wird ein Kodex, der außer der Schaffung der grundsätzlichen bürgerlichen Rechtsregeln auch für andere Rechtsbereiche ausführliche Regeln erteilt. Das Kodifikationsverfahren ist in die Phase der Abfassung der Rechtsnormen gekommen, so wird voraussichtlich – nach den notwendigen Abstimmungen, Verhandlungen – bald als Gesetzesvorlage vor das Parlament kommen.

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Why has the General Land Consolidation no Chance in Hungary?[1]

The political decision maker has awareness of the over-all – historical and present, national and international – experiences, regarding the regrouping agricultural lands , while the home professionals cope with the strategically challenges of this issue (Dorgai, 2004.). What's the reason that, considering this problem without bias, within a reasonable time limit there is hardly any chance for the general land consolidation in our country?

I. It derives from land policy, – for which the regrouping of agricultural lands is one of the basic institutions – that the land consolidation is determined by plenty of factors. For this very reason the whole system of land consolidation, namely such decisive factors of it like the aims and instruments, functions, technical-, social-, economical effects etc. are created by the quality of land policy. History knows two kinds of land policy: the worth-based, which enforces public interest, and the utilitarian, which refuses public interest. The last one is one-sidely built on purpose rationalism (see Weber, Max) and nowadays it is represented by the neoliberal land policy to be served the interests of capital utilization. (Tanka, 2004: 22-40). These two kinds of land policies are also system-creater features in environmental economy. (Oláh, 2006. vol. IV. 78-79.)

Since 1988 our land relations have been ruled by the neoliberal land policy, which builds the international agrarian capital's new living space, and is based upon Hayek's theory on land capital system. Its main function is excluding the civil value patterned land reform, refusing the model of family farms and instead of that, it formed the state socialistic large-scale farms to capital ownership's latifundium.

Its system of institutions has some decisive elements, as follows:

- The unrestricted farm size, which was institutionalized by Land Act, is just, on the land-user's financial power depending, the optional number of farm holdings; with accumulating

1 Summary of a lecture made by the author at the International Conference on a Rural Development Concept for Central and Eastern Europe, European Council of EU, RALF (Regrouping of Agricultural Land and Forest), Lacu Rosu/ Gyilkos-tó, 16-17 October, 2006

the landed property's and leasehold's legal titles and with abolishing the size limits regarding the leasehold (see the part tenancy and partial cultivation) as well with abandonment of the maximum of acreage.

- In land mobilization the eliminating of the executive power's official and other instruments, winding up the administrative control and sanctions.
- Abolishing directly or indirectly (it was fulfilled often with informal legal technics, e.g. in case of "pocket contracts") the limits of foreign acquisition of the landed property. In this process have become many institutions important:
  - The Land Act (Act LV of 1994 on Arable Lands) didn't incorporated the institution of the Treaty on Association (article 44. /8/), which limits the EU and foreign citizen's and firms' leasehold, according to EC law. From 1992 it could have prevented in itself the foreigner's speculative and illegal acquisition of land. Conversely, the paragraph 23 of the Hungarian Land Act has established a legal ground for any kind of foreign investors to maintain and manage an unrestricted sized large-scale farm from abroad, without settling in Hungary.
  - Paragraph 7 of Land Act doesn't require, inconsistent with the Treaty of Accesion and community law, the settling of foreigners for entrepreneurial purpose, in order to be require land ownership in Hungary. Instead of it the law is satisfied with the declared intention by the entitled person, regarding the settlement. Moreover, in case of failure of intention, the law doesn't afflict the invalid contracting foreigner with losing his landownership. In addition, the paragraph 3 has opened a roundabout way also for foreign legal entities to acquire landownership by establishing a one-man company as an independent undertaking.

That is why the 7 years derogation (the temporarily excluding of the foreigner's acquisition of landownership) from the EU became a fiction: length of time in itself is just symbolic (from 2008 the exemption could be terminated by EC), while since our membership in EU the foreign legal person has become entitled to acquire landownership, contrary to the Hungarian co-operatives and companies. (This legal fact, in itself must be considered a hard discrimination against the EC law.) The institution is operated successfully: these days – in spite of the obstacle on land property acquisition – nearly one third of the agricultural land fund is owned by legal persons.

  - The under-lease for integration, breaking through the traditional ban on under-lease of landed property, became the privilege of the foreigner's financial power, which curtails the landowner's right of disposal (mostly relating to parcels owned by proportional share owners) to the benefit of the investor and, in spite of the dispersal of small-plot, insures unified large-scale farming. Also the foreigner investor's advantage has – by right of plantation or setting-up a fish-pond, recently on the ground of animal keeping plant or upkeep fish-pond – pre-emptive lease right priority over any other leaseholder, which is also the guarantee of the prior acquisition of land.
  - The Land Act hasn't enforced – in spite of the Treaty of Accession and EC law – since our membership of the EU the prohibition of marketing person's negative discrimination in farming lease's market: instead of guaranteeing for any lease-holder the same cubic measure for leasehold, not only preserves co-operative's and company's large-scale farming advantages (instead of 300 hectare assuring 2500 hectare), but with the extension of this farm size even gives another legal title for them. (By the National Land Fund given 50 years leasehold doesn't count in this restriction.)

- In the institutional system of Land Act, which establishes landlordism, the legal order of pre-emption and pre-emptive lease fills the part of "central controls", which ensures getting landed property and tenure of a land for in any country living abroad, foreign and national,

big farming proprietors of the firms, while depriving local farmers of the possibility for acquiring landownership and leasehold.

The techniques of ordering is here the cynical using of "virtual law": according to the law the so called local person is authorized to the prior right of emption and tenure of land, who perhaps has never been in Hungary, but with share or stock he is proprietor of such a leaseholder legal entity (company), which has its seat in the settlement in conformity with the farm's position (or in 15 kilometres from the settlement's administrative boundary). This way any other claimants can get only those lands, to which the latifundium's proprietor doesn't have a claim at all.

- In the service of the supranational agrarian capital has leading part also the neoliberal land policy's other institutions having some significance beyond the Land Act but is entwined with it.
  - Accordingly, the National Land Fund (NLF) has not carrying a public stock of land's economy, but its task is to increase the stock of land's system of big estates by state means. This function is guaranteed thereby, that any land transaction (selling, leasing) of the NLF has legal effect only by exercising pre-emption and pre-emptive lease rights binding based on the Land Act. It means that also this agency is liable to offer the land to the large estate's proprietors of the firm. The resource is provided mostly to them by the „life-annuity for the land"-program, which in the mean time is amoral and illegal: it improves, for acquire the landed property at symbolic price, misusing the sorry plight of the small farmers, who can't get to their land in kind and can't to sell it in the market, moreover who are exposed at their old age and pauperism, while it cogitate for the death of disposer by the law amount and the exclusion succession.

The EC law won't have such an agency, but guarantees the prompt payment of the real market price for the owner who transferred his land property by his early retirement for third person.

- The land policy realises one of the most serious breach of the Constitution by state „misappropriate" of lands owned by share proportional owners. The state under the rule of law guarantees the constitutional remedy of private ownership was obliged to transfer possession for the justified owners this -3,6 million hectare- land fund in kind after 1989, but this happened in the small measure possible in spite of the 16 times repeated modification of the 1993:II. so far. The real reason of the public administration' default was besides the commitment of the political legislative the aim, that also this determining land fund (being more than the half of the 5,8 million hectare gross land) fortify the system of large estates by the way of giving possession transferring property „freezing" and ingenious techniques for investors of solid capital.

It is not acceptable as settling the claim of ownership, that nowadays is doubtful „only" the portion of 1,5million hectare land , because the undivided common possession curtails the property disposal in like manner, as the converting of private property.The breach of the constitutional is added to by the sharing out the extant lands between owners according to „rest-principle", moreover that the person, who can't come by the landed property in kind, is entitled only to 80 000 HUF/hectare indemnity. Because the deprivation of property arises here forced, by dysfunction of public administration, it means expropriation by rights, that' why total, immediate, based value proportional – also equal to the real market price – recompense were due.

- In rejecting of the value based land policy has got brunt the Treaty of Accession and the community and national agricultural subvention based on the reforms of the Common Agricultural Policy (CAP), which is wholly opposite to the constitutional aims of the CAP. Between the latter, is also decisive, that the CAP intends to „provide appropriate living standard for the agricultural population, in the first place by increasing for living person's from agriculture per capital income." (Treaty of Rome 33. paragraph 1/b.)

The living standard's guarantees is given up in advance in one respect – by the seriously disadvantage subvention rate compared to the 15 EU entitled –, that gives only the quarter part of the allowance guarantees the elimination from the competition and being forced to on the title of first pillar of CAP. This hard discrimination guarantees that 91 per cent of present land cultivators, mainly small and medium farmholders are forced to leave agriculture, utmost within 10 years. On the other hand, the concept of viable farms–like the lower threshold of the right to investing-developing subvention – is quantified in 2 European Size Units by the cabinet (in national competence). It can give subvention only for – in view of farmer's number – 9 per cent of the farms, while the 91 per cent of them is precluded from the production for the market and from the competititon, so these are „condemned to death". („…in 10-15 years distance , estimating by the land use, for 70-80 000 farms /private and collective/ it's possible, to become steady viable." Dorgai, 2004: 87.)

II. The land policy's contents, which can describe here only by some elements of the system, determines the vital conditions of the land consolidation. Nowadays in the country – by the institutional system directed by political purposes – there is going on the annihilation of the agricultural population, which is shrivelled to 15 per cent compared to the rate of 1989, there is distraction of villages, devastation of the rural area and environment. (See shattering of the values of the administration, traffic, health, education and social provision etc. on the title of necessary reforms). The „general" character of the land consolidation means in reality not only a technical category (namely the extension of it to the whole settlement or to it's separable part), but it is a quality mark too: it must be in service of common goods and life qualities with it's effects.

Today the chances of the redistribution of landed property inland is a light year away from the regrouping principles of EU, to be served public interests, which have become essential part of the CAP. Not the techniques (the efficiency-mending, which is available with increasing of the board size) but the enlargement of the employment by developing of agriculture, the establishment of young farmer's main professional farming, the reserving of the rural population, the environmental protection and nature conservation, and so – between of the reserving of the cultural values – the minority autonomy and the ensuring of ethnic language's survival are in the focus of them. (EU-doc. 1–2.)

Our land policy, considering to the European solidarity and ecosocial agricultural model, can't use the obvious means either for self-defence to stop the global capitalist regime eliminating the sustainability. For example, the need for agricultural farm regulation recently was recognised, but the land policy doesn't want to limit the extent of large estate system, utmost only in the future would be prohibited the legal maximum exceeded increase of the permitted land size. (Kapronczai, 2006: 42)

The only realistic break point is rather clear: in land policy it needs for fundamental change to overcome the value based land policy and to adoption legal institutional system of the EC law. Without this the general land consolidation won't represent the public interest, so can't vindicate to social general agreement and support. Consequently, if the land consolidation is compelled from the very beginning to give up the quality of life in the Hungarian rural area, the element needs of the nearly one million private farms and two million population concerned in agriculture, than the society can have only opposite interest in the issue of „land fusion" serving exclusively the profit increasing of big farming estates. This latter process can't be a public affair, nor the renewal of the national agriculture and rural countryside, but reserves only the global agrarian capitalist regime in Hungary.

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Zusammenfassung

Die Fachliteratur verengt die Frage der Umverteilung des Eigentums auf das technische-wirtschaftliche Bedingungsystem der institutionellen Modernisation. Aufgrund der Erfahrungen der Systemforschung erweitert der Verfasser die Bestimmtheit der Eigentumsumverteilung auf gesellschaftliche – wirtschaftliche Einzelteile des Institutes. Die Chance und den Inhalt der Eigentumsumverteilung gestaltet hauptsächlich die Qualität der Eigentumspolitik. In den ungarischen Eigentumsverhältnissen bestätigen dessen neuliberale Instrumente seit 1988 einseitig die adäquaten Interessen des globalen Agrarkapitals, die durch wirtschaftliche und gesetzliche Regler zur Ablehnung des Familienwirtschaftsmodel, zum Ausschluss der Landwirte vom Grundbesitz- und Pachmarkt und zur Befestigung des industriellen Großgrundbesitztums – das auf Lohnarbeit beruht – führt. Die Eigentumsumverteilung kann nur im Fall gesellschaftliche Übereinstimmung und Unterstützung beanspruchen, wenn die heutige nutzenorientierte Eigentumspolitik auf gemeinnützige wertorientierte Eigentumspolitik ausgewechselt wird. Diese muss das ökosoziale Agrarmodel der EU begründen, in dessen Rahmen die Eigentumsumverteilung zur Nachhaltigkeit, zur Lebensqualität auf dem Lande und zum Lebensunterhalt lokaler Gemeinschaften dient.

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Media revolution – Effects of technological development on freedom of expression

Introduction

This paper endeavors to summarize the development of the constitutional regulations concerning the media – freedom of speech, freedom of press, including radio and television – in the American experiment.[1] United States and its Constitution were chosen for according to my thesis and strong belief the very words of the US Constitution and moreover its practice spread all over the world, even in Hungary and resulted in the – more or less successful – adoption of the US theory of free speech. In this essay the development of the American regulatory system will be summarized; the effects on other countries, especially on Hungary would be beyond the scope of this paper and will be discussed in another paper.

Communication – the exchange of information – has always been dependant on the methods of information-flow. Body-talk and gestures are visible to an onlooker, just as speaking is only audible for listeners. However, the desperate desire to communicate led to writing, which enabled the conveyance of thoughts without the actual common presence of the writer and reader, the deliverer and receiver of the information.[2] For thousands of years the main issues of technical development were the preservation of the written text and of course its reproduction. These issues are related; the best method of preserving fixed information is the indefinite and accurate reproduction. Invention of printing was the third revolution of communication if writing is accepted to be the second one after speaking the first. Printing enabled masses to gain access to information which was a privilege before, open only for a fraction of societies. Literacy boosted social development and undoubtedly was a key element of the development of free, democratic societies. Imagine a free community without the technical capability of unlimited communication – a hard, if not impossible task!

1 As Justice Holmes refers to the pursuit of the truth through letting the concurrent views debate: "It is an experiment, as all life is an experiment." J. HOLMES: Dissenting Opinion, *Abrams v. United States* 250 U.S. 616, 630 (1919)

2 Naturally, representative arts are part of the communication process, however I ignored it because the accuracy of the communication is lower, than the other methods. Nevertheless, arts and other forms of expression of views may be part of the protected speech, as shown below.

Development of freedom of speech

However, law had to keep up with the technical development and guarantee the possibility of the free speech. What is the capability of unlimited communication worth, if powers (i.e. state, church) deny the right to express one's opinion? Therefore the right of free speech, one of the first fundamental rights, was acknowledged all over the world, actually on the luckier side of the free world even for the 21st century there are countries that fail to assure this right. The philosophical fundaments of the right to free speech was laid by – amongst others – John Milton, who wrote on the power of truth with passion:

"And though all the winds of doctrine were let loose to play on the earth, so Truth be in the field, we do injuriously by licensing and prohibiting misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter? (…) For who knows not that Truth is strong, next to the Almighty? She needs no policies, nor stratagems, nor licensings to make her victorious; those are the shifts and the defences that error uses against her power."[3]

Milton's Areopagitica and several other writings were consulted during the drafting of the Constitution of the United States of America; his views had great impact on the First Amendment, which was the third[4] written acknowledgement of the right to free speech. Those states adopting free speech had taken steps to liberate the press, to eliminate censorship and guarantee the freedom of open debate. In the US – according to the composition of the First Amendment – the liabilities of the federal government are negative:

„Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[5]

The primary interpretation of this clause shows that it is forbidden for the State to pass any law concerning the liberties of the First Amendment. This is the absolute interpretation of the Bill of Rights, which remained in minority amongst the Justices of the Supreme Court.[6] However it must not be forgotten that the greatest freedom from the state's legislative and executive and even judicial power is the lack of abridging regulation, when state does not interfere, intervene in the exercising of the right of the free speech. This absolute view of the free speech will protect even the obscenity and the libel, for these are – nevertheless – speech to be protected by the First Amendment.[7]

So, the constitutional basis of the right to free speech was established and it evolved through more than one century without major changes in the means of communication. In the 19th century printed press flourished, although limitations on the relatively free speech had been developed. Basic decisions on the free speech were delivered on the turning of the new

3 John Milton: Areopagitica, A Speech For The Liberty Of Unlicensed Printing To The Parliament Of England; http://www.gutenberg.org/files/608/608-h/608-h.htm

4 First was the Virginia Declaration of Rights: "XII That the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments." (June 12, 1776) Second was The Declaration of the Rights of Man and of the Citizen (French: *La Déclaration des droits de l'Homme et du citoyen)* from 1789.

5 Amendments to the Constitution of the United States of America, Amendment I.

6 Justice Black was one of the greatest advocates of this view; he dissented in most of the cases regarding the limitation of the First Amendment, for he believed that literally "no law" should be made on these issues. See: Edmond Cahn: Justice Black and FAM "Absolutes": A Public Interview, N.Y.U.L.Review 37:549-562 (1962)

7 Black: The Bill of Rights and the Federal Government, in The Great Rights (ed. Cahn), 43 (1963)

century, when the whole world started to shake and tumble. The labor movement and the Great War shook the very foundations of the great 19th century and the western liberal democracies. One of the long-lasting, even in our days effective decision was delivered in 1919, when Justice Holmes developed his famous test for limitation of free speech.

"Words which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment may become subject to prohibition when of such a nature and used in such circumstances a to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent. The character of every act depends upon the circumstances in which it is done."[8]

Clear and present danger became a standard of constitutional limitation of free speech. Though in the early years Justice Holmes remained in minority several times,[9] and could advocate his views only in his dissenting opinions, slowly but surely his test became generally recognized and utilized. The First Amendment does not protect such communication that may directly and certainly cause "substantive evil", in other words, violence or violation of other constitutional regulation. This issue always depends on the actual circumstances, as Justice Holmes reasoned his decision: "It is a question of proximity and degree." Therefore, this is always the right of the Courts to determine, whether a limitation of the free speech was or was not in the violation of the First Amendment, whether the words in question caused clear and present danger, or did not.[10] It is of particular significance that Justice Holmes used the reasoning similar to Milton's Areopagitica, when he interpreted the First Amendment.

"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution."[11]

Seemingly, the instrumental reasoning of the free speech dominated and regardless the media of communication, general standards were set to ensure this constitutional right. However, there was a further aspect that influenced the position and reasoning of free speech. The Bill of Rights, including First Amendment was originally applied against federal power,[12] abusive actions of the state against these rights were not subject to the federal jurisdiction. Fourteenth Amendment of the Constitution, after the crisis of the Civil War changed this protected position of the states and within the scope of due process of law it gave power to the federal state to protect US citizens against their native state itself.[13] These limitations on state power dramatically expanded the protections of the Constitution.[14] More than fifty years passed until the Supreme Court acknowledged that First Amendment, freedom of speech is

8 *Schenk v. United States*, 249 U.S. 47 (1919)

9 *Abrams v. United States* 250 U.S. 616 (1919); *Gitlow v. People* 268 U.S. 652 (1925)

10 Actually, in an other decision in 1919, Justice Holmes remained in minority and closed a dissenting opinion to a decision, which stated a communist leaflet as clear and present danger, therefore constitutionally punishable under the Espionage Act. See: Abrams v. United States 250 U.S. 616 (1919)

11 *Abrams v. United States* 250 U.S. 630 (1919)

12 *Barron v. Baltimore*, 32 U.S. 243 (1833)

13 "(…) No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Amendment XIV; The United States Constitution, Oxford University Press 2005, 55.

14 ibid. 56.

part of those liberties, mentioned in the Amendment XIV. It was in the Gitlow v. People where the Supreme Court stated:

Assumed, for the purposes of the case, that freedom of speech and of the press are among the personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States.[15]

In case freedom of expression and freedom are considered personal liberty, it moves the certification of this right from the instrumental towards the constitutive justification. The constitutive approach of the free speech emphasizes the autonomy of the person to express his views and opinions, therefore denies the broad possibility of limitation of this freedom.[16]

Are there any tests besides the "clear and present dander" that measure the constitutionality of the speech or other forms of communication? It is not a coincidence that I mentioned another form of communication, for more than words can convey information, content. Pictures, gestures have a meaning, sometimes radically divergent from the primal meaning. Though it is not the phenomenon of the late years, pictures of pornographic contents spread faster and wider with the improved means of communication than before. US jurisprudence dealt with this question using the "obscenity concept"[17] and a test qualified to these cases. According to this theory only those words (communication) deserve constitutional protection that contribute to the functioning of the society.

(…) [A]lthough all ideas having even the slightest redeeming social value – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – have the full protection of the guarantees, implicit in the history of the first amendment is the rejection of speech that is utterly without redeeming social importance. Thus, certain forms of speech – notably obscenity – deemed not to have redeeming social value, are not protected against laws that punish or suppress them.[18]

Test of the "redeeming social value" excludes those words and other forms of communication from the protection of the First Amendment that do not contribute to the democratic society. According to the Supreme Court's practice this test is used only in such cases, that are in connection with sexual content, in other words in obscenity cases. However, the theoretic possibility of a change in the scope of the obscenity remains; as Justice Black draws our attention to the historical changes in the meaning of obscenity.[19] Until the Court is able to determine the concept of obscenity, the very reasons of Justice Black's fears, namely tyranny of the Court are present. However, Justice Brennan emphasizes the responsibility of the Courts to protect the Constitution[20] and the majority of the Justices agreed on the

15 Gitlow v. People 268 U.S. 652 (1925)

16 Human Rights (ed. Gábor Halmai – Gábor Attila Tóth), Budapest, Osiris 2003, 431-432. [hereafter: Human Rights (2003)]; see also András Sajó: Handbook of Free Speech, Budapest, KJK-Kerszöv 2005, 21-22. [hereafter: Sajó (2005)]

17 US obscenity concept has direct links to those of English obscenity rules under the common law. Most interestingly English experts called for a blood transfusion for the traditional – therefore rigid – English law on obscene libel and strongly recommended the use of the American approach. See: Norman St. John-Stevas: Obscenity and the Law, Criminal Law Review 817-833, 832 (1954)

18 William J. Jr. Brennan: The Supreme Court and the Meiklejohn Interpretation of the First Amendment, Harvard Law Review, 79: 5-6 (1965)

19 Cahn, supra note 6, 558. „It was the law in Rome that they could arrest people for obscenity after Augustus became Ceasar. Tacitus says that then it became obscene to criticize the Emperor."

20 Brennan: supra note 17, 8. "It is also hard to see why the Court's performance of this function in an obscenity case should eb denigrated by such epithets as 'censor' or 'supercensor'. Use of those opprobrious labels can neither obscure nor impugn the Court's performance of its obligation to test challenged judgments against the guarantees of the first and fourteenth amendment and, in doing so, to delineate the scope of constitutionally protected speech."

possibility of the limitation of free speech on the basis of the "redeeming social value". To summarize: mere pornography – until having no positive social impact – is not subject of the First Amendment and does not enjoy the protection of the constitutional guarantees. Yet, sexual content is not completely expelled from lawful communication, since pornography is not a synonym of sex.[21]

If you take a look around and see pornographic content flowing from around every corner of the modern media, especially the Internet, you could safely assume, that rules of the obscenity have changed since the redeeming social value test and a special test for obscenity[22] were laid down. This is a false belief for the traditional rules and tests of the obscenity are effective without major changes and only the lack of regarding activity of the attorney-generals prevent courts from sustaining those rules in particular decisions. However, there are recent academic opinions which concept of obscenity and limitations on free speech on this basis are against the First Amendment – not because it is of absolute nature that no law could be passed on, but because the moral harm caused by the obscenity does not justify the abridgement of free speech.[23]

Moreover the abovementioned two tests, the Supreme Court formed a test for the case of regulations not intended directly to condemn the content of speech but incidentally limiting its exercise. According to the "balancing" test the "court must, in each case, balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression".[24]

Yet, life is more colorful than static standards could describe it for all eternity. In 1963 the Supreme Court faced a situation not-yet-seen; the Justices were to determine the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct. The Supreme Court – Justice Black and Goldberg dissenting – reversed the judgment and limited the State's power to entitle its officers to take legal actions against critics. According to the famous test:

Factual error, content defamatory of official reputation, or both, are insufficient to warrant an award of damages for false statements unless "actual malice" – knowledge that statements are false or in reckless disregard of the truth – is alleged and proved.[25]

András Sajó points out that the particular importance of this decision partly lies in its political context.[26] If the Supreme Court had not altered the former rules of damages of public officials this legal institution – damages for defamatory statements – could have been abused against the democratic movement of civil rights activists, especially the blacks (afro-american citizens).[27] Some scholars emphasized that this revolutionary decision bears the markings of Meiklejohn's theory of self-governance,[28] for it awards the political speech with strong and most effective protection. However, Justice Brennan reveals that the origins of this new rule

21 *Roth v. United States* 354 U.S. 476 (1957) "Obscene material is material which deals with sex in a manner appealing to prurient interest – *i.e.,* material having a tendency to excite lustful thoughts"

22 *Miller v. California* 413 U.S. 15 (1973)

23 Andrew Koppelman: Does Obscenity Cause Moral Harm? Colum. Law Rev. 105: 1635-1679, 1679 (2005)

24 Thomas Irvin Emerson: Toward a General Theory of the First Amendment, 72, Yale Law Journal 877, 912 (1963)

25 *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964)

26 Negro churchmen placed a paid advertisement – some of which statements were untrue – in the New York Times about abuses of a particular Alabama policemen who sued for civil libel and damages.

27 Sajó (2005), 33-34.

28 Kalven: The New York Times Case: A Note on „The Central Meaning of the First Amendment", Supreme Court Review 191 (1964)

stem from the "redeeming social value" test; because it does not give protection to statements that are well known false or the speaker is in reckless regard of whether it is false or true.[29]

New phenomenon in communication

Obscenity, clear and present danger tests were set in the era of the flourishing printed press, which was a nearly five hundred year old means of communication. Yet, another revolutionary technical phenomenon emerged at the dawn of the 20th century that changed the character of communication: the radio and shortly after the television transformed communication into mass communication.[30] Electronic media is capable of reaching whole nations; not even borders can stop the radio beams. The effect of the electronic media is much wider and deeper, than first thought. Their impact on (political) thinking, their power to affect people, even to manipulate them is manifold to the printed press. Having greater possibilities also results into greater problems.

Up this point in the early 1920 years, the freedom of press seemed to be quite simple: no preliminary censorship is allowed for the state to control the press. Foundation of the press was – in general – free, because there was no licensing, and the resources (paper and capital) were at hand without theoretical limitations. This situation sharply changed with the emergence of a new medium, the radio. Radio waves have limited resource and they belong to the public, the people of the United States. The first steps were chaotic, because government seized the licensing[31] without proper constitutional basis, which ultimately led to chaos on the air. Hundreds of radio stations (mainly non-profit organizations) were functioning sometimes using each other's frequencies. The Radio Act in 1927 created the Federal Radio Commission (FRC) to bring order on the air and reallocate the licenses. The legal basis of the reallocation was the "public interest, convenience or necessity", on the basis of which the FRC gave advantage to the for-profit broadcasters against the yet-existing non-profit broadcasters.

The FRC equated capitalist broadcasters with "general public service" broadcasters since, in their quest for profit, they would be motivated to provide whatever programming the market desired. In contrast, those stations that did not operate for profit and that did not derive their revenues from the sale of advertising were termed by the FRC as "propaganda" stations since, according to the FRC, they were more interested in spreading their particular viewpoint than in satisfying audience needs.[32]

During the bitter contest, even fight to the death, between the non-profit and for profit broadcasters many of the arguments turned up, which were used in later debates as well. For example, FRC repelled attacks on its policy with the argument that unsatisfied listeners could shift away from the station or turn it off.[33] For-profit broadcasters defended the already settled

29 William J. Jr. Brennan: The Supreme Court and the Meiklejohn Interpretation of the First Amendment, Harvard Law Rev. 79: 18-19 (1965)

30 Although mass circulated newspapers can be regarded as mass media, since it reaches great many people, according to the common opinion radio and television had the genuine quality to reach the masses almost regardless of limitations.

31 T. Rosen Philip: The Modern Stentors: Radio Broadcasters and the Federal Government 1920-1934 (Westport, CT: Greenwood Press, 1980)

32 Robert W. McChesney: Free Speech and Democracy!, The American Journal of Legal History 35:362 (1991)

33 FRC, Third Annual Report, 32-36.

situation that they equated its basis with the immanent American values, although the system was historically developed as contester of the then existing non-profit broadcasters.

[For-profit, advertisement based radio] is a free system because it is a free country. It is privately owned because private ownership is one of our national doctrines. It is privately supported, through commercial sponsorship of a portion of the program hours, and at no cost to the listener, because ours is a free economic system. No special laws had to be passed to bring these things about. They were already implicit in the American system, ready and waiting for broadcasting when it came.[34]

However, the non-profit broadcasters, universities, educators, churches, worker unions etc. amongst them, had strong arguments as well. Arguments arose that the *de facto* privatization of the airwaves took place, without proper legitimate basis.[35] They also insisted on the fact that the allocation of the radio licenses exclusively to capitalist enterprises allow or directly create censorship. This is not the censorship in its earlier meaning, for it was done on a case-by case basis, but a censorship on a vast scale. Moreover it is not carried out by the state, but by private enterprises.

Do they fail to realize that we already have a censorship – a censorship applied not by the government, which is elected and maintained by the people and responsible to their control, but a censorship maintained by powerful private interests who are responsible to no one but their own selfish interests?[36]

The battle between the two systems ended with the crushing defeat of the non-profit broadcasters, who were driven off the ether and almost became extinct.[37] By the time of the Communications Act of 1934 the dominant broadcasters had been in winning position and turned their attention towards the free speech, now protecting *them* against the government. As McChesney puts it: "Free speech only became a legitimate concern when it suited the self-interest of the broadcasting corporations and not a moment earlier."[38]

In this legal environment a brand new medium was born: the television. Assuming that radio had great power to penetrate minds, this new medium, which conveys not only sound but motion picture as well, must have even a greater impact. The special characteristics of this new way of communication were acknowledged as early as 1949. "[T]he ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use, of sound trucks so long as the restrictions are reasonable and applied without discrimination. *Kovacs v. Cooper* 336, U.S. 77 (1949)."[39] These are restrictions on the "how and where" of the speech, which do not fall under the protection of the First Amendment, unless the restriction denies the very possibility of the speech itself. "[T]hough the speech itself be under the first amendment, the manner of its exercise or its collateral aspects may fall beyond the scope of the amendment."[40] Justice Black explains these restrictions with the famous theatre aphorism from the clear and present danger test.

That is a wonderful aphorism about shouting "fire" in a crowded theater. But you do not have to shout "fire" to get arrested. If a person creates a disorder in a theater, they would get

34 Cited in „In their Own Behalf" Education by the Radio, June-July 1938, 21.

35 Note 32, 388.

36 Joy Elmer MORGAN: "Education's Rights on the Air", *Radio and Education: First Assembly* (1931), 128.

37 For overview of the history of radio education see: Eugene E LEACH: Tuning Out Education. The Cooperation Doctrine in Radio; http://www.current.org/coop/#author; originally serialized in *Current* during January, February and March 1983 under the title, "Snookered 50 Years Ago"

38 Note 32, 388.

39 Cited in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 387 (1969)

40 Note 29, 5.

him there not because of what *he hollered but because he* hollered. *They would get him not because of any views he had but because they thought he did not have any views that they wanted to hear there.*[41]

But the loudness (and the loud success) of this new medium is only one attribute of this media, which draws distinction between the traditional paper-based press and the new electronic media. The audience has a great ease in obtaining the information if it comes in an easily-digestible form, in combination of sounds and pictures of the related issue. It is much easier for a shallow observer to watch and listen TV than to thoroughly read and think about serious problems. No wonder that TV channels needed little time to become popular. Along with popularity came the fall of the other means of communication, so electronic media, especially TV became a primary information source for a great part of the society.

The legal importance of this process was realized as early as in the late 1940's,[42] but – probably due to the court system – it was only the late 1960's when cases reached the Supreme Court. The most important case of this era was the *Red Lion Broadcasting Co. v. FCC*, where the Supreme Court was to decide the constitutionality of the so-called "fairness-doctrine". What is this doctrine that outraged the broadcasters so much that they did not hesitate to go through the appellate procedure for the protection of the Free Speech and Freedom of Press?

Fairness at all costs

Fairness doctrine had been around for some time, actually from the very beginning of the radio era. "The fairness doctrine is not new; it has its roots in the speeches of Herbert Hoover and in decisions of the Federal Radio Commission as early as 1929." [43] General fairness doctrine – which is separate from the undermentioned special variants – requires that when a broadcaster allows his facility to broadcast a controversial issue it must be ensured that opposing opinions are presented as well. This doctrine and its application took its effect in the license-application procedure, since FCC could and had to take into account the compliance of the licensees with the doctrine. To merit a broadcast license, applicants were obliged 'to cover vitally important controversial issues of interest in their communities,' and 'to provide a reasonable opportunity for the presentation of contrasting viewpoints.'[44]

From the general fairness doctrine two different special rules emerged: the political editorial rule (a) and the personal attack rule (b). Moreover, there is a third type of the compulsory presentation rules, which applies to the special situation of the elections (c).

ad a) According to the political editorial rule press is compelled to take positive actions to ensure that proper coverage is given to the public on any controversial issues. Proper as not only one side but both or possibly all sides of the question must be enlightened. "In essence, the fairness doctrine requires that when a broadcaster allows his facilities to be used for the presentation of one side of a controversial issue, he must see that other (contrasting) viewpoints are presented as well."[45]

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41 Cahn: supra note 6, 558-559.

42 Chafee Zechariah: Government and Mass Communications (1947)

43 Donald P. Mullaly: The Fairness Doctrine: Benefits and Costs, Public Opinion Quarterly 33:578-581, 578 (1969) [The referred decision is *Great Lakes Broadcasting Co.,* 3 F.R.C. Annual Report 32, 33 (1929)]

44 Syracuse Peace Council, 2 F.C.C.R. 5043, 5058 n.2 (1987), recon. denied, 3 F.C.C.R. 2035 (1988).

45 Ibid.

ad b) Personal attack rules apply to different cases of political editorials. "When (…) an attack is made upon the honesty, character, integrity or like personal qualities of" [46] someone, the licensee is forced by this rule to send a notification to the attacked along with a tape or summary of the attack and must offer "reasonable opportunity" to respond. This possibility does not apply to foreigns or electoral candidates [see under c)] and its material scope does not cover the bona fide newscast, interview, on-spot coverage of a news event. However, it always applies to editorials of the broadcaster. Primarily personal attack rules were at stake in the *Red Lion Broadcasting Co. v. FCC.*

ad c) Statute law regarding election fairness provided special rule for the candidates: equal time should be allocated to each legally qualified candidate who run for any public office. FCC set special regulations on this issue and provided further possibility to the opposing candidate to react upon editorial in which he was endorsed or opposed. Note, that this is a mixture of political editorial, personal attack and election rule since it is applied for editorials and in case of personal involvement.[47]

The background of the most famous case on the fairness doctrine was a personal attack. Red Lion Broadcasting Company was licensed to operate WGBC, a Pennsylvania radio station. In 1964 a short program was broadcasted, where the author of a book, Mr. Cook was directly attacked by the broadcaster, and was accused – amongst others – with sympathy to communist views. After the McCarthy era these assumptions were not without dangerous consequences even when the chilling '50s had passed. The attacked Mr. Cook applied for an opportunity to respond to the allegations, but instead of the welcome letter the radio sent him the list of the fees. Did he want preserve his human dignity and honor than he should pay for this. Mr. Cook wanted free broadcast time for the answer, since he felt personally attacked and the FCC – which was involved in the procedure after an exchange of letters – agreed with him. FCC stated that Red Lion must provide time for the personally attacked author, since it failed to meet his obligations under the general fairness doctrine and its personal attack variant.[48]

The Supreme Court held both general fairness doctrine, and the special personal attack rule valid and constitutional "[b]elieving that the specific application of the fairness doctrine in Red Lion, and the promulgation of the [personal attack and editorial] regulations in RTNDA, are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment".[49] In the Supreme Court's view, the general obligation of the fair presentation and the limited obligation to allow opportunity to answer to personal attacks do not violate the freedom of speech or the freedom of press.

The simple fact that the attacked men or unendorsed candidates may respond themselves or through agents is not a critical distinction, and indeed, it is not unreasonable for the FCC to conclude that the objective of adequate presentation of all sides may best be served by allowing those most closely affected to make the response, rather than leaving the response in the hands of the station which has attacked their candidacies, endorsed their opponents, or carried a personal attack upon them.[50]

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46 31 Fed Reg. 5710, as amended, cited in *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 373-374 (1969)

47 Ibid.

48 Note that personal attack rules were developed in their abovementioned form after the Red Lion litigation began, so "personal attack rules" were not so precise and developed then. However, Supreme Court decided both the earlier variant and the later adopted precise version of these rules in the *Red Lion Broadcasting Co. V. FCC.*

49 *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 375 (1969)

50 Ibid. 378-379

The main argument by justification of the fairness doctrine and the personal attack rule was the scarcity of the radio frequencies,[51] which was a massive reality then. Since licensee gets the license as a trust from the people of the United States he can be imposed with several duties to ensure the protection of the rights of people. "[P]eople as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[52] The Supreme Court defined the true content of the First Amendment far from the absolute views. Absolutists say that literally no law should be enacted in connection with the freedom speech and press. According to the absolutist opinion even the slightest legal regulation may abridge the freedom of speech.

It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. (…) It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.[53]

True content of the First Amendment seems to be a positive obligation of the Congress to preserve the free market of ideas, and people may claim their right to receive proper information about the world. As far as I am concerned the Supreme Court used Meiklejohn's interpretation of the First Amendment to justify the burden on the broadcasters. "[It is not] inconsistent with the *First Amendment goal of producing an informed public capable of conducting its own affairs* to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues (…)"[54] To the shallow observer the goal of the First Amendment seems to be the prevention of the government the abridgement of free speech. But the very purpose of the Founding Fathers and the drafters of the Bill of Rights – as Meiklejohn saw – were to ensure the capability of the people to the effective self-government. To fulfill this obligation a negative approach of the state powers is not enough but the positive duty to create the capability of self-government is needed. This is only possible if people have access to various sources of information and if technical conditions, scarce frequencies hinder people to see contrasting views, Congress must act. "There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all."[55]

However, Supreme Court hinted that general fairness doctrine may be obsolete if the very fundaments change. First of all, this stronger, positive protection of the First Amendment only applies to a "medium not open to all". Secondly, the scarcity of the wavelengths may be temporary and subject to experts' researches. As soon as the shortage in resources ceases this decision may be reviewed.

For the evaluation of the Red Lion case and its impact we quote Donald P. Mullaly's words.

"[T]wo facts are indisputable: (1) we are *restricting the freedom of the broadcaster when we burden him with an obligation triggered by his statement or the statement he allows to be broadcast; (2) if we do not place this burden upon him, we allow the broadcaster himself to restrict the freedom of others to express their opinions and on an entirely arbitrary basis."*[56]

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51 "[B]ecause the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few." Ibid. 391

52 Ibid.

53 Ibid.

54 Ibid. *italics mine!*

55 Ibid. 392

56 Note 43, 582.

Supreme Court faced challenges of this relatively new trend in only five years. As they hinted, the restrictions on the freedom of press are only valid to such media, which use scarce resources to distribute information. Clearly, press media is not one of them, so if printed press is imposed with the burden of the "right to reply" it does not necessarily follow, that press would fall under the Red Lion rules – which enables Congress or its authorized agent to regulate such right.

The facts of the *Miami Herald Publishing Co. v. Tornillo*[57] were the following: Mr. Tornillo, leader of a teacher's association run for public position. Miami Herald published harsh critics on the electoral candidate, who demanded a free possibility to respond to these critics. Under a 1913 (!) Statute – which had only been used once before – the personally attacked public candidates must be given free space equal to those of used to attack them to publish their response free of charge. Failing this obligation constitutes a first-degree misdemeanor. Circuit Court denied remedy, but Florida Supreme Court on direct appeal reversed and held that the Statute is constitutional, since indeed it promotes, not abridges free speech and even civil remedies, damages are available for violating the right-of-reply.

Supreme Court had to measure two clashing views. The appellee and his fellow pro-right-of-reply advocates started with the thorough review of the media-system since the 1791 beginning, when the Bill of Rights was drafted, until present days. According to their views, the "happy" free marketplace of ideas, which was reality in the late 18th and the 19th century became past to the second half of the 20th century. Ownership of newspapers had concentrated in the hands of a few big publishing companies that were often affiliated with the radio and TV companies. The lack of competition did not ease the entering of the market for new newspapers, on the contrary it made almost impossible to reach a sustainable market position. For these reasons advocates of right-of-reply insist that fairness should be reached with positive duties imposed to the existing newspapers. "The First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' today a monopoly controlled by the owners of the market."[58] Appellant publishing company attacked the Florida Supreme Court's decision on traditional FAM basis that compulsory right-of-reply would abridge freedom of press, especially the freedom of the editor to write and publish whatever he sees reasonable.

The very essence of this case was the following: the freedom of editor and through that the freedom of press. "Compelling editors or publishers to publish that which '«reason» tells them should not be published' is what is at issue in this case."[59] Supreme Court rejected those arguments that claimed that freedom of press was not violated, since noone told the newspaper in advance what not to publish. Censorship is broader than preliminary ban on the content of the news. "The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter."[60] Telling what to publish may end in occupying the available space, which ultimately equals to telling what not to publish.

The Supreme Court made it clear that there is an apparent distinction between the press media and the electronic media regarding the variants of the right-of-reply, since it is conspicuous that the electronic media uses scarce resources where there is a limited possibility to voluntarily represent every possibly angle of a controversial issue.

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57 *Miami Herald Publishing Co. v. Tornillo* 418 U.S. 241 (1974)

58 Ibid. 251 Note that these arguments stem from the Red Lion case, where affirmative action of the state – regarding the radio – has been justified.

59 Ibid. 256

60 Ibid. 257

It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.[61]

The first conclusion to draw is that there is constitutionally relevant difference between the printed and the electronic media and that is due to the "finite technological limitations". But then it follows that printed press can not be deemed as absolutely infinite resource-based medium, since economic realities must be considered, which are natural limits of the compulsory reply. In other words, although there is limitless number of trees to chunk and make paper of, though capital is limitless theoretically, therefore state could freely compel press to print whatever it wants, the ultimate economic reality denies this possibility. In my interpretation if the press participates in the process of the democratic debate, during this process it may not be forced to use its own capital to publish views that state thinks necessary, since it may ultimately lead to the bankruptcy of the press. This would definitely narrow the possible channels of debate; endanger the vivid exchange of views.

The Supreme Court gave further protection to the rights of the editor as well. An additional argument of the unconstitutionality of the right-of-reply is the unclear nature of this infringement to the rights of the editor.

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment.[62]

This leads us to the second conclusion. It is also unconstitutional to interfere with the freedom of the editor to publish whatever reason tells him to publish and its negative variant. An editor is a constitutionally relevant, might I say, the most important person in ensuring the freedom of press. Indeed, this is constitutional immunity to them being as unfair as they please, since the free marketplace of ideas will ensure that Truth will prevail and emerge from a great variety of the opposing views. Responsibility of the editors is not of legal questions – as far as they comply with the abovementioned constitutional regulations of the public debate – but of ethical issue, ultimately enforced by the readers – who will supposedly turn away from the liar, hypocrite press.

Fall of the General Fairness

Not more than a decade had passed and general fairness and its corollaries – political editorial and personal attack rules – were under fire once again. RTNDA, the powerful Radio- and Television News Directors Association petitioned FCC to eliminate these rules in 1980 and the FCC showed sympathy to the petitioners. Repeal of the allegedly unconstitutional policies of the FCC was seriously considered, since the movement was favored by the political climate. Broadcasters came up with the long-known arguments: due to these rules broadcasters are discouraged from airing

61 Ibid 256-257
62 Ibid. 258

editorials that may be controversial in order to avoid sanctions, which decrease the available airtime by compelling to broadcast the response of the attacked politician or public figure.

In 1983 a *Notice of Proposed Rule Making*[63] were issued by the Commission where they requested comment on the proposal to eliminate both the political editorial and personal attack rules. Most of the big broadcaster companies and their associations advocated the repeal of general fairness and political editorial/personal attack rules. Opposing their views a considerable number of comments arrived in favor of the above-mentioned policies of the FCC. Typically civil activist groups were enlisted on the pro-limitation side and all the for-profit broadcasters vehemently fought for repeal of the FCC policies.

The general fairness doctrine was the first to cease. In 1987 FCC decided the *Syracuse Peace Council* case[64] and eliminated the general fairness doctrine on the basis that it was contrary to the public interest and First Amendment. The reasoning of the Commission was dual. First they acknowledged the great change in the technological environment and stated that "growth in the number of broadcast outlets reduced a need for the doctrine".[65] They returned to the path of the traditional reasoning of the FAM rights, in which the marketplace of ideas will ensure the final triumph of Truth – through the satisfactory multiplicity of information for the viewing and listening public. Diversity of sources alone will guarantee the fair coverage of controversial issues, without the burdensome intrusion to the freedom of press, free deliberation of the editor.

The second argument was "that the doctrine often worked to dissuade broadcasters from presenting any treatment of controversial viewpoints, that it put the government in the doubtful position of evaluating program content, and that it created an opportunity for incumbents to abuse it for partisan purposes."[66] Again the traditional justification, where arguments of the broadcasters prevailed and arguments of the non-profit broadcasters fell. Broadcasters supported their standpoint with empiric data, a survey, which showed a chilling effect on the editorializing of controversial issues. They insisted that editors should rather avoid than engage in edgy commentaries for they are afraid of the worst possible consequence: the loss of the valuable airtime. Supporters of the fairness doctrine rejected the outcome of the survey pointing out the insecure methods of the data-gathering and evaluating. Although FCC decided in favor of the broadcasters in 1987, the core-question remained: Does it violate the First Amendment if we are limiting the freedom of editor by imposing the burden of fairness on them?

General fairness doctrine ceased to exist in 1987 by the *Syracuse Peace Council*, but personal attack and political editorial rules remained effective. That of course outraged broadcasters, who argued that the two sub-rules were part of the general fairness doctrine, therefore automatically ceased with it. In 1990 they filed a joint petition for repeal of the two rules, but the Commission was unable to decide. In 1997 after an excessive debate on the personal attack and political editorial rules they issued a Public Notice that they postpone the decision since they cannot reach majority.[67] Then-commissioner Ness and Tristani issued a joint statement, which was considered as the opinion of the FCC in a pending procedure. They insisted that the personal attack and the political editorial rules must remain in effect, since they advance the public interest.[68]

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63 *Repeal or Modification of the Personal Attack and Political Editorial Rules, Notice of Proposed Rulemaking,* Gen. Docket 83-484. (June 21, 1983)

64 *Syracuse Peace Council v. FCC*, 867 F.2d 654, 656 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990)

65 Ibid.

66 Ibid.

67 *FCC Public Notice* (August 8, 1997)

68 Joint Statement of Commissioner Susan Ness and Commissioner Gloria Tristani Concerning the Political Editorial and Personal Attack Rules (Gen.Docket No 83-484); *http://www.fcc.gov/Speeches/Tristani/Statements/stgt816.html* [hereinafter: Joint Statement (1998)]

U.S. Court of Appeal for the District of Columbia had jurisdiction to decide the petition of the broadcasters against the two rules. The burden of probation was an important factor of the decision, since the Court rejected FCC's argument, that petitioners should prove the unconstitutionality of the attacked policies along with the fact that public interest does not justify the rules. On the contrary, FCC was imposed with the burden of probation, because prior to the procedure they issued a Notice proposing the repeal of the attacked rules.

The FCC's attempt to minimize its burden might be appropriate if petitioners were appealing from denial of a petition for a rulemaking to repeal an existing rule. (…) But having initiated a rulemaking premised on the conclusion that the rules may not be in the public interest and then rejected its own proposal to abrogate the rules, the FCC bears a burden of explanation.[69]

The Court rejected almost all arguments of the FCC and intervenors on its side. They pointed out that the interest of the listening public in a vigorous debate will not justify the uphold of the rules, since FCC found these arguments unsatisfactory once. In *Syracuse Peace Council* the public interest was not enough to maintain the general fairness rules, on the contrary, FCC found that they were lacking a proper constitutional basis. How could a non-existent legal basis justify another rule that stem from the flawed origin? Quotation of the *Red Lion* was inapt, as well, because according to the Court's opinion an almost thirty years old decision – which hinted the possible shift in policy itself – is not an appropriate basis for a thorough examination of the rules. Scarcity of the air-waves does not justify everything, least the arbitrary rulemaking – so the Court ordered.

The Commissioners defended the rules with the utmost argument of its great and vital contribution to the democratic society.

[P]olitical editorial rule is intended to provide citizens with the information necessary to enable them to exercise their vote in a more responsible and informed manner. In such respects, we believe that this particular rule goes to the very heart of our democratic electoral process.[70]

A sound argument, but even it cannot cover the faults in the reasoning. Having acknowledged the importance of this argument, the Court stressed that arbitrary choice of editorials as the subject of the rule has never been justified with strong rationale.[71] If promoting vivid debate is so important in the democracy, why not pick more programs to fall under content regulation, to be subject of right-of-reply rules. On the contrary, the less control we impose the more vigorous the debate will be. Yet, until the decision FCC had not ventured to take broader perspective and extend the rules to other broadcasts, but solely that "omission" will not justify a narrower, but still burdensome policy.

The Court imputes the FCC's lack of argument regarding the alleged positive effects of the personal attack rules. As the Joint Statement argued, airwaves should not be a platform of personal attacks.[72]

[T]he Joint Statement ignores the concerns that the FCC raised in the NPRM [Notice of Proposed Rule Making] about the rule's utility. The NPRM notes that newspapers are not bound by a similar right of reply and yet no serious consequences seem to have ensued, that at least some victims (those who are public figures) of personal attacks have sufficient access to broadcast media that a right-of-reply requirement is unnecessary, that the rule does not apply to newscasts and yet its inapplicability does not seem to have led to the problems that the rule is designed to address, that the rationale for applying the rule to non-news programming was even less sound than applying it to newscasts, and that the FCC lacked any

69 RTNDA & NAB v. FCC & USA, 184 F.3d 872 D.C. Cir. (1999)
70 Joint Statement (1998)
71 Ibid.
72 Joint Statement (1998)

"evidence that personal attacks are inherently more persuasive than other [types of] arguments." NPRM, 48 Fed. Reg. at 28,298-99.[73]

It is noteworthy that the NPRM and the Court regarded the printed media and the electronic media as equal from the constitutional point of view; in other words the lack of similar right-of-reply institution in the press solely queries the justification of the same measure in the field of electronic media. Another conclusion is the prohibition of arbitrary measures: It can be whatsoever useful instrument, but if it is applied in a capricious way it cannot meet the requirement of the "public interest".

Moreover, the Court points out that personal attack and political editorial rules are direct state intervention to the "editorial judgment of professional journalists and entangle the government in day-to-day operations of the media."[74] Imposing such burden on the editors, putting First Amendment at such risk is not automatically precluded, however it needs strong rationale – one which FCC have failed to present yet.

The repeal of the general fairness doctrine had its effect on the remaining two rules. It did not mean that the two rules directly and immediately lost their constitutional foundation, however it did mean that if the broader rule disappears, the narrower ones need stronger arguments to survive. "Although repeal of the fairness doctrine could in theory have left the challenged rules intact, the Joint Statement never presents a plausible explanation why political editorials and personal attacks are sufficiently meaningful to warrant regulation when other kinds of topics, editorials, and attacks do not."[75]

The Court rejected the *Red Lion* argument, as well. That case was decided almost thirty years ago, was based on even older data and status of the media-market. The mere fact that the personal attack and political editorial rules are not unconstitutional does not mean that its perpetuation is not arbitrary and capricious. And again! *Red Lion* reasoning cannot be precisely the same – as the FCC claimed – since the disappearance of general fairness doctrine undermined the accuracy of the analogy.

The Court did not automatically preclude personal attack and political editorial rules; without bias they acknowledged that there may be appropriate reasoning for sustaining the rules under attack. However, FCC had more than ten years to provide rationale for the rules, and they failed to do so. According to the command of the Court, FCC was charged to supply the rules with affirmative reasoning and the need to act expeditiously.

In 2000, on the turn of the millennium a more interesting thing happened that had occurred for 30 years. RTNDA and fellow petitioners continued their struggle against the political editorial and personal attack rule, the FCC – remained mute. On October 2nd, 2000 petitioners filed an Emergency Motion stating that FCC neglected its duties and they asked for immediate decision of the Court. Now FCC acted expeditiously, on October 4th they issued a joint statement on the 60 days suspension of the two rules and asked the media to submit evidence on the effect of the suspension. According to their intentions the rules would have revived after the expiration of the term, and analysis of the received data would have helped to justify them.

Concerning the political editorial rule Commission asked broadcasters to report on (1) the number of political editorials run during the suspension period, (2) the number of editorials run during prior election cycles, (3) the nature of the elections on which they editorialize, such as national, state, or local, and (4) whether other media outlets editorialized on those races. Since the very choice of interfering only editorials was also questioned, evidence on the general status of the editorials was needed as well. Broadcasters had to report on (1) whether they

73 RTNDA & NAB v. FCC & USA, 184 F.3d 872 D.C. Cir. (1999)
74 Ibid.
75 Ibid.

editorialize on topics unrelated to political campaigns, (2) whether the rate of such editorials is increasing or decreasing, and (3) what factors are relevant to a broadcaster's decision to editorialize.[76] Questions with reference to the personal attack rule were also issued.

But it was too late! On October 11th US Court of Appeals for the District of Columbia Circuit delivered its final decision on the remnants of the general fairness doctrine. From the premises the result could be suspected and – no wonder – the Court ordered FCC to repeal the personal attack and political editorial rules. Judges used relatively strong remarks on the FCC's default: "If these circumstances do not constitute agency action unreasonably delayed (…), it is difficult to imagine circumstances that would."

One could argue that FCC took steps to review the justification of the rules, as only a week ago they suspended the rules and applied to the broadcasters for evidence. But the Court did not accept FCC's defense, rather pointed to the consequences of the default. Firstly, the Court ordered immediate action, but FCC fell numb for nine months. After twenty years of unsuccessful rulemaking process "it is folly to suppose that the 60-day suspension and call to update the record cures anything."[77] Furthermore, if the Court had accepted the suspension as proper measure, the very content of the FCC's order was flawed.

Clearly, the Order is not responsive to the court's remand. The Commission still has not provided adequate justification for the rules, and in its Order provides no assurance that it will do so. The suspension of the rules for 60 days simply has the effect of further postponing a final decision by the Commission. Incredibly, the Order reinstates the rules before the Commission will have received any of the updated information that the Commission states it requires in order to evaluate the rules.[78]

Again, crushing victory for the for-profit broadcasters, now against the Federal Communications Commission. In their words: "This is a tremendous and historic victory for the First Amendment rights of broadcast journalists. For 20 years, RTNDA has fought to get these antiquated and discriminatory rules repealed. This fight has not been easy or inexpensive, but it was the right thing to do. As the court said, less stalwart petitioners would have abandoned this fight long ago. As a result of the court's order, broadcast journalists from today forward will benefit from expanded First Amendment rights."[79]

It is remarkable that broadcasters celebrated this decision as a victory of the First Amendment. Yet, this decision was not directly based on the freedom of speech, rather was the outcome of the FCC's continuing default. Although the FAM-limiting character of the right-of-reply rules was acknowledged, the Court expressly afforded FCC to provide appropriate justification for the constitutional application of these rules. From the mere fact that FCC had failed to do so does not necessarily follow that no such rule exist. The Court expressly accepted the possibility that personal attack rules and political editorial rules may promote public interest, since they gave opportunity to give detailed reasoning.[80] According to the Court's opinion, there may be such rationale, although not yet discovered and presented for deliberation. Naturally, the exclusion of such reasoning would be great result, too.

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76 FCC News Release October 4, 2000; *http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2000/nrmm0041.html*

77 RTNDA & NAB v. FCC & USA, 185 F.3d D.C. Cir. (2000)

78 Ibid.

79 Barbara COCHRAN, president of the Radio-Television News Directors Association; *http://www.rtnda.org/news/2000/hvfbj.shtml*

80 "[I]t was incumbent upon the Commission to 'explain why the public interest would benefit from rules that raise these policy and constitutional doubts'" RTNDA & NAB v. FCC & USA, 185 F.3d D.C. Cir. (2000)

Conclusion

Free speech and the freedom of press are one of America's – as we Europeans address USA – primary values, I daresay – in certain aspect – the core of their constitutional theory, for it is a vital element of the democratic process. Seemingly, this central character is unmistakably demonstrated in the development of these fundamental rights, since they are in constant expansion. Courts, especially the Supreme Court is extremely eager to protect this right; due to the evolving precedents most of the once-existing restrictions on free speech were eliminated. Naturally, new doubts emerge,[81] but generally US enjoys the positive effects of the free press and speech – the free minds. Regarding the radio and the television, the new media of the 20th century there were more restrictions, mainly due to technological circumstances, but also as a result of the great success of these media. They proved to be far more persuasive than other means of communication, therefore legislative and executive powers developed a new approach. This method allowed greater possibility of intrusion into the particular affairs of electronic media (see: personal attack, political editorial rules), but more importantly – as a result of the 1920's years chaos – led to a monolithic media structure, where for-profit broadcasters dominated and non-profit broadcasters scarcely existed. First Amendment rights protected this status quo, after it materialized, but broadcasters as trustee's of public interest had more burden imposed on them as press had had. Even in 1969 this additional burden was accepted as constitutional, but then in thirty years – due to new technical developments, especially cable television – difference between press and electronic media slowly but surely ceased. Last remnants of the once-broad burdens – political editorial and personal attack rules, variants to right-of-reply theme – became obsolete in 2000, thus US turned to the new millennium without main differences regarding the constitutional status of the press and the electronic media. Most remarkably, the eradicating of the radio's and TV's additional burdens started long before the Internet era, the digitalization-movement and ended before digital TV – the "hangman" of scarcity rationale – could affect events. My belief is that – even considering the obvious differences in US and other legal systems – the trend is worth to follow. If without the scarcity rationale additional limitations on the electronic media could be torn down, can we find a sound argument to maintain the seemingly unconstitutional extra burden imposed on TV and radio?

Zusammenfassung

Der Autor stellt die Entwicklung der Redefreiheit in den Vereinigten Staaten dar, die verbundene Praxis des Obersten Gerichts wird ins System gestellt. Durch das Thema des Medienrechtes widmet er eine besondere Acht der Ausgestaltung der verfassungsmäßigen Grundlagen des Systems vom Rundfunk und Fernsehen. Er analysiert die sog. faierness doctrine, die über lange Jahrzehnte durch die verfassungsmäßige Lage der elektronischen Presse bestimmt hat. Er stellt die langsame Erodierung der Doktrin und ihren letzten Sturz samt Begründungen vor.

81 See e.g. Elena J. Zeide: In Bed With the Military: First Amendment Implications of Embedded Journalism, NYU Law Rev. Vol. 80. 1309-1343 (October 2005); Jodie Morse: Managing the News: History and Constitutionality of the Government Spin Machine, NYU Law Rev. Vol. 81. 843-874 (May 2006)

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The Hungarian Debtor List and Its Problems

This study shows the regulation and the linked questions, problems of debtor list urged on by members of the Hungarian credit life with a short presentation of the historical and vocational preliminaries.

The register of debtors dates back to the appearance of money and banking services respectively. From the ancient Caldeon Empire (2300 B.C.) we have data on banks which lend money. At that time, it is very likely that they took into account which clients were worth receiving credit, and who did not perform their obligations. We have knowledge of the best-known provision which suppose comprehensive registers in the ancient Greek history. One of Solon's (Σολον), who was elected archon (αρχων) with full authority in 594 B.C. for one year, first actions was the introduction of seisachteia (σεισαχτεια), which means the total abolition of all debts.[1] A similar solution can be found in the III Book of Moses. According to this, every debt had to be cancelled in every 50th year – the Jubilee Year (or the Year of Trumpeting). The present sense of credit information system was developed only in the nineteen eighties in Western Europe.[2] The members of the credit life use this list in two senses, with two attributes: negative or positive depending on whether only non-paying debtors are kept on record or everybody who owns debt. Both types raise economic problems and points of law, especially constitutional, private law and data protection.

1. The History of the Hungarian Debtor List

The true to type active operation of credit institution is lending where the entering into a contract is preceded by a detailed analysis: the credit assessment. Between the two world wars

1 Even nowadays it is a question that has given rise to much controversy wether this provision extends over commercial and money businesses or it concerns only debts on land and burdened with personal freedom? In: Ókori Lexikon; szerk. Vilmos PECZ; 1902

2 in Spain (1983), France (1984, 1989), Belgium (1985), Austria (1986), - it is interesting that in Germany from 1934 and in Italy from 1964 functions central register.

the banks solved this with the so-called credit letter of advice.[3] In this the credit institution made inquires on the client's financial standing, trustworthiness, business character, reputation etc. from the debtor's clients. This solution was very reasonable because the banks got an overall picture of the borrower's financial status at first hand, from his direct partners. Abuses might have also occurred at that time, indeed there was not any responsibilities connected to the credit letter of advice, but the business moral was different; the honour was presented more tangibly in the common life of companies and enterprises. According to the way of thinking in the decades of socialism the mechanism of credit assessment could not be continued, so in that way after the transformation of the political regime in Hungary – in the young two-level banking system – it had no considerable part, established practice and condition-system. Consequently, these facts contributed to in crashes and bank consolidations at that time.[4] There was a special solution of the problem: credit insurance, when the insurance company vouch for non-paying clients in exchange of a convenient payment of a fee. Such practice was performed by the Állami Biztosító in the 1980s and the ÁB-Generali Biztosító in the 1990s. In that typical purchase loan construction the insurance company pays at the falling out of the customer, id est the bank get its money.

Bank bankruptcies are caused by careless lending out, or on the other side by debtors who are unable to pay; fraud and other crimes emerge exceptionally.[5] In parallel with this, in the 1990s the Hungarian credit institutions – taking over western samples – began preparing and keeping debt registers whose contents they wanted to make available for each other. The most important thing was the moderation of risks related to lending out, which supposes an effective, mutual exchange of information among credit institutions about the loan applicants' indebtedness, solvency and paying willingness. In those days the extension of a central register popped up. To achieve this a single legal background had to be created, because such a system can work only that way according to the law and efficiently.

The initial problems emerged about personal data protection and about the manner of the realization of an inter credit institution register. The Constitution and the Act on Data Protection stipulate strict rules related to the protection, handling and cognition of personal data. Contemporaneously, the credit institutions also refer to the civil law protection of business, trade and banking secrets. Without any modification each of them would become damaged. The banks, as data owners – for obvious reasons – did not want to reveal all of their difficult and confused affairs public before the people and each other because it can damage their reputation, and the clients can become suspicious.[6] The other side of the coin is that – as users – they are interested in a more complete, detailed register, because only a reliable database can lend banks an effective helping hand in the course of the preparation of decision. At that time the creation of the legal background touched upon the text of the Act LXIX of 1991 on Financial Institution and Financial Activities (so called first Banking Act or Pit). The amendment was passed by the Parliament in October 1993, subsequently according to this,

3 In Révai Kereskedelmi, Pénzügyi és Ipari Lexikona; szerk. Béla SCHACK; 1930

4 It happened notwithstanding that in 2001 the inhabitants' loans outstanding were only about 6% of the GDP, otherwise in the EU this measure was about 46% (KSH –Hungarian Central Statistic Office).

5 In Meir KOHN: Bank- és pénzügyek, pénzügyi piacok; Osiris, 2003. 335.o

6 As a contribution to this, the exchange of information is divided disproportionately among credit institutions. Leading banks get into contact with more members, clients and customers; therefore possess more data, too. It can be imagined that the competition among each other and the information causes bigger loss actually, that profit comes from the using of data published by smaller financial institutions. A detailed description of this given in M. PAGANO and T. JAPELLI: Information Sharing in Credit Markets, Journal of Finance, 1993 Dec.

on the 15th February 1994 eight leading banks[7] established the Interbank Information Service Providing Company Ltd (Bankközi Informatika Szolgáltató Rt. hereinafter referred to as "BISZ") as a private joint-stock company. Finally, it was only on the 28th June 1995[8] that the Interbank Debtor and Credit Information System (Bankközi Adós- és Hitelinformációs Rendszer, hereinafter referred to as "BAR") started to operate. The building up of such a centralised register – along with the condition and the development of the computer technology – was a big challenge for Hungarian data owners, because they had to record vast number of information quickly and correctly, but they had to ensure a simple way of access and utilization at the same time. First of all the central system (BAR KR) began to operate, then the interfaces (BAR IR) on the end points were installed. Only after this could the uploading of the database and the polling begin progressively. The database with an utilizable amount of information came into existence in a comparatively short time. Later the smaller financial institutions and cooperative credit institutions (credit and savings unions) joined. In the middle of 1996 all the credit market members acceded to the register, and at the end of that year the database of the enterprises' debt contract became complete.

Originally the BAR contained only the enterprises' data, because the legal background prohibited record-keeping about natural persons, furthermore the commercial banks refrained from this line of business. To all intents and purposes the OTP ruled this segment of the financial market. The demands of the credit market urged the extension of the register over natural persons as well as a result of the similar problems that occurred. In connection with this, it is indispensable to examine and analyse the constitutional projection of the subject. The 59th section of the Fundamental Law declares that the protection of personal data is the citizens' constitutional basic right, and in case of that kind its limitation can only be consistent with the Rechtsstaat (state founded on the rule of law in England) – according to the provisions of the Constitution and the practice of the Constitutional Court – if

– it does not affect the essential content of other fundamental rights;
– it protects other fundamental rights or obligations;
– the public interest justifies the limitation;
– the purpose cannot be reached in another way;
– the limitation is suitable for serving this purpose.

The negative debtor list meets these requirements, because in this way the Hungarian credit life can operate more safely. Then again the interests of credit institutions and their clients and the right to private property justify that the members of this kind of database are not able to accumulate further debts, endangering the position of normal members of credit life. Therefore, the amendment of the Act CXII of 1996 on Credit Institutions and Financial Enterprises (hereinafter referred to as "Banking Act") in 1997 the system was supplemented with the data of natural persons who have accumulated debt portfolio or unpaid liability from breach of contract.[9] In the same year the accession to the system was obligated for financial institutions that practice

7 This is a difference from western European systems, because those databases were typically established by central banks and are operated by supervisory authorities. The founders were: Budapest Bank, Inter-Európa Bank, Kereskedelmi és Hitelbank, Külkereskedelmi Bank, Magyar Hitelbank, Takarékbank, Országos Takarékpénztár és Kereskedelmi Bank Rt, Postabank. In 1995, after the capital rise five other institutions joined the owner: Commerzbank, Creditanstalt, Magyar Fejlesztési Bank, Mezőbank and Füzesabony és Vidéke Takarékszövetkezet. Taking this into consideration, it is interesting how the Hungarian national bank system transformed in a decade.

8 In literature there is a controversy on this date: on the webpage of the BISz Ltd. (www.bisz.hu) there is 28th June 1995, but on the www.webbank.hu homepage is 1st July 1994.

9 The citizens' system started to operate substantively only from 1999.

certain financial activities. Furthermore, the Student Loan Center (Diákhitel Központ) became a member of the BAR in a more limited way than banks.[10] In this way the breach of paying obligations, which were undertaken in a student credit contract, defined by the special rule of law bore a relation to the general legal conditions on other debts. In May 2003 an important change took place in the circle of the shareholders, namely the GIRO Elszámolásforgalmi Rt. became the exclusive owner of the Interbank Information Service Providing Company Ltd.

The most comprehensive reform of the system was made by the Act CLXXXVIII of 2005, which amended the earlier Banking Act. The most significant element of the legal change was that the legislator extended the information obligation of financial institutions. Thereupon it was mostly necessary because numerous complaints were submitted to the Data Protection Commissioner – especially during the big flat credit borrowing fever in 2003 – in the following way: the great part of the debtors learned the information that they were members of the debtor list when another credit enquiry had been declined by a reference to the database. The clients objected against the difficulty of getting information, and there was no correct legal redress if the records were kept in a false or erroneous way. According to the amendment it is obligatory for financial institutions to supply information in writing to the clients before the conclusion of the credit contract about the consequences of the default. In addition, if there is a further non-paying thirty days before the registration on the list it is necessary to inform the debtor that what kind of consequences his default may lead to. In parallel with this, the system was developed in the same year, so in the new form of query the credit report shall process in a better way, visualize perspicuously the data of the clients and solve the problem of the management of the name versions of natural persons.

2. The Central Credit Information System

The official denomination of the register from the 1st January 2006 is Central Credit Information System (Központi Hitelinformációs Rendszer hereinafter referred to as "KHR"). You can find the foundamental provisions in the Banking Act in Chapter XX/A. According to the legal definition the central credit information system is a closed database designed to provide facilities for better and more reliable credit information, and hence to expand the spectrum of lending, and to help to reduce the credit risk of reference data[11] – defined taxatively by law – providers with a view to guaranteeing their prudent and safe operation. The KHR totally keeps on 155 000 debtors' (from this 80 000 entrepreneurial, 75 000 residential) approximately 1 220 000 (from this 1 100 000 entrepreneurial, 120 000 residential) defaulting record. The number of the queries is more than 27 000 (7 000 entrepreneurial 20 000 residential) per a month.[12] The company operates the standard in accordance with MSZ EN ISO 9001:2001 Quality Management System. At the moment more than 400 financial institutions are in contact with the database.[13]

10 Banking. 130/A.§ (5): Apart from what is contained in Subsection (4) of Section 130/J, reference data may not be supplied from the KHR to the Student Loan Center.

11 'Reference data' means any data, including the personal identification data of the data subject, that the financial enterprise operating the central credit information system is authorized to process under this Act. (Banking Act 2nd Shedule V. Chapter)

12 ÁRVAI – DÁVID – VINCZE: Hitelinformációs rendszerek; Hitelintézeti szemle, 2002/5.

13 Every financial institution can be a user of KHR who has access admission from the PSZÁF, and conclude cooperation contract with BISZ ZRt. The circle of the members are rather varied: banks, specialized credit institutions, savings and credit unions, factoring and leasing firms, investment firms and other financial enterprises.

Table No. 1.: The members of the KHR on 1st January 2006

Form of financial institution	amount
Banks	29
Specialized credit institutions	7
Financial enterprises	212
Savings unions	167
Credit unions	5
Investment firms	4
Total	**424**

Source: www.bisz.hu

By the right of the Hungarian Financial Supervisor Authority (Pénzügyi Szervezetek Állami Felügyelet, hereinafter referred to as "PSZÁF") the exclusive operator is Interbank Information Service Providing Central Credit Information Company Ltd. (Bankközi Informatika Szolgáltató Központi Hitelinformációs ZRt. hereinafter referred to as "BISz ZRt.")[14]–, which meets the requirements set in the Banking Act.[15] The nucleus of the system is the central unit in the official residence of the BISZ ZRt., to which the interfaces situated at the data owners as data providers establish the possibility of connection. The interface is built up by the BISZ ZRt. and trains the obligees and obligors to use the system. They can connect to the centre through a defined channel with an adequate password, cancelling the problems and dangers of the data communications via internet. Guaranteed rules are that the KHR works with the same conditions for each connected credit institutions, receives reference data only from them and conveys reference data to data providers only from this database. The BISz ZRt. and the reference data providers are required to keep records on any data supplied in either direction, including the date and time and the type of data disclosed. These data can only be modified by the data owners observing the defined rules. The buffered data are transferred to the members according to the strict provisions. As a matter of fact the joined institutions and enterprises of the credit and financial market are data owners and data users at the same time. Even so these two categories do not match completely because some of the companies complete transactions that do not keep a record in the KHR, so they attach to the system as a reference element. On the other side there are those who have relations with only a few business associations, thus after the data providing or conclusion of the contract getting query hardly happens. Further obligation of the data provider is to be liable to maintain reference data in a complex system and to keep them current and updated at all times. But the truth to nature and preciseness does not result from this list, which have to be a basic, fundamental element of an reliable system. The lack of the truth to nature can be explained by the persons acting fraudulently, but in this case certain facts (e.g. official documents and its contents) have

14 Place of official residence: 1205 Budapest, Mártonffy u. 25-27., webpage: www.bisz.hu

15 See Banking Act, section 130/B: Authorization to operate the KHR shall be granted to a company that is able to satisfy the conditions specified below: must be a financial enterprise operating in the form of a public limited liability company; must have at least two hundred million Forints in own funds; credit reporting service must be the sole activity; all shares must be held by financial institutions or investment firms; not less than seventy per cent of all reference data providers have expressed their intention to join the credit information system it operates, and these reference data providers control at least eighty per cent of the exposures of all reference data providers as calculated based upon the annual report they have filed for the previous year.

to be regarded as real until proved. So the BISz ZRt. does not bear the responsibility of the authenticity and reliability of data, which can challenge the validity of the reason for the existence of the whole system. It is the data owner's obligation to ensure the up to date state of the database, which has to entry every change in five working days. Reference data are handled for five years, then upon expiry of this period the BISz ZRt irretrievably erases the reference data from its records. In relation to this in 2005 came to the Data Protection Commissioner's knowledge[16] that the data after the five years were entered for another five years in the archive storage of the KHR. In such a way that the data providers are not allowed to see the information, but the data can be handed out for courts or prosecution if they submit a letter of request in writing. The ombudsman called upon the BISz ZRt. on the one hand to forbear from the further data handling and on the other hand to stop the unlawful administration. Finally, the data handler, accepting the official point of view, took the necessary measures. It is worth calling attention to the fact that this above mentioned five-year period begins at the time when the overdue debt is satisfied, or when the queued liability is no longer held in abeyance, or when the data are transferred in case of abuse or crime.

The most important thing is that you can get out from the KHR neither by legal conduct, nor by performance according to the contract. From this point of view passive and active debtor lists are distinguished.[17] The passive one contains debtors who settled their debts, the active persons have not even done that. Naturally, the banks take this into account during the credit assessment because being a member of the negative list does not mean the automatic rejection of the credit solicitation, because the credit institution keeps an open mind on the loan application upon its internal deliberating angle. According to the sense these credit constructions are not as favourable as you can come across in the media or in the press. The list members at a new credit borrowing can choose from several possibilities: one of their close relatives can conclude a contract, they can give another deposit or security (especially real estate), expensive Austrian credits or private credits (typically usurers). The Austrian credit is the best-known solution of the problem, but you have to proceed cautiously and circumspectly against the foreign contract elements; therefore the first and the second solutions are considered to be recommended.

The Central Credit Information System consists of three parts:

– data of data providers;
– data of natural persons;
– data of companies, firms, enterprises.

Implicitly to the sense these two latter sub-systems create the debtor list. It is important to keep records of data providers because the KHR is allowed to receive and convey reference data only from / to the members of the system. The provisions of the Banking Act are different on private persons and companies. Common rules are that the debts have to be in relation with the following types of transactions: credit and loan operation, financial leasing, issuing electronic money and cash-substitute payment instruments, providing surety bonds and bank guarantees. Natural persons can be listed – in case of a debtor list this version have to be regarded typical – if they meet the following requirements: the amount of any overdue and unpaid debt for which they are liable exceeding the prevailing monthly minimum wage in effect at the time of default, and this delay in excess of the prevailing minimum wage is sustained for over ninety days. This period is enough to clear his debts, but the amount is relatively low, on account of the minimal wage whose present value is only 62 500 Ft per month in 2006. An overdue debt has many other burdens which raise its amount: interest on default, banking procedure, costs of a distraint. Furthermore, if the contract is secured with pledge there is the possibility of loss of the pledged

16 in Data Protection Commissioner's Annual Report, 2005. file number: 1653/K/2005
17 This terminoligcal distinction derives from the www.bankweb.hu webpage.

property (typically real estate). Consequently, in case of a minor inattention, carelessness or incapacitation the borrower can found himself on the list for – the above mentioned – five-year period. Other cases are related to commission of a criminal act or other false conduct: giving false data, using falsified or forged document, abuse of cash-substitute payment instrument. In case of natural persons these conditions have to be taken into consideration in each legal relationship.

The sub-system which contains companies is complete[18] and consists of three parts. Every borrower gets into the first part – so this is not a negative list yet – irrespective of the fact whether it is a legal entity or not, or the sum of the debt contract concluded. The real list includes whose bank account records indicate any liability queued for more than one million forints for a period exceeding thirty consecutive days owing to lack of coverage. Regarding the individual structure of the Hungarian economy – namely the large scale of the small and middle enterprises – the view may be put forward that the provisions on business sphere are more lenient, because the yearly commerce is approximately about this amount at the large number of business associations. The third way to get into the KHR is stricter because it is not connected to crimes or false conduct; it is enough to violate the obligations stipulated in a contract for the acceptance of cash-substitute payment instruments, in consequence of which the reference data provider terminates or suspends its agreement. Actually, in this case the bank decides whether the company gets onto the list or not, because the financial institution can choose other solutions besides these two possibilities e.g. cancellation of the contract.

3. Client and Data Protection

On one side of the client protection there is the obligation and the right to receive information in writing. Here the two circles of the clients are also distinguished. In case of natural persons the provisions are difficult and unnecessarily complicated the practice that the financial institution has different information obligation before the initiation of the deal and the conclusion of the contract. It would be simpler if the client was completely informed at the first time. The further rules have major and guarantee importance. Thirty days before the planned transmission of data to the KHR the customer has to be informed that his debts are according to the above mentioned conditions. Because there is no provision the banks can decide whether they extend the defined ninety-day period or after sixty days the letter can be sent with the following: after thirty days the client is put on the list. The law is unambiguous in that the credit institution has the obligation to inform the debtor about the transfer of the reference data within eight days. Simpler rules are applied to enterprises: before the conclusion of the contract it is necessary to introduce the condition of being a list-member. But it can be regarded as disquieting that no instruction, information is provided before or after the debtors effectively become members. After this one can find common provisions. Anyone has the right at any bank to receive information about which data of his shall be included on the list and which bank shall hand it over. The time of this procedure may not exceed the time period of nine days.[19] This so

18 This is the main difference between the entrepreneurial and the residential sub-system. In case of natural persons only the established and unsettled debts are being recorded, but in the case of enterprises every contract is got into the KHR.

19 The credit institution shall forward the request for information to the BISZ Ltd. without delay, not to exceed two working days, whereupon it shall supply the requested data by secure delivery within five days to the bank to be forwarded, also by secure delivery, to the requesting person without delay, not to exceed two working days, with a certificate of delivery attached.

called client-informing is free of charge once a year but one has to pay the expenses of further data polling. In accordance with the cogent provision of the Banking Act the supplying of data for and from the KHR does not mean the violation of banking secret for credit institution.

The other great sphere of client-protection is the guarantee of right to legal remedy and the fixing of the rules of the connected procedural rules. Therefore the clients have the right to lodge an objection as far as the data are faulty or supplied unlawfully. As a result of this provision the note shall be erased or the register shall be corrected, but in an extreme case the unchanging can be imagined. The credit institution and the BISZ Ltd. shall investigate the objection within fifteen days from the date of receipt. They shall convey their findings to the data subject in writing without delay, within two working days, in a document with a certificate of delivery attached, and shall take the necessary steps (correction, cancellation, information the interested credit institution). If the client is not informed satisfactorily or does not receive a favourable answer, he can file charges against the credit institution and the BISZ Ltd. at the local court of jurisdiction by reference to his residence within thirty days[20] from the date of receipt of the information. As long as the credit-data lawsuit begins, the KHR has to keep a record of this beside the available information. It is an important client-protecting provision that the burden of proof to show lies with the bank and/or the financial enterprise operating the KHR, and that the transmission of reference data and the processing in the KHR took place in observation of the legal conditions. During the lawsuit the court may order the suspension of further processing of the reference data, but after the judgement until it is elevated to binding status, the processing of them shall be suspended. The court shall send its final ruling ordering the correction or erasure of reference data to the Hungarian Financial Supervisor Authority as well.

The credit institutions would have liked to interpret the legal provisions related to data in an extremely narrow way: restricted only to reference data, e.g. wriggling out of the explanation of credit assessment. But in accordance with the defining sections of the Act LXIII of 1992 on the Protection of Personal Data and Public Access to Data of Public Interest (a személyes adatok védelméről és a közérdekű adatok nyilvánosságáról szóló 1992. évi LXIII. törvény hereinafter referred to as Avtv.) personal data includes not only data relating to a specific natural person but any conclusion with respect to the data subject as well. Therefore, in conformity with Article 12 of the Avtv, it is necessary for credit institutions to inform the client about the reasons of the credit-assignment or repudiation. The banks are of the opinion that the explanation of creditworthiness or uncreditability infringes upon the banks' right to the protection of business secret guaranteed to them, because their internal qualification manner can become recognizable. Some of the credit institutions tried to circumvent the provisions of the Avtv by including a term among the general contract conditions or on the client signed application form that the bank does not explain its credit assessment decision and the debtor has no possibility to protest against the respects and the result. Naturally this is unlawful, because you are not allowed to eliminate a legal cogent provision by an adhesive contract. This is also confirmed by the Data Protection Commissioner's recommendation of 22th December 1999, a further consultation with the president of PSzÁF in 2002, and another case in 2005. As a result, if the credit institution does not fulfil its above mentioned obligation, the citizen has the right to go to law referring to these recommendations and the Article 17 of Avtv.

Personal data can have a part in another way in the course of credit assessment. It often occurs in numerous banks that they make inquires about personal information beyond the suppliable reference data: medical data, income, earnings, photos etc. As long as the client contributes to the managing or recognition of such information, his constitutional rights are

20 This period is a term of preclusion.

not infringed. But considering the circumstances of the present credit life, these conditions have become general practice. In certain cases a special rule of law contains the binding provisions. The 25/1997 (VIII. 1.) PM (Minister of Finance) decree on the applying methodological principles in the case of mortgage stipulates special provisions, therefore the 2. c) 5. sub-point of Schedule No. 4 contains the photos which show the state and the value of the real estate as legally binding. The Data Protection Commissioner received numerous complaints according to this, because these photos may contain parts which can be in relation to personal data. The Ombudsman in 2004 appealed to the Minister of Finance, who answered that he forwarded the request through the Hungarian Banking Association to every interested credit institution with the following demand: the banks strive to proceed in accordance with the contents of the recommendation and the Minister agrees with the Data Protection Commissioner's attitude. The Banking Association stressed the importance that a photo about a real estate can be regarded to be personal data even in that case if it does not contain any personal belongings.

In Hungary a so called private credit bureau works beside the KHR. The Girodat Ltd. was established in 1998 which got its account squared in 2003. From January 2004 the GIRinfo operating in the Giro Ltd. has continued its activity. When the GIRinfo assumed its duties the founders planned a positive listed credit information system based on the sample of the German SCHUFA, which contains the data of private persons. Because of the legal delimitation this is also impossible at present. Unlike the KHR the credit bureau does not possess a database of its own, the members get the necessary information themselves by registering through a common searching software. In addition, it accesses to other databases which can be used by the members as well e.g. register of identity cards, passports, driving licences, addresses, mug shots, signatures, companies, pledge and mortgage contracts. The credit institutions can connect to this firm voluntarily, but thanks to the fact that the connection to the KHR is obligated and contains data on enterprises as well, the GIRinfo is associated with only few financial institutions. From this point of view, no favourable change may be expected in the further years, taking into account the price, costs of the connection to the database, in addition, it cannot give surplus performance either. Moreover, the BISZ Ltd. has set up a debtor qualifying system:[21] Entrepreneurial/Personal BAR Index which categorizes the clients from 0 to 9 by risk-factor. 1 stands for the worst client, 5 for a customer with transitional risk, 9 for the best one and 0 is given if there is no data in the register. According to sense of the Personal BAR Index, which only contains negative information, goes from 1 to 5. Experience shows that banks do not use this client qualifying service, but they consider their decision on the bases of their internal methods of their own.[22]

4. The Positive List

The other type of the debtor list is the positive one, which contains the whole credit history of the borrowers, showing a more complicated picture about a person's creditworthiness, paying custom, habit, ability, skill and inclination. Taking the international practice into consideration this type is regarded revealing (e.g. United States, Great Britain, Germany, Poland, Italy) but there are numerous countries that use only the negative list (e.g. Portugal, France, Finland, Australia).

21 Credit scoring has had an established banking practice in the American economics life for a long time, the client can conclude a loan contract above a certain threshold. In greater detail see Meir KOHN: Bank- és pénzügyek, pénzügyi piacok; Osiris, 2003.

22 In: Háttéranyag a lakossági hitelinformációs rendszerkről, PSzÁF, 2006.

According to some authors the disadvantage of the negative list compared to the positive one is the following: it keeps on record only about the problematic deals so the non-repayment rate is higher and the acceptance of the credit solicitation of the list members' rate is lower. The further advantage of the positive list is that not only the payments are included but other events such as when the client was mala fide, fraudulent and therefore the bank refused to conclude a contract with him. If a person's whole credit history is known then it comes to light what kind of financial habit he has generally, how many debts he borrowed and whether he is able to assume more. In general, it can be said of solvency that who always completes right in time and has no large amount of debts, it means a smaller non-repaying risk, consequently, his credit solicitation is worth assessing favourably.[23] In case of natural persons the knowledge of the whole credit history bears importance because private persons do not need to prepare an official report or register about their indebtedness.

From time to time, the thought of the extension of the positive debtor list returns into the credit information life of Hungary. In 1998 when the database which keeps a record on private persons started, the residential crediting did not reach such an amount that convincingly indicated a complete credit history system. In 2002 the Hungarian National Bank and the Bank Association jointly made a proposal to the Ministry of Finance about the extension of the system. The negotiations and conciliations among the PSzÁF (Supervisor Authority), National Bank and the Commissioner have not been closed yet. It is important to refer to the fact that the Supervisor Authority took the view to urge on the amendment of the Banking Act in that matter only in August 2006.

The establishment of the national positive list can be analysed in two dimensions: the questions related to information technology and the legal point of view. The technical question is whether to develop the existing one or to make a new one? In the first case the reseating of the polish system would be the most obvious, while in the second case Germany can be the example to be followed. The modification of the present KHR would take up at least nine months.[24] In consideration of the credit information state of the Girodat, the improvement of the private credit bureau does not come up. The greatest problem would be the handling of the increased amount of data. The present client number (155 000) would reach 2 or 3 million in a few moments. Such a large database can be operated only clumsily with the natural identifiers (name, date of birth, mother's name), therefore, a new one has to be generated for everybody. Some authors consider the personal identification number as an evident solution and regret that the BISz. Ltd. has not been given the right to handle this authentic identifier. The personal identifier number would not be brought into connection with the credit information system. On the one hand, it appears rarely and rarely in everyday life, on the other hand the easier connection of the disparate systems comes upon. Moreover, it reminds many people of the socialist political system, which does not agree with a two-levelled modern banking system. It is perceivable that themes of a legal point of view are more complicated than technical ones. The question arises: since when does this new register include the debtors and the contracts. Naturally this is possible only for the future, so only those contracts can get on which are concluded after the introduction of the positive list. It follows that the system can be filled with enough amount of information only after 3-4 years. The definition of the circle of the registered data is problematic. Many people think that not only credit information

23 Numerous studies were written about this subject. The most important among these is an American work of J. BARRON és M. STATEN: The Value of Comprehensive Credit Reports: Lessons from the U. S. Experience, 2000 Draft. In their opinion the complete and properly handled credit bureau has a great share in the development of financial services as experience showed in the last decade.

24 This period was calculated by polish data providers. In addition, they offered their modified system. In: ÁRVAI – DÁVID – VINCZE: Hitelinformációs rendszerek; Hitelintézeti szemle, 2002/5.

are included in the awarding of solvency but assumption of obligations related to income and fortune, public utility payments etc. and other data as well.

The other question regards the data protection. An amendment of the Banking Act would be necessary so that the KHR could supply every data about the clients. At present neither the lawmaker nor the data protection commissioner urges on the introduction of the positive list,[25] because the above mentioned condition-system related to the delimitation of fundamental rights does not provide satisfying reasons for the establishment of this complete register. Many documents can prove many documents that the expansion of the database may mean saving in costs on a long-term for the credit institutions: the administration becomes cheaper, because everyone uses the same centre. The more complete credit report may improve the quality of the credit assessment and the risk of outplacement of money, so it may decrease the crediting loss and with that the banking offer rate of credits. Finally, it may stabilize the whole credit market much more. But this is only a hypothesis; there is no unambiguous and adequate calculating method that can confirm this undoubtedly. In the European Union credits are cheaper than in Hungary indeed, but it would be a naïve thing to trace this back to positive lists,[26] as there are such macro-economic instruments and occurrences (central bank base rate, trend of stock exchange, official quotation, inflation etc.) that have an influence on the evolution of the credit interests. So taking into account clients who perform according to contract may be a stocker database without any purpose in many instances (of the order of millions).

Otherwise, the debtors are in defenceless position against credit institutions. The Data Protection Commissioner receives a vast number of complaints[27] which flash a beam of light on banking abuse and unlawful data supplying. It is not reasonable that the creditors get a more tinged picture about theirs clients, because in most of the cases they lend money besides proper security. The multi-colouring of the accessory obligations for securing a contract contained by the Hungarian Civil Code provides enough security on the case of non-repaying as well. Some economics experts are of the opinion that the positive list would be favourable for clients, since as a result of the well-informing, the competition among credit institutions would become increasingly stronger, and they would work out more debtor-centralized contractual conditions. Others underline the protection of honesty and good reputation, saying, that it can be advantageous in the business life to refer to being a member of the list and to the reached index points. It is sorrowful enough that in the national economics the protection of honesty and good reputation comes up as a thing that should not be protected against attacks, but whose existence should be asserted.

5. Debtor List in the EU

From 2004 after the accession to the European Union of Hungary every legal question presents in EU dimension as well. The situation is similar with the Hungarian debtor list, as all of the members of the Union have one ore more institutions that supply credit reference, credit information services. In consequences of the four basic freedoms and the integration of credit markets, the demand of the establishment of a single European credit register system arose. At present, the greatest problem is that there are significant differences between the member

25 One can read about this in a more detailed way on the www.abiweb.obh.hu webpage: in: Állásfoglalás a pozitív adóslistával kapcsolatban, and in the relevant parts of the annual reports.

26 The Háttéranyag a lakossági hitelinformációs rendszerekről, 2006. entitled document of the Supervisor Authority contains such an approximation as well.

27 In 2005 the Commissioner received approximately 120 complaints about the data supplying of credit institutions, 40% of which were in relation to the operation of the Central Credit Information System.

states according to the conditions: obligatory/voluntary, positive/negative list, state institute/organization of market, appearance of thresholds. Just by examining some countries it can be observed that even the members themselves show a great variety alredy.

Table No. 2.: Some EU member states' credit reference institutions

Country	Member institutions
Austria	National financial institutions, insurance companies, leasing and factoring firms and its foreign subsidiary companies
Belgium	National financial institutions and its foreign branch offices
France	National financial institutions and its foreign branch offices, leasing and factoring firms
Germany	National financial institutions and its foreign branch offices, national insurance companies
Italy	National financial institutions and its foreign branch offices, foreign banks' Italian branch offices
Portugal	National financial institutions, foreign banks' Portugal branch offices, leasing and factoring firms and credit card companies
Spain	National financial institutions, foreign banks' Spanish branch offices, leasing and factoring firms

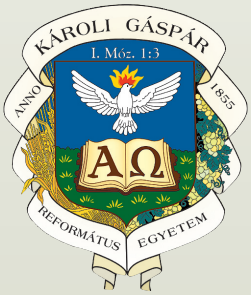
Source: ÁRVAI – DÁVID – VINCZE: Hitelinformációs rendszerek; Hitelintézeti szemle, 2002/5.

At present only the private credit bureaus can establish among each other an organ overhanging on boards, under: The European Association of Consumer Credit Information Suppliers, ACCIS. Naturally it is the purpose of the European Union that the amendment of the Consumer Credit Directive (87/102/EEC) ensures that an EU-member creditor shall be given the possibility of access to another credit information system with the same conditions. But experiencing the assistance of harmonisation and regarding the implementation conduct of member states this is keeping us waiting for a long time. Even so it is probable that on medium term the single register system will be worked out. It will be enforced by the strengthening of the moving of the private persons and enterprises of the member states. Independent reference suppliers have been already operating successfully which give reliable business information about the potential credit borrower for foreign financial institutions, and they are unwilling to do corruption in the interest of theirs bonity.

ZUSAMMENFASSUNG

Das ungarische Debitorenverzeichnis und seine Probleme

Die Studie präsentiert die Regelung des ungarischen Debitorenverzeichnisses und seine betreffenden Fragen. Die kurze Vorstellung der historischen und fachlichen Prämissen zeichnet uns verschiedene Daten der Schuldnerliste von den alten Zeiten bis zur Heute. Das Rechtsmaterial des neuen reformierten Zentralen Kreditinformationssystems wird auch präsentiert und analysiert. Die wichtigsten Garantieregelungen sind der Schutz und die Auskunft der personellen Daten und Bankgeheimnissen der Bankkunden. Der folgende Teil beschäftigt sich mit der Erweiterung des positiven Debitorenverzeichnisses an Naturpersonen (für die Betriebe ist schon gültig), was eine große Streitfrage in dem ungarischen Bankleben ist. Schließlich: dieses Problem erscheint sich nach dem Anschluss Ungarns von 2004 auch in den Dimensionen der EU, ebenso wie fast alle anderen Rechtsfragen.



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