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## Foreword

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When we try to sketch the intellectual coordinate system of our new legal periodical, *ELTE Law Journal*, several important dates may come into our mind, especially 1667, 1990 and 2004.

The Faculty of Law of Eötvös Loránd University was established in 1667, almost 350 years ago. This is the oldest institution of this kind in Hungary and has preserved its leading role and academic excellence over the centuries. No other Hungarian Faculty of Law has a longer uninterrupted record, and it ranks well among the most venerable of Central Europe's law schools in terms of distinction. This is the tradition and legacy which certainly determines our work in the future too.

In 1990, the collapse of communist dictatorship and the former socialist block, the dissolution of the Warsaw Pact, the crisis in the state-controlled economy and the regained freedom created not only a new political and economic situation in Hungary but also brought new legal challenges: the historic task of creating a firm system of rule of law and providing the modern legal infrastructure for a smoothly functioning market economy. The first part of this mission was completed; the "revolution through law" – as the late President of the Republic, *Ferenc Mádl*, referred to the sweeping changes – was successful. However, the fine-tuning and maintenance of this system requires further attention and independent reflection from scholars as well. As the classical proverb warns us, eternal vigilance is the price of freedom.

As a result of the transition, the European dream has come true as well. In 2004 – after long years of careful preparation – Hungary voluntarily joined the European Union. The tide of EU rules has reached the Hungarian legal system - even beyond the impact of the approximation of laws in the EU. Hungarian law has to be interpreted very often in the context of European rules.

These dates – 1667, 1990, 2004 – and the related events clearly symbolise our main goals: launching a new legal periodical which is based on the tradition and outstanding quality of our University, offering a forum for studies reflecting the problems of contemporary law in modern democracies and devoting special attention to the European and international dimension of legal development. In other words, *ELTE Law Journal* sets out to contribute to the free movement of legal ideas in the European legal space and to support the full re-integration of Hungarian legal science into the mainstream of legal thinking.

The establishment of *ELTE Law Journal* is part of a broader strategy of internationalisation, too. Our Faculty maintains wide-ranging international relations, primarily with universities in Europe, and is proud to be involved in educational and research projects with similar institutions abroad. In recent years we have placed special emphasis on consolidating ties with universities in neighbouring countries to promote intensive regional cooperation in legal education. We are proud to announce that in September 2013 the Faculty launched Hungary's first LL.M. programme in European and International Business Law. These efforts are backed by a new generation of colleagues at our Faculty, many of whom completed their PhD or LL.M abroad.

Remembering the incipient stage of this journal, and the months and days filled with many challenges, the Editorial Board would like to express its special thanks to Diána Mecsi, Krisztina Stump and Balázs Tőkey for their commitment to their work that proved invaluable to the Editor in Chief.

The very first issue of ELTE Law Journal starts strongly, publishing papers with a characteristic cross-border approach: Balázs J. Gellér presents his thoughts on the changing faces of human dignity in criminal law in a comparative study. Helmut Koziol offers a paper on harmonising tort law in the European Union, while Kurt Siehr has written on the Unidroit Convention of 1995 and unclaimed cultural property without provenance. Both professors are honorary doctors and professors of Eötvös Loránd University.

Nóra Chronowski and Erzsébet Csatlós meditate on the interface between International Law and Hungarian courts, András Koltay delivers an analysis on protecting the reputation of public figures in the European legal systems and our young colleague Kinga Timár reviews a number of arbitration laws and rules while investigating the relationship between the parties and arbitral institutions.

With the abundant wealth of legal ideas reflected by this short overview, the editors launch ELTE Law Journal, asking for the benign interest and support of our dear readers.

Budapest, 6 December, 2013.

*Ádám Fuglinszky*  
Editor in Chief

*Miklós Király*  
President of the Editorial Board  
Dean of ELTE Faculty of Law

*István Varga*  
Editor  
Vice Dean for Scientific Affairs

Nóra Chronowski\* – Erzsébet Csatlós\*\*

## **Judicial Dialogue or National Monologue? The International Law and Hungarian Courts\*\*\***

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### **I Introduction**

The focus of this study is the application of international law by the Hungarian Constitutional Court and ordinary courts. The purpose of the paper is to reveal whether there is any judicial dialogue or just a national monologue in this field. To achieve this aim, after an overview of the constitutional and legal framework (II), the application of the international treaties (III), international customary law and other sources of international law (IV) will be analysed, and also the interpretation of domestic law in the light of international obligations will be investigated (V) with special regard to ‘judicial dialogue’ (VI).

The importance of the question is underpinned by the fact that the Hungarian constitutional system has been – again – in transition since 2010 and the common standards of the international community – such as rule of law, protection of fundamental rights and democracy – seem to be at risk because of the permanent revision and changes of legal norms, amendments to the constitution and legal uncertainty. However, it may be presupposed that the judicial practice on the application of international law and the judicial dialogue with international courts could balance the aforementioned process, if judges are aware of its significance and are open to international law. Common values of the European constitutional states governed by the rule of law are enshrined in international treaties – as the Hungarian Constitutional Court reaffirmed in 2012.<sup>1</sup> The ordinary courts should consider this statement.

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\*\*\* The study is based on the country report (by Nóra Chronowski, Erzsébet Csatlós, Tamás Hoffmann) for project 10-ECRP-028 ‘International Law through the National Prism: the Impact of Judicial Dialogue’. We are grateful to the anonymous reviewer of ELTE Law Journal for the useful remarks. Manuscript was last reviewed on 20 September 2013.

<sup>1</sup> Decision 45/2012. (XII. 29.) AB of the Constitutional Court of the Republic of Hungary (item IV.7), ABK January 2013, 2, 29.

## II Constitutional Frameworks for the Application of International Law

### 1 Constitutional Regulation

In Hungary a new constitution, the Fundamental Law of Hungary<sup>2</sup> (hereinafter: FL), was adopted on 25 April 2011 and came into force on 1 January 2012. The new constitution does not affect the scope of Hungary's international commitments. However, there are permanent modifications regarding the constitutional foundations and so a short overview might be reasonable.

The FL expresses *commitment to the international community and law* (Article Q) and also contains a *European clause* mandating cooperation in the EU (Article E).<sup>3</sup> The function and the purpose of these articles are similar to the corresponding rules of the former Constitution (Act XX of 1949 on the Constitution of the Republic of Hungary as revised in 1989-90, in force until 31 December 2011; hereinafter: Constitution).<sup>4</sup>

Article Q (2)-(3) of the FL regulates the relation between international and domestic law. It maintains the principle of harmony, and in respect of the 'generally recognised rules of international law' it retains the monist concept.<sup>5</sup> This results in the customary international law, *ius cogens* and general principles of law recognised by civilised nations, being the 'generally recognised rules of international law' under the terminology of the FL,<sup>6</sup> having at least constitutional rank in the Hungarian hierarchy of legal norms, because they can be regarded as part of the constitution;<sup>7</sup> or, moreover, *ius cogens* norms have priority over the constitution.<sup>8</sup> With

<sup>2</sup> For the official English translation of the Fundamental Law (without amendments), see <<http://www.kormany.hu/download/7/99/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>> and for the consolidated version after the Fourth Amendment <<http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF%282013%29016-e>> accessed 24 June 2013.

<sup>3</sup> See also Chronowski Nóra, 'The new Hungarian Fundamental Law in the light of the European Union's normative values' [2012] (numéro spéciale 1) *Revue Est Europa* 111-142, 120-124.

<sup>4</sup> 1949. évi XX. törvény, *A Magyar Köztársaság Alkotmánya* (Act XX of 1949, The Constitution of the Republic of Hungary) ch I s 6 paras (1)-(2) and (4), s 7 para(1), s 2/A. On the relation of international law and Hungarian law (before FL), see Chronowski Nóra, Drinóczi Tímea, Ernszt Ildikó, 'Hungary' in Dinah Shelton (ed) *International Law and Domestic Legal Systems – Incorporation, Transformation, and Persuasion* (Oxford University Press 2011, Oxford, 259-287) 261-268.

<sup>5</sup> However, many scholars share the view that it means a general transformation rather than adoption, thus they maintain the dualist concept instead of monist. See e.g. Sulyok Gábor, 'A nemzetközi jog és a belső jog viszonyának alaptörvényi szabályozása' (2012) 4 (1) *Jog – Állam – Politika* 17-60, 18ff.

<sup>6</sup> According the practice of the Constitutional Court the expression 'generally recognized rules of international law' used by the Constitution and also by the FL covers universal customary international law, peremptory norms (*ius cogens*) and general principles of law recognized by civilized nations. See Decision 30/1998. (VI. 25.) AB of the Constitutional Court of the Republic of Hungary, ABH 1998, 220.

<sup>7</sup> Jakab András, *A magyar jogrendszer szerkezete* (Dialóg Campus 2007, Budapest-Pécs) 160.

<sup>8</sup> The Constitutional Court of Hungary stated in Decision 45/2012. (XII. 29.) AB (n 1) on unconstitutionality of TP-FL (in item IV.7): 'The constitutional criteria of a democratic State under the rule of law are at the same time constitutional values, principles and fundamental democratic freedoms enshrined in international treaties and accepted and acknowledged by communities of democratic States under the rule of law, as well as the *ius cogens*, which is partly the same as the foregoing. As appropriate, the Constitutional Court may even examine the free enforcement and the constitutionalization of the substantial requirements, guarantees and values of democratic States under the rule of law.'

regard to other sources of international law (i.e. sources other than ‘generally recognised rules,’ such as treaties, mandatory decisions of international organs and certain judgements of international courts), the FL supports the dualist model with transformation. It still does not express the priority of international law over domestic law.<sup>9</sup> The ‘harmony’ shall be ensured just with those international norms to which Hungary is obligated and so the instruments of international soft law (e.g. recommendations, declarations, final acts) are excluded from the scope of the harmony rule.<sup>10</sup> According to the detailed explanation of the FL, EU law also falls out of the scope of Article Q.<sup>11</sup>

To ensure ‘harmony,’ the Constitutional Court, under Article 24(2) item f) of the FL, will continue to review the conflict between domestic legislation and international treaties in the future, but the FL neither regulates who may initiate this procedure nor refers to the possibility of ex officio revision. This is defined in the cardinal act on the Constitutional Court.<sup>12</sup> It is not clear, either, how ‘harmony’ shall be ensured if a domestic legal act violates one of the ‘generally recognised rules of international law; hence – as hitherto – it can be answered by constitutional interpretation. The annulment of any domestic legislation breaching an international treaty is optional under Article 24(3) item c) of the FL, which weakens the existence of the strict legal hierarchy of international law and domestic law in order to ensure the harmony between them. In the light of the constitutional obligation to ensure harmony, any international norms implemented in domestic law will take the incorporating provision’s place in the hierarchy of norms. Hence, deriving purely from the requirement of harmony, international treaties shall be placed below the constitution and above all ‘secondary legal sources’ (laws as well as other forms of state administration). However, the FL itself does not clarify the rank of norms derived from international law in the Hungarian hierarchy of legal norms, and the related rules are scattered: the relevant acts of Parliament are the Act on procedure related to international agreements and the Act on the Constitutional Court.

Article E(1), as the basis of *European and Union cooperation*, essentially follows the Section 6(4) of the Constitution word for word<sup>13</sup> and so the frame of interpretation remains unchanged,<sup>14</sup> this objective expresses the commitment to each kind of European (international or supranational) cooperation. Article E paragraphs (2) and (4), with some simplification, adopts the

<sup>9</sup> FL Article Q(2). The Constitutional Court held that international law is not to be adjusted to the conditions of domestic law, but rather domestic law should be adjusted to comply with international law. Decision 53/1993. (X. 13.) AB of the Constitutional Court of the Republic of Hungary, ABH 1993, 323, 333.

<sup>10</sup> Molnár Tamás, *A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe* (Dialog Campus – Dóm 2013, Budapest–Pécs) 62-63.

<sup>11</sup> See more about Article Q of the FL in Molnár Tamás, ‘Az új Alaptörvény rendelkezései a nemzetközi jog és a belső jog viszonyáról’ in Drinóczi Tímea, Jakab András (eds), *Alkotmányozás Magyarországon 2010-2011* (PPKE JÁK – PTE ÁJK 2013, Budapest – Pécs, 83-91), and Sulyok (n 5) 17-60.

<sup>12</sup> According to Act CLI of 2011 on the Constitutional Court (*2011. évi CLI. törvény az Alkotmánybíróságról*), the revision either takes place ex officio, or upon the initiation of one-fourth of the MPs, the Government, the president of the Supreme Court, the Supreme Prosecutor, the Commissioner for Fundamental Rights, or the judge of any court of law if in a given case s/he shall apply a domestic legislative act conflicting with an international treaty.

<sup>13</sup> See also Bragyova András, ‘No New(s), Good News? The Fundamental Law and the European law’ in Tóth Gábor Attila (ed), *Constitution for a Disunited Nation* (CEU Press 2012, Budapest-New York, 335-358) 335-338.

<sup>14</sup> See also Blutman László, Chronowski Nóra, ‘Hungarian Constitutional Court: Keeping Aloof from European Union Law’ (2011) 5 (3) *International Constitutional Law* 329-348.

rules of Section 2/A of the Constitution. Article E contains only one new rule compared to Section 2/A of the Constitution: in its paragraph (3), it states that '[t]he law of the European Union may stipulate a generally binding rule of conduct'. From the domestic legal viewpoint, the grounds for the constitutional validity of Union law become clearer than it used to be; however, this paragraph still does not solve the problem of application primacy, i.e. that the domestic legal act conflicting with an EU legal act is not applicable. The duty of the courts of law to ensure the compliance of domestic with Union law still stems from EU Treaties (i.e. asking for preliminary ruling), and not from the constitution itself. As such, the position of international law in the domestic legal system is still better defined under Article Q of the FL by the harmony requirement than the constitutional rank of Union law.

## 2 Instability of the Constitutional Foundations

Beyond the direct rules of Articles B and I, with respect to Articles Q and E of the FL, international agreements also continue to oblige Hungary to respect, protect and uphold the rule of law, democracy and fundamental rights. These obligations thus stem from the constitution itself, and set such requirements which broach no exceptions. The European constitutions also contain similar provisions on international law with the same functions, reaffirming the existence of multilevel and parallel constitutionalism in the European legal area. As such, these kinds of constitutional provisions inherently commit and restrain the national governments for and by international and common European values.<sup>15</sup> Several provisions of the FL, however, can also be interpreted as permitting exceptions to the aforementioned European requirements – pertaining to democracy, the rule of law and the protection of fundamental rights – and as such they could come into conflict with international commitments. The permanent amendments of the FL have also been widening the gap between international and Hungarian constitutional values. It is impossible to assess every amendment under the framework of this study, but it is worth mentioning that the erosive process had started with the Transitional Provisions of the FL (hereinafter: TP-FL) that were adopted by the Parliament on 30 December 2011, and came into force on 1 January 2012.<sup>16</sup>

The TP-FL served the coming into force of the new constitution. However, regarding its content, the TP-FL was in fact an amendment to it, as about half of its rules were not transitional at all, and some of them undermined the principles and provisions of the FL. It was an extremely alarming issue, concerning the basic principles of the FL, that the TP-FL has overruled important statements of the Constitutional Court on the right to the independent and impartial judge<sup>17</sup> and undermined the provisions of the FL on judicial independence, the separation of church and

<sup>15</sup> Tom Ginsburg, Svitlana Chernykh, Zachary Elkins, 'Commitment and Diffusion: Why Constitutions Incorporate International Law' [2008] (1) University of Illinois Law Review 201-237, 202-203.

<sup>16</sup> An unofficial translation of the TP-FL by Bánkúti Miklós, Halmai Gábor and Kim Lane Scheppele is available at <<http://lapa.princeton.edu/hosteddocs/hungary/The%20Act%20on%20the%20Transitional%20Provisions%20of%20the%20Fundamental%20Law.pdf>> accessed 12 May 2012.

<sup>17</sup> Decision 166/2011. (XII. 20.) AB of the Constitutional Court of the Republic of Hungary, ABH 2011, 545.

state, division of powers, independence of the Central Bank, etc.<sup>18</sup> The Ombudsman requested the Constitutional Court to examine whether the Transitional Provisions comply with the requirements of the rule of law laid down in the FL. After the Ombudsman's initiative, the Parliament adopted the First Amendment to the FL, clarifying that the Transitional Provisions are part of the FL. By this amendment the governing majority intended to avoid the constitutional review of the TP-FL, confirming its constitutional rank.<sup>19</sup> Despite this, the Constitutional Court ruled on the Ombudsman's petition, declaring that all those provisions of the TP-FL are invalid, which did not have a transitional character.<sup>20</sup> As a response, the governing majority adopted the Fourth Amendment<sup>21</sup> of the FL, which incorporates the majority of the quashed articles into the constitution. The amendment was firmly criticised by the Venice Commission,<sup>22</sup> the European Parliament and the European Commission as it raises concerns with respect to the principle of the rule of law, EU law and Council of Europe standards.

Before the Fourth Amendment some hope was given regarding 'constitutional continuity', in that the Constitutional Court seemed to be willing to refer to its jurisprudence and recall the previous argumentation if the formulation of text of the FL is the same as was the wording of the Constitution.<sup>23</sup>

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<sup>18</sup> On the TP-FL and other cardinal acts read more in 'Amicus Brief for the Venice Commission on the Transitional Provisions of the Fundamental Law and Key Cardinal Laws' (ed. Halmai Gábor, Kim Lane Scheppele), available at <[http://lapa.princeton.edu/hosteddocs/hungary/Amicus\\_Cardinal\\_Laws\\_final.pdf](http://lapa.princeton.edu/hosteddocs/hungary/Amicus_Cardinal_Laws_final.pdf)> accessed 12 May 2012. In Hungarian see Katalin Szajbély – Attila Láposy, 'Az Alaptörvény Átmeneti Rendelkezéseinek alkotmányosságáról' (2012) 5 (2) *Közjogi Szemle* 1-9.

<sup>19</sup> In April, 2012 the Government of Hungary lodged a bill to the Parliament as the First Amendment of the Fundamental Law of Hungary so as to clarify that the Transitional Provisions are the part of the FL. The first amendment was adopted in June 2012. The First Amendment repealed – upon the criticisms of the EU – Article 30 of the TP-FL that infringed the independence of the Central Bank.

<sup>20</sup> The Constitutional Court annulled – for formal reasons – approximately half of the articles of the TP-FL in its Decision 45/2012. (XII. 29.) AB (n 1). The Court emphasised that the Parliament acted *ultra vires* by creating non-transitional rules; at the same time it refused a substantive review of the rules concerned.

<sup>21</sup> The Parliament adopted the Fourth Amendment on 11 March 2013; it came into force 1 April 2013. In March 2013, during the parliamentary debate of the Fourth Amendment, the Council of Europe, the UN High Commissioner, the president of the European Commission, Hungarian human rights associations and scholars voiced concerns over the changes. For the joint expert opinion of Hungarian Helsinki Committee, Eötvös Károly Policy Institute and Hungarian Civil Liberties Union on the Fourth Amendment, see <[http://helsinki.hu/wp-content/uploads/Appendix\\_1\\_Main\\_concerns\\_regarding\\_the\\_4th\\_Amendment\\_to\\_the\\_Fundamental\\_Law\\_of\\_Hungary.pdf](http://helsinki.hu/wp-content/uploads/Appendix_1_Main_concerns_regarding_the_4th_Amendment_to_the_Fundamental_Law_of_Hungary.pdf)>. Unofficial translation of the Fourth Amendment is available here: <[http://helsinki.hu/wp-content/uploads/Appendix\\_2\\_Fourth\\_Amendment\\_to\\_the\\_Fundamental\\_Law\\_Unofficial\\_translation.pdf](http://helsinki.hu/wp-content/uploads/Appendix_2_Fourth_Amendment_to_the_Fundamental_Law_Unofficial_translation.pdf)> accessed 15 April 2013.

See also Halmai Gábor: 'Constitutionalism in Hungary: Undermining the Fundamental Law' (2013) *JURIST – Forum*, April 12 <<http://jurist.org/forum/2013/04/gabor-halmay-hungary-churches.php>> accessed 15 April 2013.

<sup>22</sup> See Opinion 720/2013 of the Venice Commission on the Fourth Amendment of the Fundamental Law of Hungary, Strasbourg 17 June 2013, <<http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29012-e>> accessed 17 June 2013.

<sup>23</sup> The Constitutional Court has clarified that the formulation of art E paras (2) and (4) of the FL and that of s 2/A paras (1)-(2) of the Constitution has the same meaning and so, during the interpretation of art E, the Court has maintained its previous precedent. Decision 22/2012. (V. 11.) AB of the Constitutional Court of Hungary, ABK June 2012, 94, 97. Reasoning [40]-[41]: In the new cases the Constitutional Court may use the arguments included in its previous decision adopted before the Fundamental Law came into force in relation to the constitutional question ruled upon

However, the Fourth Amendment of the FL has repealed the decisions of the Constitutional Court delivered prior to the FL entering into force.<sup>24</sup> This brand new regulation reinforces the concern that the governing majority refuses the constitutional traditions of the last two decades.<sup>25</sup> It undermines not just the case law of the Constitutional Court, but also the practice of the courts of law, which, with increasing frequency, referred to Constitutional Court rulings, among them to decisions related to international law. Although the Constitutional Court refused the substantive examination of the Fourth Amendment, it emphasised the importance of the international and European constitutional achievements,<sup>26</sup> and later clarified that, even after the Fourth Amendment, it is possible to quote the former decisions under certain circumstances.<sup>27</sup> However, the Constitutional Court should give stronger evidence of its commitment to international and European law, because it could also trigger the ordinary courts to rely on international and European standards, and protect the rights of individuals even against the uncertain domestic law. This study will not enter into predictions, because it analyses the practice of the past, but at this point it may be ventured to say that the constitutional uncertainty and changing constitutional practice is unfavourable to the application of international law in the mostly dualist Hungarian legal system, especially because it was not really intensive even before the constitutional changes of 2010-2013.

### 3 Questions Related to the Application of International Law

Apart from the category of generally recognised rules of international law, the Hungarian legal system follows the dualist approach with transformation. The treaties are applicable after transformation, i.e. if they are promulgated and published in a Hungarian legal instrument (act of Parliament or decree of the Government).<sup>28</sup> The procedure related to international agreements is regulated by Act L of

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in the given decision, provided that this is possible on the basis of the concrete provisions and interpretation rules of the Fundamental Law, having the same or similar content as the provisions included in the previous Constitution. [...] The conclusions of the Constitutional Court pertaining to those basic values, human rights and freedoms, and constitutional institutions, which have not been altered in the Fundamental Law, remain valid.'

<sup>24</sup> See art 19 of the Fourth Amendment and n 21.

<sup>25</sup> For detailed comments on the issue, see joint expert opinion of Hungarian Helsinki Committee, Eötvös Károly Policy Institute and Hungarian Civil Liberties Union, referred in n 21.

<sup>26</sup> The obligations of Hungary that arise from the international treaties, the EU membership and the generally recognised rules of international law, and the fundamental principles and values compose such a coherent system that cannot be left out of consideration during the constitution-making process, legislation and constitutional examination of the Constitutional Court. See Decision 12/2013. (V. 24.) AB of the Constitutional Court of Hungary, ABK March 2013, 542, 547.

<sup>27</sup> According to the position of the Constitutional Court, the use of the arguments in the decisions dated before the Fundamental Law shall be reasoned with sufficient detail. Ignoring the principles from the previous decisions is possible even if the content of certain provisions of the previous Constitution and the Fundamental Law is the same. However, the way that domestic and European constitutional development has done so far, the regularity of constitutional law affects the interpretation of the Fundamental Law as well. See Decision 13/2013. (VI. 17.) AB of the Constitutional Court of Hungary, ABK March 2013, 618, 624.

<sup>28</sup> The procedure related to international agreements is regulated by the Act L of 2005 (*2005. évi L. törvény a nemzetközi szerződésekkel kapcsolatos eljárásról*). This Act contains the rules on preparation, establishment, and recognition binding force, publication and entering into force, provisional application, modification, suspension and termination of international treaties.

2005 and the same rules shall be applied *mutatis mutandis* to certain EU decisions, the compulsory decisions of international courts and other organisations.<sup>29</sup> The Constitutional Court has competence to decide whether the incorporation of an international norm was constitutional, and ensure the harmony of the domestic and international law. For this reason, Act CLI of 2011 on the Constitutional Court is also relevant regarding the application of international law.<sup>30</sup>

The Constitutional Court has a leading role in ensuring the harmony of domestic *legislation* and assumed international obligations due to its powers, but the application of the sources of international law in legal practice is a different aspect of harmony. Is the judge obliged to search for, invoke and apply the alleged international regulation binding on Hungary in every single case or can the judge trust the domestic legislation, which is in fact already in harmony with international obligations? Is the judge obliged to know that a certain legal question is also regulated by international obligations and is he or she expected to verify always that, for example, an Act to be applied in the case is in total conformity with an international treaty which happens to be superior to domestic legislation, except for the constitutional provisions? Principally the answers are all yes, and section 32 of the Act on the Constitutional Court prescribes for judges to turn to the Constitutional Court when they have to apply any domestic norm colliding with an international treaty. However, there are no sanctions if judges fail to do so. It is even more problematic in the question of legal practice related to treaty-based provisions, which are continuously interpreted by a judicial organ explicitly established for disputes arising from the convention itself. Certainly, the decision settling litigation is only binding for the parties; however, the legal reasoning and the exploration of the content of a provision shall form a part of the convention itself. Is the Hungarian judge obliged to follow the practice of the European Court of Human Rights (ECtHR) on whether it develops the provisions of European Convention on Human Rights (ECHR) in a way that is different from the actual Hungarian legal practice, or is it only the task of the legislative power to keep the legislation updated? In the following, the study tries to outline the answers to the main points of these questions on the basis of the foregoing judicial practice.

### III Application of International Treaties

#### 1 Definition of the International Treaties

According to Act L of 2005, an international treaty is a written agreement that is covered by instruments of international law, with any name or title and regardless of whether it is incorporated into one, two or more interrelated documents, concluded with other States or other subjects of international law with the capacity to contract, which creates, modifies or terminates

<sup>29</sup> Act L of 2005, s 12 and s 13 paras (3)-(4), see also Molnár, *A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe* (n 10) 182ff.

<sup>30</sup> 2011. évi CLI. törvény az Alkotmánybíróságról (Act CLI of 2011 on the Constitutional Court) s 23 paras (3)-(4), s 40 para (3), s 24-25, s 32, s 42, s 46 paras (1)-(2).

<sup>31</sup> Act L of 2005 s 2 item a).

rights and obligations for Hungary under the international law.<sup>31</sup> This definition complies with that of the Vienna Convention on the Law of Treaties<sup>32</sup> (promulgated in Law-Decree 12 of 1987, hereinafter: Vienna Convention), and even more, it has wider scope covering not only treaties created by states but also by other entities (e.g. the Vatican, Taiwan, Order of Malta, national liberation movements, states in statu nascendi).<sup>33</sup> The former regulation on the procedure related to international agreements (Law-Decree 27 of 1982) was declared unconstitutional by the Constitutional Court in 2005. The Court relied, inter alia, on the fact that the law-decree was not in accordance with the Vienna Convention.<sup>34</sup>

The courts of law therefore have to take into consideration the definition of Act L of 2005, the rulings of the Constitutional Court, and the terminology of the Vienna Convention. They do not make attempts to create an independent definition of ‘international treaty’. The statutory definition clearly distinguishes international treaties from political commitments.

## 2 Conditions of Direct Applicability

The courts distinguish the ratified, non-ratified, approved etc. treaties on the basis of Act L of 2005. However, because of the dualist approach, the courts apply only those treaties which are transformed, i.e. promulgated into a Hungarian legal act and entered into force. The courts do not intend to use treaties which are not in force,<sup>35</sup> but the situation is the same as with the domestic legal acts – they are applied by the courts when they come into effect. If an international treaty comes into effect earlier than the legislator can transpose it by a domestic legal act, the courts have the competence to decide whether the given treaty has to be applied in single cases.<sup>36</sup>

The conditions of direct applicability are the exact definition of the subjects of private law addressed by the international treaty and the exact specification of the rights and obligations under the treaty, so that the treaty can be implemented without any further act of legislation in all states parties.<sup>37</sup>

According to the courts’ practice, the procedural condition of direct applicability is the transformation of the international treaty, and the substantive condition is whether the rights, duties and sanctions in the given convention are sufficiently defined for judges to apply them in concrete cases, and establish subjective rights upon the treaty provisions.<sup>38</sup> It is in compliance with the rulings of the Constitutional Court.

<sup>32</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

<sup>33</sup> Molnár, *A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe* (n 10) 109-110.

<sup>34</sup> Decision 7/2005. (III. 31.) AB of the Constitutional Court of the Republic of Hungary, ABH 2005, 83, 94.

<sup>35</sup> E.g. in a case started in 2008 the plaintiff referred to the Charter of Fundamental Rights of the EU. The Court of Appeal, however, found it irrelevant in 2010, as the Charter surely has no retroactive effect, and the legal dispute shall be determined on the basis of the legal acts effective at the time of the injury. Budapest-Capital Regional Court of Appeal 5.Pf.20.736/2010/6.

<sup>36</sup> Decision 116/B/2006. AB of the Constitutional Court of the Republic of Hungary, ABH 2007, 1936, 1938.

<sup>37</sup> Decision 7/2005. (III. 31.) AB (n 34) 88-89.

<sup>38</sup> Fejér County Court 25.P.22.432/2008/61., 25.P./2008/80.

### 3 The Influence of EU Law

EU law has been regarded as a separate legal system by the Constitutional Court and the courts of law since the accession. As such the supremacy and direct applicability of EU legal acts are recognised; in most cases the courts ensure the effectiveness of Community/Union law<sup>39</sup> but it does not really influence the application of international law, except in certain cases, when the applied EU legal act refers to the ECHR. The references to the principles of direct effect or supremacy are rather automatic;<sup>40</sup> the courts follow the well-known textbooks on EU law or utilise the ministerial explanations attached to the bill of the applied Hungarian law. If the EU legal act refers to the ECHR, the courts then cite the referred article of the Convention and sometimes the landmark decisions of the ECtHR relevant in the given case, but only rarely do they add further interpretation or reach individualised conclusions in the light of the particular circumstances of the case.<sup>41</sup> However, the Curia (former Supreme Court) seems to be willing to establish the triangular relationship of EU law, the ECHR and domestic law, and interpret the harmonised Hungarian legal acts in the light of the ECHR, if the implemented EC directive provides a minimum standard.<sup>42</sup>

So far, the Constitutional Court has established two principles marking the boundaries of future constitutional practice. *First*, it will not treat the founding and amending treaties of the

<sup>39</sup> See Dezső Márta, Vincze Attila, *Magyar alkotmányosság az európai integrációban* (2nd rev edn, HVG-ORAC 2012, Budapest) 208-209.

<sup>40</sup> See e.g. the Decision of Szabolcs-Szatmár-Bereg County Court 5.K.20. 631/2010/4.: 'Since the date of the accession of Hungary to the European Union on 2004 May 1 the Community Treaty has the highest rank in the hierarchy of legal norms. From that date the inferior laws shall be always assessed and interpreted by the courts and the authorities in the light of the aim and spirit of the Treaty. This also means that the relationship of EU law and national law is determined by the principle of primacy, as the Supreme Court stated in principle: the national law shall be interpreted in a way that is appropriate to fulfil (i.e. implement) the Community law (EBH 2006/1568).'

See also Supreme Court Decision Kfv.I.35.052/2007/7. that referred to *Costa v ENEL* and *Van-Gend en Loos*.

<sup>41</sup> E.g. in the case law on expulsion, the courts are used to refer to the Council Directive 2003/86/EC on the right to family reunification, which cites Article 8 of the ECHR. Hence, the Hungarian courts quote Article 8 of the ECHR, and then summarise the practice of the ECtHR: 'According to the case law of the ECtHR, in order to determine whether the family reunification might be limited or not (i.e. whether expulsion is applicable, and if so, how long), it must first be determined whether there is a family in the country of residence (does the referred family relationship correspond to the concept of the family), and then, whether the expulsion of the family member limits family life (the living conditions of the family in the host country are sufficient). If not, it must be considered whether the limitation of the family life is acceptable [Article 8(2) of ECHR justifies the reason], then, to what extent coexistence may be limited (proportionality of the expulsion)'. This formula was used by the Municipal Court of Budapest in several cases, see 27.K.33.900/2009/5., 27.K.30.107/2010/6., 27.K.32.880/2009/8., 17.K.33.440/2008/5.

<sup>42</sup> The Supreme Court established that only refugees are covered by the scope of the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ 251/12; however, in the light of Article 8 of the ECHR, the domestic law may recognise this right of other protected persons as well. The Supreme Court emphasised that Member States may maintain or introduce more favourable provisions than those laid down by the Directive. According to the Supreme Court, there is no such international obligation that would require the equal safeguard of the right to family reunification of refugees and other protected persons and so domestic law may lay down different rules in term of the different groups; however, express provisions on the differentiation is needed in the domestic law, otherwise equal protection shall be ensured with regard to the ECHR. Supreme Court Kfv.III.37.925/2009/7.

European Union as international law for the purposes of constitutional review,<sup>43</sup> thereby setting up a three-tier system of legal rules applicable within Hungarian legal practice that distinguishes between national, international and European law. *Second*, in the absence of jurisdiction to review substantive (un)constitutionality (as opposed to procedural constitutionality), the Constitutional Court does not regard a conflict between domestic law and EU law as a constitutionality issue<sup>44</sup> and this mandates the ordinary courts to resolve such conflict of a sub-constitutional nature.<sup>45</sup>

#### 4 ECHR – the Most Popular Treaty Applied by the Hungarian Courts

The Hungarian courts usually refer to the interpretations of international tribunals when they apply an international treaty and usually put aside the national interest. The most popular is definitely the ECHR and the case law of the ECtHR, while foreign judgments related to the ECHR are never referred to. In general, the ECHR was – and in most cases is still – a point of reference for the Constitutional Court and the ordinary courts (referred as passing comment or obiter dictum), but not the rationale for the decision (*ratio decidendi*). The Constitutional Court is the most consequential in the field of the application of the Convention.<sup>46</sup> In recent years (2011-2013) the references of the Constitutional Court became increasingly explicit and definite.

According to the Constitutional Court, if the essential content of a certain fundamental right in the Constitution / FL is defined in the same way as it is formulated in international treaties (e.g. International Covenant on Civil and Political Rights [hereinafter: ICCPR] or the ECHR), the level of the fundamental rights protection provided by the Constitutional Court may not, under any circumstances, be lower than the level of international protection (typically that detailed by the ECtHR). It follows from the principle of *pacta sunt servanda* that the Constitutional Court shall pursue the case law of the ECtHR even if it has not been derived from its own previous ‘precedents’.<sup>47</sup> To interpret and clarify a certain provision of the ECHR, the Constitutional Court takes as a basis the practice of the ECtHR, which body was authorised by the contracting parties to give an authoritative interpretation of the Convention. Foremost those decisions (precedents) in which the ECtHR interprets the Convention itself, and points out what is in compliance with it and what violates it, are taken as a basis.<sup>48</sup> The interpretation of international treaties given by the Constitutional Court obviously shall coincide with the official interpretation given by the Council of Europe.<sup>49</sup>

*Molnár* even assessed the phenomenon as if the Constitutional Court was stating ‘double unconstitutionality’ by declaring first the collision with – or potential infringement of – the ECHR, and second the ‘domestic unconstitutionality’ upon the interpretation of the provisions

<sup>43</sup> Decision 1053/E/2005. AB of the Constitutional Court of the Republic of Hungary, II ABH 2006, 1824.

<sup>44</sup> Decision 72/2006. (XII. 15.) AB of the Constitutional Court of the Republic of Hungary, I ABH 2006, 819, 860.

<sup>45</sup> Blutman, Chronowski (n 14) 329-348.

<sup>46</sup> See Szalai Anikó, ‘Az Emberi Jogok Európai Bírósága ítélezésének megjelenése a magyar Alkotmánybíróság gyakorlatában’ (2010) 7 (4) *Kül-Világ* 14-21, 15-16.

<sup>47</sup> Decision 61/2011. (VII. 13.) AB of the Constitutional Court of the Republic of Hungary, ABH 2011, 290, 321.

<sup>48</sup> Constitutional Court Decisions 166/2011. (XII. 20.) AB, ABH 2011, 545, 557.; 43/2012. (XII. 20.) AB (on the protection of families), ABK 2012, 788, 800-801.

<sup>49</sup> Decision 41/2012. (XII. 6.) AB of the Constitutional Court of Hungary, ABK 2012, 742, 745.

of the Constitution or FL.<sup>50</sup> The best examples for this are the Constitutional Court Decisions 1/2013. (I. 7.) on electoral registration and 4/2013. (II. 21.) on using a five-pointed red star.<sup>51</sup> In the latter case, the Constitutional Court explicitly overruled its previous practice on criminalising the use of totalitarian symbols with regard to the decisions of ECtHR related to Hungary. In these decisions the ECtHR rulings seem to determine the ratio decidendi indeed and they do not remain just obiter dictum.

The ordinary courts also respect the ECHR and they should also respect the case law of the ECtHR; however, their practice is neither unambiguous nor consistent in this field. The Strasbourg case law does not fall within the scope of Act L of 2005 and so it does not bind the courts on a formal basis.<sup>52</sup> It is also true that government communication or action in certain cases might indirectly influence the enforcement of international courts' judgments, but the effect of the expressed 'national interest' has not yet appeared in the domestic courts' decisions. Concerning the legal effect of a decision by an international judicial body, the reaction of the legislative power is recently something to be worried about. As regards the *Fratanoló case*<sup>53</sup> the Parliament adopted a resolution declaring that the alleged provision of the Hungarian Criminal Code is correct and, even if the ECHR stated otherwise, the Parliament does not agree with the opinion of the ECtHR.<sup>54</sup> However, this attitude of the Parliament does not impede ordinary courts to follow the ECtHR decision and, on the same day of the adoption of the negative declaration of the Parliament, the Supreme Court rendered a Strasbourg-conformant judgment and relieved the accused on the grounds that no crime had been committed in the view of the ECtHR according to its decision in a similar case.<sup>55</sup>

<sup>50</sup> Molnár, *A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe* (n 10) 186.

<sup>51</sup> Decisions 1/2013. (I. 7.) AB of the Constitutional Court of Hungary, ABH 2013, 50-87. and 4/2013. (II. 21.) AB of the Constitutional Court of Hungary, ABH 2013, 188-211.

<sup>52</sup> An exception to this rule that the Act XIX of 1998 on Criminal Procedure prescribes: review proceedings may be instituted in favour of the defendant if a human rights institution set up by an international treaty has established that the conduct of the proceedings or the final decision of the court has violated a provision of an international treaty promulgated by an act, provided that Hungary has acknowledged the jurisdiction of the international human rights organisation and that the violation can be remedied through review. The claim shall be judged on the basis of the decision of the human rights institution and disregard to the domestic law infringing the treaty provision. See 1998. évi XIX. törvény a büntetőeljárásról (Act XIX of 1998 on Criminal Procedure) § 416 para (1) item g) and s 423 para (3).

<sup>53</sup> *Fratanoló v. Hungary*, no. 29459/10, 3 November 2011 (violation of article 10 of the Convention by using of totalitarian symbols).

<sup>54</sup> See, *Az Emberi Jogok Európai Bíróságának a Fratanoló kontra Magyarország ügyben hozott ítélete végrehajtásával kapcsolatos kérdésekről szóló J/6853. számú jelentés (elfogadva az Országgyűlés 2012. július 2-i ülésnapján)* [Report J/6852 of the Parliament on the execution of the judgement of the European Court of Human Rights in the case of *Fratanoló v. Hungary*, adopted on the session of 2 July, 2012] *Az Emberi Jogok Európai Bíróságának a Fratanoló kontra Magyarország ügyben hozott ítélete végrehajtásával kapcsolatos kérdésekről szóló jelentés elfogadásáról szóló 58/2012. (VII. 10.) OGY határozat* [Resolution 58/2012. (VII. 10.) of the Parliament on the execution of the judgement of the European Court of Human Rights in the case of *Fratanoló v. Hungary*]. Molnár Tamás, 'Két kevésbé ismert nemzetközi jogforrás helye a belső jogban: a nemzetközi büntetőbíróság döntései, valamint az egyoldalú állami aktusok esete a magyar jogrendszerrel' (2012) 5 (3) *Közjogi Szemle* 1-7, 1.

<sup>55</sup> Curia Bfv.III.570/2012/2.; Molnár, *ibid* 3.

All in all, the above-mentioned rulings of the Constitutional Court may encourage the ordinary courts to follow the ECtHR practice as well. Despite this, there were cases when the ordinary court completely refused to apply the ECtHR judgments referred to by the plaintiff,<sup>56</sup> or the court of appeal clarified for the court of first instance that, although the judgments of the ECtHR must be taken into consideration, it does not mean that – regarding the differences between the applicable law and the parties concerned – it could be implemented generally and automatically.<sup>57</sup>

An opposite (but rare) example is the landmark judgment in the Hungarian Guard case. The Budapest-Capital Regional Court of Appeal directly applied the ECHR, and deliberated the admissibility of the restriction of the given fundamental right (i.e. dissolution of the association and movement concerned) on the basis of ECtHR measures. Thus, instead of relying on the Constitution and the necessity – proportionality test of the Constitutional Court, the criteria drawn up under Article 10 of the ECHR were implemented (i.e. the restriction is prescribed by law, has a legitimate aim, and is necessary in a democratic society). The court also referred to the International Convention on the Elimination of all forms of Racial Discrimination (New York, 1965), so as to strengthen the argumentation.<sup>58</sup>

Concerning the practice on international judicial decisions, the ECtHR is the most frequently cited; however, it happens that, in the reasoning, decisions of the ECtHR which are only indirectly connected to the case are cited and invoked, and sometimes the foreign names of these decisions are even misspelled. The famous *Babus* case of the Budapest-Capital Regional Court of Appeal is an example of the significance of ECtHR judgments in the interpretation and clarification of the Hungarian legal practice, and at the same time it serves as an anti-example for the application of international law as well, through the decoration of reasoning with irrelevant and incorrectly cited decisions of the ECtHR.<sup>59</sup>

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<sup>56</sup> In 2003 the Municipal Court of Budapest drew the attention to the fact that the Hungarian judiciary does not apply a precedent system, and the judgments of the ECtHR before the EU accession cannot be referred to in the proceedings of the courts and administrative authorities. [This is obviously a professionally incorrect position.] Decision of Municipal Court of Budapest 20. Kpk.45.434/2003/2. Cited by Szalai (n 46) 18. and Molnár, *A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe* (n 10) 186. In the famous Fratanoló case, the Pécs Regional Court of Appeal in 2012 also declared that the judgments of the ECtHR are not directly applicable. Pécsi Ítéltábla Bfv.III.570/2012/2. Cited by Molnár, *ibid.*

<sup>57</sup> Decision of the Budapest-Capital Regional Court of Appeal 5.Pf.20.736/2010/6. The subject matter of the case was the right to a judicial decision within a reasonable time, and the court of first instance referred to Article 6 of the ECHR, several judgement of the ECtHR, even the jurisprudence (textbooks, German commentaries), and interpreted Article 2 of the Hungarian Civil Procedure Code (CPC) in that light. Section 2 of the CPC provides for the courts to ensure the right to completion of the trials within reasonable time. Article 6 of ECHR guarantees the right to a fair and public hearing within a reasonable time. The judge assessed that the CPC shall be interpreted in compliance with the ECHR, and the right to completion of the trial shall not be restricted to the right to a final judgment; instead it also covers the interim decisions and the hearings during the whole proceeding. The judge partially awarded for the plaintiff (against the defender court). The Court of Appeal, however, stated that Article 6 of the ECHR cannot be an independent legal basis, and the legislator did not intend to encourage such a broad interpretation of Section 2 of the Civil Procedure Code.

<sup>58</sup> Decision of the Budapest-Capital Regional Court of Appeal 5.Pf.20.738/2009/7.

<sup>59</sup> Budapest-Capital Regional Court of Appeal Decision 3.Bhar.341/2009/6. Koltay András, 'A Fővárosi Ítéltábla határozata Babus Endre újságíró rágalalmazási ügyében' (2010) 1 (3) *Jogesetek Magyarázata* 33-38, 35.

It has to be noted that, in the practice of ordinary courts, there is a group of cases that reveal the application of international law; those containing a foreign element and international law has a significant role in the reasoning of the judgment, a definitive one or at least complementary. These cases are related to double taxation,<sup>60</sup> the calculation of social allowances such as old age pension<sup>61</sup> for those who lived a part of their life abroad – in a non-EU Member State or before the accession of Hungary – and, in most instances, litigation concerning the carriage of goods. Altogether, beyond human rights-related issues and the ECHR, the most frequently cited international instrument, among other bilateral treaties in the subject,<sup>62</sup> is the 1956 Geneva Convention on the Contract for the International Carriage of Goods by Road (CMR).<sup>63</sup>

## IV References to Customary International Law and Other Sources of International Law

### 1 Customary International Law

The terminology ‘customary international law’ is used neither in the text of the FL, nor in that of the Constitution; it is covered by the term ‘generally recognised rules of international law’.<sup>64</sup> It is generally transformed into the domestic legal system by Article Q(3) of the FL and cannot derogate the provisions of the FL.<sup>65</sup> According to constitutional judge *Péter Kovács*, the question of the technical solution that transformed international rules can be debated but the fact that the principle of *pacta sunt servanda* obliges Hungary is unquestionable.<sup>66</sup>

The Constitutional Court refers to *customary international law* in the form of its codified version. Sometimes the Constitutional Court only adds the information that the cited norm is a *generally recognised rule of international law* but it relies, for its argumentation, on the treaty

<sup>60</sup> See, for example, Agreement between the Republic of Croatia and the Republic of Hungary for the avoidance of double taxation with respect to taxes on income and on capital. 30 August in Supreme Court Decision Kfv.I.35.460/2007/8 and Bács-Kiskun County Court Decision K.21.858/2006/17.

<sup>61</sup> See, for example, Agreement on social security between the Hungarian Republic and the Republic of Austria, 7 September, 1961 in Supreme Court Decision MfvK.IV.10.206/2007/4., Municipal Court of Budapest Decision Mfv/K.III.11.015/2006/5.; Convention between the Hungarian People’s Republic and Federal Republic of Germany on social security, 2 May, 1998 in Győr-Moson-Sopron County Court Decision 9.K.27.302/2007/10.

<sup>62</sup> See, for example, Convention between the Government of the Hungarian People’s Republic and the Government of the Socialist Republic of Romania on the carriage of persons and goods, 9 February, 1972 in Supreme Court Decisions Kfv.I.35.063/2007/6 and Kfv.I.35.411/2006/5; Kfv.I.35.107/2007/5. Agreement between the Government of the Hungarian People’s Republic and the Government of the People’s Republic of Bulgaria on the carriage of persons and goods in Supreme Court Decision Kfv.I.35.103/2007/7.

<sup>63</sup> *Convention on the Contract for the International Carriage of Goods by Road* opened for signature 19 May 1956, 399 UNTS 189 (entered into force 2 July 1961) See the application of the convention for example, Supreme Court Decisions Kfv.I.35.259/2010/7.; Kfv.V.39.138/2010/7; Gfv. X.30.302/2009/4; Gfv.IX.30.095/2010/4; Gfv.X.30.186/2008/6; Gfv.X.30.239/2007/4; Gfv.X.30.342/2009/5.

<sup>64</sup> Decision 30/1998. (VI. 25.) AB (n 6) 220.; but in decision 823/B/2003, ABH 2006, 1540. the Constitutional Court did not share this view.

<sup>65</sup> Decision 4/1997. (I. 22.) AB of the Constitutional Court of the Republic of Hungary, ABH 1997, 41, 83.

<sup>66</sup> Decision 95/2009. (X. 16.) AB of the Constitutional Court, ABH 2009, 863. (Judge Kovács).

provision that involves the customary international law in question.<sup>67</sup> There is no sharp separation among the generally recognised rules of international law; thus, for instance in decision 32/2008. (III. 12.), the principles of *nullum crimen sine lege* and *nulla poena sine lege* are declared as *fundamental principles of international law*;<sup>68</sup> and the principle of *pacta sunt servanda* is referred to as *ius cogens* and customary international law as well.<sup>69</sup> Moreover, the qualification is important as *ius cogens* can prevail even over the FL.<sup>70</sup>

The practice of the Hungarian Constitutional Court includes only a small number of cases in which customary international law appears. These cases refer to the principle of *nullum crimen sine lege* and the rule that war crimes and crimes against humanity shall be punished without statutory limitation is declared to be *ius cogens*. It is to be noted, that the principle of *nullum crimen sine lege* also constitutes customary international law.<sup>71</sup>

In decision 53/1993. (X. 13.), the Constitutional Court pursued a preliminary norm control concerning the modification of the Hungarian Criminal Code and its conformity with international norms relating to the prescription of crimes regulated by common Article 2 and 3 of the Geneva Conventions. Concerning these kinds of crimes against humanity and war crimes, the Constitutional Court derived the legal basis for punishability without time limit from the fact that they are considered *ius cogens* as they threaten the whole of humankind.

In decision 32/2008. (III. 12.), for instance, the argumentation of the Constitutional Court concerning the criminality of war crimes and crimes against humanity prescribed by universal principle of international customary law is declared to be effective in domestic law through the provisions of Section 7(1) of the Constitution. The obligations issuing from this norm are analysed and interpreted in the view of the principle of *nullum crimen sine lege*, which is declared in the ECHR and in the ICCPR; however, the provisions of these conventions contain exceptions which allow the retroactive effect of the customary norm of criminality of war crimes and crimes against humanity. These sources of international law mean international legal obligations to be taken into account as Section 57(4) of the Constitution – and Article XXVIII(4) of the FL – declaring the principle of *nullum crimen sine lege* in domestic law does not contain any exceptions from the general ban.<sup>72</sup> It is noteworthy, however, that since 2011 – on the bases of the aforementioned Constitutional Court decisions – Article XXVIII (5) of the FL limits the prohibition related to the principle of *nullum crimen sine lege*.

Concerning the practice of ordinary courts, only domestic customary law is applied except for the nine so-called ‘volley cases’. The term refers to the prosecutions of gunfire against unarmed civilians but it became used in connection with the prosecution of all criminal acts committed in the period

<sup>67</sup> See Decision 53/1993 (X. 13.) AB (n 9) 327.

<sup>68</sup> Decision 32/2008. (III. 12.) AB of the Constitutional Court of the Republic of Hungary, ABH 2008, 334.

<sup>69</sup> Decision 4/1997. (I. 22.) AB of the Constitutional Court of the Republic of Hungary, ABH 1997, 41, 52.

<sup>70</sup> See, for example, Constitutional Court Decisions 4/1997. (I. 22.) AB, ABH 1997, 51; 30/1998. (VI. 25.) AB (n 6) 237-238.

<sup>71</sup> See Decision 53/1993. (X.13.) AB (n 9) 327.

<sup>72</sup> Decision 2/1994. (I. 14.) AB of the Constitutional Court of the Republic of Hungary, ABH 1994, 41, 53-54. See on this decision, Bodnár László, ‘Igazságtétel – most már kizárólag a nemzetközi jog alapján?’ (1998) 6 (53) *Acta Universitatis Szegediensis – Acta Juridica et Politica* 77-84.

of the 1956 revolution, thus including such crimes as extrajudicial executions.<sup>73</sup> The Parliament adopted a statute in 1993 on 'the procedure to follow in case of certain crimes committed during the 1956 war of independence and revolution' that made possible the punishment of crimes against humanity and war crimes without statutory limitation. Decision 53/1993. (X. 13.) of the Constitutional Court stated that the principle of *nullum crimen sine lege* is not to be applied in such cases, as the non-application of statutory limitation for the above mentioned crimes is the order of international customary law and *ius cogens*.<sup>74</sup> Although the Act of 1993 was declared to be unconstitutional and annulled in 1996 for other reasons, the volley trials were however judged in the light of the statements of the 1993 decision of the constitutional Court and so the courts applied the customary international norm while delivering the judgments in these cases.<sup>75</sup>

## 2 'Other Sources of International Law'

The Constitutional Court frequently refers to the resolutions of international organisations to clarify treaty-based obligations.

As regards binding resolutions of international organisations, the FL does not contain any provisions; however, there are many international organisations that make binding decisions. The UN Security Council is a well-known example.<sup>76</sup> As for the transformation of Security Council decisions, Hungarian practice is incoherent, confusing and contradictory. Sometimes they are promulgated by government decrees or regulations and very rarely by acts.<sup>77</sup> Sometimes (such as many of the resolutions concerning sanctions against Iraq, Angola, Sierra Leone and Afghanistan) they do not even appear in the Hungarian legal system,<sup>78</sup> and it happens quite often that they are published in the form of a Foreign Office bulletin (*külgügyminiszteri tájékoztató*). This latter solution is a monist technique; as such, this kind of publication of resolutions is absolutely contrary to the provisions concerning Hungarian legal order and legal certainty.<sup>79</sup> In legal practice it causes problems in determining the applicable law. For example, during the years of the Yugoslav Wars, the

<sup>73</sup> Hoffmann Tamás, 'Individual Criminal Responsibility for Crimes Committed in Non-International Armed Conflicts – The Hungarian Jurisprudence on the 1956 Volley Cases' in Stefano Manacorda, Adán Nieto (eds), *Criminal Law Between War and Peace: Justice and Cooperation in Criminal Matters in International Military Interventions* (Cuenca Ediciones de la Universidad de Castilla-La Mancha 2009, 735-753) 736.

<sup>74</sup> Decision 53/1993. (X. 13.) AB (n 9) 332.

<sup>75</sup> See, for example, Supreme Court Bfv.X.1.055/2008/5. Bodnár (n 72) 77-84.; Hoffmann Tamás, 'A nemzetközi szokásjog szerepe a magyar büntetőbíráóság gyakorlatának tükrében' [2011] (4) *Jogelméleti Szemle* <<http://jesz.ajk.elte.hu/hoffmann48.html>> accessed 17 April 2013.

<sup>76</sup> Molnár Tamás, Sulyok Gábor, Jakab András, 'Nemzetközi jog és belső jog: jogalkotási törvény' in Jakab András (ed), *Az Alkotmány kommentárja* (2nd rev edn, Vol. I, Századvég 2009, Budapest, 357-386) 381.

<sup>77</sup> Security Council Resolutions and the Hungarian legal system is discussed in details in Molnár Tamás, 'Mit kezd a magyar jog az ENSZ Biztonsági Tanácsának kötelező erejű határozataival? (az utóbbiak beépülése és helye a belső jogban)' [2011] *Grotius* <<http://www.grotius.hu/publ/displ.asp?id=JTIYVQ>> accessed 18 November 2012.

<sup>78</sup> SC Res 864, 327<sup>th</sup> mtg, UN Doc S/Res/864 (15 September 1993), SC Res 1127, 3814<sup>th</sup> mtg, UN Doc S/RES/1127 (28 August 1997) SC Res 1173, 3891<sup>th</sup> mtg, UN Doc S/RES/1173 (12 June 1998) and SC Res 1221, 3965<sup>th</sup> mtg, UN Doc S/RES/1221 (12 January 1999); SC Res 1267, 4051<sup>th</sup> mtg, UN Doc S/RES/1267 (1999) (15 October 1999).

<sup>79</sup> Molnár, Sulyok, Jakab (n 76) 382.

SC imposed an arms embargo over the whole territory of the former state. A smuggler was arrested on Hungarian territory and convicted of violating it but at second instance the judgment was modified and he was discharged. In fact the embargo was suspended for a while but at the time of the crime it was in force again.<sup>80</sup> The earlier resolution suspending the embargo was promulgated late, so at the time of the trial of the second instance the judge could only rely on the Foreign Office bulletin providing for the suspension. The result was that the act committed was not qualified as a crime at the time of the appellate procedure, despite the fact that at that time Yugoslavia was embargoed again, as the latter resolution providing for it was not promulgated in time.<sup>81</sup>

As for non-binding resolutions, the recommendations and resolutions of the competent organs of the Council of Europe are frequently invoked as relevant interpretations of ECHR provisions and the Constitutional Court relies many times on these sources as guidance. Many resolutions and recommendations of the Parliamentary Assembly, the Committee of Ministers or the Venice Commission are cited to interpret and clarify obligations; in general they are therefore invoked in the company of treaty-based provisions and ECHR judgments and, most of the time, they are not the source and basis of the final decision, just the support for the argumentation based on domestic law. In these cases the terms and phrases used, such as *Parliamentary Assembly also urges or the opinion of the Constitutional Court is in accordance with [...]* reveal of the purpose of citation.<sup>82</sup> The same can be observed regarding the decisions of the United Nations and its specialised agencies and the communications of the institutions of the EU. For instance, when the Constitutional Court had to decide upon a case in which the rights of homosexual people were concerned, the Court invoked many international instruments to evince the conformity of domestic law with international standards.<sup>83</sup>

It is rare but not unique for these instruments to form an integral part of the reasoning and the formation of the final decision; however, in such cases they are always accompanied by treaty-based provisions and judicial practice to replace and complement the lack of constitutional practice related to a fundamental right.<sup>84</sup>

Regarding the available decisions, ordinary courts rarely invoke non-binding instruments of international law, except by referring to Constitutional Court decisions that analyse or refer to them. As such, direct citation of non-binding international legal instruments is not practiced.<sup>85</sup>

<sup>80</sup> See SC Res 757, 3083<sup>th</sup> mtg, UN Doc S/RES/757 (30 May 1992), SC Res 760, 3086<sup>th</sup> mtg, UN Doc S/RES/760 (18 June 1992) and SC Res 820, 3200<sup>th</sup> mtg, UN Doc S/RES/820 (17 April 1993) providing for sanctions against Yugoslavia; SC Res 1022, 3595<sup>th</sup> mtg, S/RES/1022 (22 November 1995) suspending the embargo and SC Res 1074, mtg, UN Doc S/RES/1074 (1996) providing for the embargo again.

<sup>81</sup> Bács Kiskun County Court I. Bf. 657/1997., BH 1998. 409. See Imola Schiffner, 'Nemzetközi jog a magyar bíróságok gyakorlatában' (2004) 14 (4) Acta Universitatis Szegediensis – Acta Juridica et Politica Publicationes Doctorandorum Juridicorum 437-480, 464-465.

<sup>82</sup> See, for example, Constitutional Court Decisions 14/2004. (V. 7.) AB, ABH 2004, 249-252; 57/2001. (XII. 5.) AB, ABH 2001, 496-498; 10/2007. (III. 7.) AB, ABH 2007, 215-217; 154/2008. (XII. 17.) AB, ABH 2008, 1211-1212; 60/2009. (V. 28.) AB, ABH 2009, 523, 97/2009. (X. 16.) AB, ABH 2009, 876, 30/1998. (VI. 25.) AB (n 6) 220.

<sup>83</sup> See Decision 37/2002. (IX. 4.) AB of the Constitutional Court, ABH 2002, 240.

<sup>84</sup> See Constitutional Court Decisions 18/2004. (V. 25.) AB, ABH 2004, 306. and 40/2005. (X. 19.) AB, ABH 2005, 446.

<sup>85</sup> See, for example, Supreme Court Kfv.IV.37.138/2010/4.; Municipal Court of Budapest 19.P.24.473/2007/17.

## V Interpretation of Domestic Law in the Light of International Obligations

### 1 'Indirect Application' of International Law

The Constitutional Court declared that domestic law shall be made and interpreted in the view of international obligations, no matter whether the obligation issues from customary international law or is incorporated in a treaty.<sup>86</sup> Using international law as an interpretational tool is based on Article Q (2) of the FL. The problem arises in connection with non-binding sources of international law; however, constitutional judge Péter Kovács noted that invoking them would help the positivist foundation of argumentation.<sup>87</sup> *Blutman* says that, due to its independence, the Constitutional Court is free to choose its tools for the argumentation and interpretation. Only the validity, causality and verifiability of conclusions form limitations to the interpretation.<sup>88</sup> The aim is to devise a politically and ideologically neutral judgment. It can easily be achieved by considering the (non-binding) decisions of international organisations and interpretative solutions of judgments of third States' courts.<sup>89</sup>

Obligation derived from the FL means that the Hungarian State takes part in the community of nations and this participation is constitutional order for domestic law.<sup>90</sup> The basis of international cooperation is formed by common principles and goals, which are subtly affected by non-binding norms and expectations to ensure the peace and good functioning of interactions. The State can avoid many of these norms but it cannot extricate herself from the whole system, as it would mean isolation from the community. Participation in the community of nations hence presumes the application of international norms containing social and moral standards as instruments for interpretation. In this way the citation of non-binding international documents and foreign jurisprudence as a tool for interpreting the Fundamental Law can be justified.<sup>91</sup>

According to *Blutman*, the main question is whether the FL creates the obligation to use, or at least consider, the application of these instruments as well. In his view, the obligation of participation in international cooperation cannot transform those norms that are not undertaken explicitly by Hungary, as it would be contrary to the principle of rule of law, legal certainty and the content of Section 7(1) of the Constitution (now Article Q of the FL) as well. However, non-binding norms might be taken into consideration to interpret norms that oblige the State.<sup>92</sup>

<sup>86</sup> Constitutional Court Decisions 4/1997. (I. 22.) AB, ABH 1997, 41, 48-49; 380/B/2004. AB, ABH 2007, 2438; 61/2011. (VII. 13.) AB, ABH 2011, 320. *Blutman* László, 'A nemzetközi jog használata az Alkotmány értelmezésénél' (2009) 64 (7-8) *Jogtudományi Közlöny* 301-315, 304.

<sup>87</sup> Constitutional Court Decision 41/2005. (X. 27.) AB, ABH 2005, 459. (Judge Kovács); *Blutman* (n 86) 302-303.

<sup>88</sup> *Blutman* (n 86) 303.

<sup>89</sup> Constitutional Court Decision 21/1996. (V. 17.) AB, ABH 1996, 74; *Blutman* *ibid.*

<sup>90</sup> Constitutional Court Decisions 53/1993. (X. 13.) AB, (n 9) 323; 15/2004. (V. 14.) AB, ABH 2004, 269.

<sup>91</sup> *Blutman* (n 86) 303-304.

<sup>92</sup> See Decision 45/2005. (XII. 14.) AB, ABH 2005, 569. (Judge Kovács); *Blutman* (n 86) 304.

Regarding the available decisions, ordinary courts, most of the time, invoke the practice of the ECtHR if the case before them concerns Fundamental Law issues, in order to interpret domestic legal provisions correctly (mainly in those cases when they are quite ambivalent or do not seem to be in conformity with international obligations).<sup>93</sup> It is not rare that the ECtHR practice is invoked in the form that it was discussed and analysed in a Constitutional Court decision, and the relevant decisions of the ECtHR are not cited directly,<sup>94</sup> or only the ‘practice of the ECtHR’ is invoked without any exact decision to support the statement.<sup>95</sup>

## 2 The Effect of International Legal Instruments on the Reasoning

International law has *constitutive* effect on the reasoning when it serves the basis for the judgement. For example in 1993 the Hungarian Parliament passed a law on *Procedures Concerning Certain Crimes Committed during the 1956 Revolution*. This law tried to make possible some form of ‘historical justice’ in order to prosecute Communist offenders as they committed crimes against humanity. The President of the Republic did not promulgate the act, but turned to the Constitutional Court for a preventive norm control. The President asked the Court to review the law for its conformity with both the Constitution and two international agreements, Article 7 of the ECHR and Article 15 of the ICCPR, which declared the principles of *nullum crimen* and *nulla poena sine lege*. The constitutionality of the provision referring to war crimes and crimes against humanity, as defined by the Geneva Conventions of 1949 for the Protection of War Victims, was upheld. The Constitutional Court cited the New York Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968 which declares that no statutory limitation shall apply to several categories of war crimes and crimes against humanity, irrespective of the date of their commission.<sup>96</sup> By signing and ratifying this convention, Hungary undertook an obligation not to apply its own statute of limitations in cases involving war crimes and crimes against humanity.<sup>97</sup> The Constitutional Court even highlighted the fact that the possibility of ignoring the principle of *nullum crimen* and *nulla poena sine lege* with regard to these kinds of crimes is based on customary international law and so the non-applicability of statutory limitations obliges Hungary without any conventional provisions.<sup>98</sup>

International law has *additional constitutive effect* when the international norm plays a supplementary role in the reasoning with other national legislative acts. In this case the final decision is based on the two types of sources as well, with the same emphasis. For example, in 1990

<sup>93</sup> See Supreme Court Kfv.VI.38.071/2010/4.; Kfv.II.38.073/2010/4.; Kfv.III.38.074/2010/4.; Kfv. 38075/2010/4.; Bfv.I.1.117/2008/6.; Budapest Regional Court of Appeal 5.Pf.20.738/2009/7.

<sup>94</sup> See, for example, Municipal Court of Budapest 19.P. 23.191/2006./19.; Supreme Court Kfv.III.37.385/2008/4.

<sup>95</sup> See, for example, Békés County Court 5. P. 20259/2008/7.; Municipal Court of Budapest 20.Bf.6162/2009/2.

<sup>96</sup> *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, opened for signature 26 November 1968, New York, 754 UNTS 73 (entered into force 11 November 1970) [hereinafter: 1968 New York Convention] Article II.

<sup>97</sup> See 1968 New York Convention, Article III-IV.

<sup>98</sup> Decision 53/1993. (X. 13.) AB (n 9) 323-338.

capital punishment was declared to be unconstitutional. The relevant provisions of the Criminal Code which permitted capital punishment as a criminal sanction conflicted with the constitutional prohibition against any limitation on the essential content of the right to life and to human dignity. This statement based on the Constitution was supplemented by international obligations and thus it is clarified as such: capital punishment conflicts with provisions that declares that human life and human dignity form an inseparable unit, thus having a greater value than other rights; and thus being an indivisible, absolute fundamental right limiting the punitive powers of the State. The reasoning is based on the relevant articles of the ICCPR;<sup>99</sup> and the ECHR with its Protocol no. 6 dealing with the right to life.<sup>100</sup> These international norms clarified the provisions of the Constitution in the light of (partly prospective) international obligations and so they had a significant role in the final reasoning of the decision.<sup>101</sup> International law has a *supportive effect* in those cases whereby the reference to international legal instruments is to strengthen a decision based on domestic law. Recommendations of the Council of Europe are frequently invoked as relevant interpretation of the provisions of the ECHR, and the Constitutional Court relies many times on these sources as guidance (as with the judgments and decisions of international judicial organs to support argumentation), or to justify that the opinion of the Constitutional Court in the reasoning is in accordance with international standards and international obligations; thus recommendations are not the sources of obligation, they are not the norms to apply; they are only the tools of interpretation of treaty based international obligations.

As regards the practice of ordinary courts, in the most cases the invocation of international law has only supportive effect, and there are very few cases where international law plays a significant role in the reasoning of the court. When international law has a constitutive effect on the case, it is usually the practice of the CJEU or that of the ECtHR which forms the basis of the reasoning. The common feature of these cases is that the applicable law is deduced from the jurisprudence. As regards the ECHR practice, the Supreme Court carried out a detailed analysis of Article 6 (the right to fair trial) and 8 (the right to respect for private and family life, home and correspondence) of the Convention in connection with a case on the legality of perquisition.<sup>102</sup>

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<sup>99</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, New York, 999 UNTS. 171. (entered into force 23 March 1976) Art 6.1. declares that every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his/her life. Paragraph 6 of the same article states that nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

<sup>100</sup> While Article 2.1 ECHR, signed in Rome on 4 November 1950, recognised the legitimacy of capital punishment, Article 1 Protocol 6 ECHR adopted on 28 April 1983 provides that the death penalty shall be abolished. No one shall be condemned to such penalty or executed. Also, Article 22 of the Declaration on Fundamental Rights and Fundamental Freedoms, adopted by the European Parliament on 12 April 1989, declares the abolition of capital punishment. Decision 23/1990. (X. 31.) AB of the Constitutional Court of the Republic of Hungary, ABH 1990, 88, 102-103.

<sup>101</sup> Decision 23/1990. (X. 31.) AB (n 100) 94-145. The Constitutional Court took into consideration the ECHR in the reasoning of its decision, although in 1990 Hungary was not yet a member of the Council of Europe and the Convention. It is also noteworthy that this landmark decision of the Hungarian Constitutional Court was cited by the South African Constitutional Court, in its Judgment of 6 June 1995 (Case No. CCT/3/94).

<sup>102</sup> Supreme Court Kfv.III.37.451/2008/7.

## VI Conclusions on Judicial Dialogue

### 1 On 'Dialogue' in General

Dialogue is when two (or more) participants, in an equal position, seek agreement via an exchange of views, generally in order to achieve some joint outcome. The precondition of the dialogue is the near identical or similar position of the participants, which primarily occurs at the level of powers and influence, and from this perspective, assumes identical weight. The dialogue is actually a specific form of debate; therefore it shall be distinguished from general discussion and consultation as well. As a specific form of debate, some criteria may be outlined that characterise dialogue, without which the parties would misunderstand each other.

First, the dialogue assumes a common goal or, if you prefer, a common subject on which the dialogue proceeds. The dialogue may never end by itself. The second criterion is the commitment to the common goal. All participants want to achieve the common goal, which is to eliminate or reduce the conflict, and the debate or their individual interests shall be subordinated to this goal. Regularity is also an important feature of the dialogue. The dialogue is rarely a single exchange of views, because the interests of the participants are usually complex. The fourth characteristic of a dialogue is that the parties strive to be conclusive and effective. All of them are interested in conflict resolution, and therefore they are willing to 'sacrifice', i.e. to give up some parts of their own interests in order to reach a compromise outcome, because this is usually preferable for everyone than enforcing their individual interests. Finally mutuality must be mentioned, which should characterise all of the participants. Mutuality also encompasses concession, empathy, tolerance, etc. The meaning of a dialogue is not overcoming each other, but to achieve a common goal.

### 2 Hungarian Courts and International Judgments

A focal question is whether, and to what extent, the Hungarian courts consider the judgments of international courts. Do they just simply refer to them, or do they reflect on them by overruling their own, prior jurisprudence? The latter would prove the existence of judicial dialogue; the former, however, is not enough to satisfy the criteria of the dialogue.

The decisions of the ECtHR as well as the decisions of the CJEU are not considered as direct sources of international law; instead, they are interpretations. In decision 18/2004. (V. 25.), the Constitutional Court declared that the jurisprudence of the ECtHR forms and obliges the Hungarian practice. This kind of obligation refers to the interpretation of the different provisions of the Convention and not to the judgment itself.<sup>103</sup> In decision 988/E/2000. the Constitutional Court highlighted that the judgment of the International Court of Justice is neither a norm nor a treaty. It decided upon a unique legal dispute even if its statements have theoretical significance and become precedent.<sup>104</sup> Two years later the new act on the procedure regarding the treaties

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<sup>103</sup> Blutman (n 86) 310.

<sup>104</sup> Decision 988/E/2000. AB of the Constitutional Court, ABH 2003, 1290.

was adopted and it reformulates this opinion by stating that decisions are binding and shall be executed in Hungary if the state is a party to the settled dispute. This decision shall be promulgated with the appropriate application of the provisions regarding the promulgation of the treaties in the Official Gazette.<sup>105</sup> As for the form of promulgation, it is the form of the *compromis* (the agreement between opposing parties to turn to a judicial forum to settle a dispute) that is determinative. It is to be noted that this obligation shall not refer to decisions in litigation where the other party to the dispute is a private individual and not a state, just like in the case of ECtHR.<sup>106</sup> In such cases only section 13(1) of Act L of 2005 obliges Hungary to consider the decisions of the organ having jurisdiction over the disputes in relation to the treaty in the course of interpreting it. In this case the decision is not a source of law; however, it can be a significant guidance for the interpretation of treaty-based obligations.<sup>107</sup>

In general, ordinary courts frequently cite international court decisions and mainly those of the ECtHR, but they rarely use the reasoning and the fundamental legal statements directly in the argumentation in their own cases. In many cases, the citation of the judicial practice of the ECtHR is given even without invoking *expressis verbis* the relevant judgment,<sup>108</sup> or the practice is invoked indirectly by citing the statements of the Constitutional Court based on the practice of the ECtHR. This phenomenon is mainly seen in the judicial activity of the Municipal Court of Budapest.<sup>109</sup>

Concerning the practice of domestic courts at a lower level, sometimes the application of international judicial decisions is beyond the scope of domestic norms. For instance, the interpretation and application of the benchmark of *good faith* established by the ECtHR is far beyond the provisions of the Hungarian Criminal Code concerning defamation and libel and the dogmatic frames and bases. Thus, the applications of ECtHR decisions to support the argumentation related to the meaning of *bona fides* in the case of a journalist called *Babus* directly conflicted with the relevant decision, echoing the Hungarian constitutional practice, of the Constitutional Court [36/1994. (VI. 24.) AB].<sup>110</sup>

### 3 Dialogue or Monologue? – Final Conclusions

Applying the general features of dialogue to the courts, one can conclude that the basic condition – an equal position – is given if we consider the powers and status of, say, the ECtHR, the Constitutional Court and ordinary courts of last instance. As to the common goal and the commitment to that – the first and second specific conditions – it may be supposed that

<sup>105</sup> Act of L of 2005, s 13.

<sup>106</sup> See Molnár, *A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe* (n 10) 184ff.

<sup>107</sup> See Municipal Court of Budapest Decision 24.K.35.639/2006/25.

<sup>108</sup> See Supreme Court Decision Kfv.IV.37.629/2009/70.

<sup>109</sup> See Municipal Court of Budapest Decisions 19.P.24. 472/2006/4.; 19.P.24. 473/2007/17.; 7. P. 26.047/2008/5.; 18. P./P.21.661./2006/6; 19.P. 24.053/2009.; 31.P. 25.751/2009., 18. P/P- III. 20.339./2006/19.; 19.P. 25-386/2006/8.; 19.P. 631.904/2004.; 31.P. 23.691/2009.; 19.P. 24.213/2006.; 19.P. 24.327/2008., 19.P. 23.752/2005., 31.P. 24.109./2010.; 31.P. 22.002./2009.

<sup>110</sup> Szomora Zsolt, 'Schranken und Schrankenlosigkeit der Meinungsfreiheit in Ungarn Grundrechtsbeeinflusste Widersprüche im ungarischen Strafrecht' (2011) 6 (1) Zeitschrift für Internationale Strafrechtsdogmatik 29-43, 33.; Koltay (n 59) 36.

the analysed courts are to protect fundamental rights and common constitutional values, but these are very broad and abstract common goals. The concrete goal of each court is to solve a given case, or safeguard the ECHR or the Constitution in line with its function, and the way they reach this goal is influenced by the circumstances of the given case, the references of the parties concerned, and the presumption of the judges regarding the *ratio decidendi*. The latter also interferes with regularity, because the Hungarian courts usually refer to international sources only if it supports the reasoning or has stronger persuasive force than the purely domestic legal based argumentation. Fourth, the courts have no conflict with each other; hence – although they respect each others’ statements and rulings – they do not need to be conclusive and effective in this respect. Sometimes the domestic courts seem to be rather careful or reticent over the interpretation of international treaties – maybe they try to avoid a potential future conflict with the international court interpreting the given treaty authoritatively. Of course if all role-players – i.e. courts – agree that the conflict can be traced back to a given piece of domestic law infringing a normative international commitment, and the procedural conditions are available (their procedures were initiated, at least one of them has power to eliminate the concerned norm, they have appropriate procedural ties between each other), the international and domestic courts may cooperate effectively by referring to each other’s decisions. Finally, in the ‘dialogue’ of the courts, mutual respect can be observed and rivalry is a really rare phenomenon, but it is also true that courts are not compelled to give mutual concessions.

As such, as a final conclusion, it can be stated that the Hungarian courts apply international law if they have to or they want to decorate their reasoning with it, but it is still far from a constructive dialogue. Hungarian courts already *listen to* the international courts, because they refer to the decisions when applying international law, but *rarely do they answer* – i.e. revise their former practice. Even the judgments of the ECtHR do not have a strong position, as they are – according to the Hungarian courts – just of a declaratory nature.

The principle of *iura novit curia* is known and accepted by the Hungarian courts.<sup>111</sup> The efficient – and not just effective – application of international law and response to the international courts’ judgments might help the preservation of the values common to liberal democratic societies. It is up to the judges to recognise that they have a role to play in maintaining the shared constitutional values of European states.

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<sup>111</sup> See, for example, Debrecen Regional Court of Appeal Gf. I. 30 741/2012/3. BDT 2013. 2884.

Balázs J. Gellér\*

## Some Thoughts on the Changing Faces of Human Dignity in Criminal Law\*\*

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### I Substantive (Material) and Procedural (in)justice

#### 1 Prelude

It was no surprise that, during the preparation of the new Hungarian Constitution, an extensive survey organised by the Government showed wide support amongst the population for life imprisonment without the option of parole.<sup>1</sup> This was duly incorporated in the new Constitution of Hungary<sup>2</sup> in Article IV. para (2). It is also a commonly shared – and most likely correct – opinion among Hungarian criminal lawyers and criminologists that, had the reestablishment of the death penalty been put to question, the majority of the *populus* would have rendered the same verdict, undoubtedly causing serious constitutional problems in the area of majoritarian democracy versus the 6<sup>th</sup> and 13<sup>th</sup> Additional Protocols of the European Convention on Human Rights (ECHR) to which Hungary is party.<sup>3</sup> Alas, The Hungarian Government is not to escape this fate since the European Court of Human Rights (CHR) arguably found whole-life tariffs to be in violation of Article 3 of ECHR in its *Vinter and others v. UK* (2013) judgment.<sup>4</sup>

Be it as it may, the theoretical and philosophical questions underlying the rationale and justification for criminal law in general and punishment in particular, as well as criminal procedure, had to be revisited when drafting the new Criminal Code.<sup>5</sup>

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\*\* I dedicate this article to my friend and colleague Professor Károly Bárd.

<sup>1</sup> *Magyarország Alaptörvénye* (2011. április 25) Fundamental Law of Hungary voted on by the Parliament on 18<sup>th</sup> April 2011.

<sup>2</sup> Article IV. para (2): 'No person shall be deprived of his or her liberty except for statutory reasons or as a result of a statutory procedure. Life imprisonment without parole shall only be imposed in relation to the commission of wilful and violent offences.'

<sup>3</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No. 005 (entered into force 3 September 1953) promulgated in Hungary on 7<sup>th</sup> April 1993.

<sup>4</sup> *Case of Vinter and Others v. The United Kingdom* Applications nos. 66069/09 and 130/10 and 3896/10, 9 July 2013.

<sup>5</sup> 2012. évi C. törvény a Büntető Törvénykönyvről (Act C of 2012 on the Criminal Code of Hungary).

## 2 Procedural (In)justice

Undoubtedly the most important requirement a criminal justice system has to meet is – not surprisingly – justice. Many have written about the questions concerning procedural justice versus objective truth and the answers given shaped not only our thinking about the criminal justice system but also specific ways and methods of appeal proceedings or rules on double jeopardy (*ne bis in idem*) etc. Before we embark on the journey of exploring some criminal philosophical thoughts, it seems judicious to dwell further on some of the dualities inherent in criminal law.

I have in the past tried to draw attention to a certain type of duality in substantive criminal law: I defined it by relying on a reiteration of the Derridian difference (*différance*) by Kramer:

[...] difference serves as the sine qua non of presence. The identities of words, concepts, and objects [...] are determined wholly by the relationships in and through which they function. Until each thing has been at least vaguely separated or marked off from everything which is not it, it can never achieve the status or presence of a thing in any form whatsoever [...] Without difference, in short, no plenitude can present itself.<sup>6</sup>

As a consequence, criminal norms, by defining what *is* a criminal offence, also define what *is not* a crime. This difference accounts for the duality of functions of substantive criminal law: the limitation and the simultaneous protection of the freedom of human behaviour. This should not be confused with the traditional approach which, by viewing criminal law as a set of legal relationships between the state and the individual,<sup>7</sup> asserts that, through normative prohibitions (commands), criminal law limits the individual's freedom and by that protects other individuals from the potential criminal.<sup>8</sup> By defining what behaviours constitute crimes, criminal law also sets

<sup>6</sup> As I wrote: a definition – and criminal norms are definitions – requires, yet must exclude, difference in order to define. [B. J. Gellér, *Legality on Trial* (Eötvös University Press 2012, Budapest) 17.] This statement is an alteration of Kramer's splendid recapitulation of the Derridian problem of *différance*: 'presence requires yet must exclude difference in order to be present': J. R. Kramer; 'Adolescents, abortion and amendments: choices after American Academy of Pediatrics v. Lungren [940 P.2d 797 (Cal. 1997)]' (1998) 33 University of San Francisco Law Review 133, San Francisco) 5. See J. Derrida: 'Différance' in *Margins of philosophy 1* (tr Bass, A. University of Chicago Press 1982, Chicago). The modification of this maxim in this work is justified by the 'presentness' of a definition. This idea is also followed up by Kramer: M. H. Kramer: *Legal theory, political theory, and deconstruction (against Rhadamanthus)* (Indiana University Press 1991, Bloomington/Indianapolis) 5ff.

<sup>7</sup> As Ashworth puts it, 'criminal proceedings are an unequal contest between the individual [...] and the State.' (A. Ashworth 'Interpreting criminal statutes: a crisis of legality' [1991] *Law Quarterly Review* 432.)

<sup>8</sup> A. Ashworth, *Principles of criminal law* (2nd edn, Clarendon Press 1995, Oxford) 16; G. P. Fletcher, *Rethinking Criminal Law* (Little, Brown 1978, Boston) xix; H-H. Jescheck, *Lehrbuch des Strafrechts, Allgemeiner Teil*. (3rd edn, Duncker & Humboldt 1978, Berlin) 1-5; C. Roxin, *Strafrecht, allgemeiner Teil, Band I*. (2nd edn, CH Beck'sche Verlagsbuchhandlung 1992, München) 3. Lewisch sees this connection as follows: 'the modern state derives its justification from its (protective) function to uphold the peace, which – because of historical reasons – it fulfils with the tools of criminal law. Criminal law, however, is not only the guarantor of civic freedom, it is also a threat to it' P. Lewisch, *Verfassung und Strafrecht. Verfassungsrechtliche Schranken der Strafgesetzgebung* (Universitätsverlag 1993, Vienna) 1.

out what is not criminal conduct, and by that it protects the individual from the enforcers of the commands, which is ultimately the state.<sup>9</sup>

Remarkably, substantive criminal law also raises issues connected to truth and justice. This, in turn, must be differentiated from procedural truth and justice, yet these two – substantive and procedural criminal law as well as truth and justice – are inextricably entwined as giant ropes holding the criminal justice system. I have also argued elsewhere that a criminal justice system cannot function without substantive criminal law and, in turn, substantive criminal law is unimaginable without the acceptance of some a priori values, which we revere as unquestionable principles as the basis of criminal legal thinking.<sup>10</sup> The genus proximum of criminal legal thinking in a modern democratic state must be legality. Legality, however, is anchored in an a priori presumption: the equality of men. It seems almost self-evident that these very principles should govern criminal procedure, but whether the presumption of equality can be observed consequently throughout the criminal justice system is a disturbing question which is directed at us again and again in the wake of historical events or grandiose codifications.

The difference between truth and justice appears in a criminal procedure as the actual difference between facts as accepted by a judgment and the events in real life. From a procedural perspective, a judgment is just if the facts accepted by the judgment as true differ as little as possible from what actually happened, as the greater the difference between the facts of the judgment and the real past events, the greater the injustice inherent in the judgment and the proceedings.

At the same time, a certain difference between procedural fact-finding and actual past events is unavoidable. This follows not only from the limited nature of human cognition but also from the philosophical impossibility of complete understanding, definition and discovery.<sup>11</sup>

The objective truthfulness of criminal judgments seem to be one of the main characteristics rendering a judgment just; consequently, the culmination of just – or, for that matter, unjust – judgments results in a just or unjust criminal justice system. Fact-finding and the procedural

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<sup>9</sup> See L. von Bar, *Gesetz und Schuld im Strafrecht (Fragen des geltenden deutschen Strafrechts und seiner Reform) Vol. 1. Das Strafgesetz* (J. Gutentag Verlagsbuchhandlung 1906, Berlin) 9. The realisation of this led Liszt to describe the criminal code as the criminals' Magna Carta: Jescheck (1978), 41. Further, Smith points out in connection with 'the preservation of civil liberties that 'the principal liberties in danger from an overinclusive public order law are, perhaps, freedom of speech and freedom from arbitrary arrest. But if the law is underinclusive, it will not afford proper protection to those whose interests are threatened by public disorder.' A. T. H. Smith, *The offences against public order (including the Public Order Act 1986)* (Sweet & Maxwell, Police Review Publishing Company 1987, London) 8. This difficult balancing, resulting from the duality of criminal law's function, is the main challenge for criminal justice. Thomas observes that 'the prohibition inherent in criminal statutes is dual: it addresses the organs of the state in establishing conditions precedent to punitive reaction. "Thou shalt not steal" also conveys the message "thou shalt not punish unless he is proved to have stolen." The constitutional importance of this aspect of the criminal law, which Dicey rightly identifies as the first principle of his idealistic rule of law, needs no emphasis.' D. A. Thomas, 'Form and function in criminal law' in Glazerook, P. (ed), *Reshaping the criminal law: essays in honour of Glanville Williams* (Stevens & Sons 1978, London) 21. Also A. I. Wiener, 'Büntetőpolitika – Büntetőjog (Criminal policy – criminal law)' in Wiener, A. I. (ed) *Büntetendőség – büntethetőség. Büntetőjogi Tanulmányok* (The imperative to punish and punishability. Essays on Criminal Law) (Közgazdasági és Jogi Könyvtár 1997, Budapest) 18, 26-27.

<sup>10</sup> Gellér (n 6).

<sup>11</sup> See e.g. L. Wittgenstein, *On Certainty* (Basil Blackwell 1969, Oxford).

safeguards which allow errors occurring in the fact-finding to be corrected to the benefit of the defendant (e.g. the presumption of innocence) become one of the most important ingredients of a just criminal justice system.<sup>12</sup>

### 3 Substantive Criminal Law and a New Duality (Truth versus Justice)

It is striking to realise that substantive criminal law avails of the same duality of objective truth and justice as procedural law. Substantive criminal law, generally speaking, does not concern itself with establishing facts; nevertheless, abstraction, generalisation and analogy are key elements in substantive criminal law thinking. Abstraction means the exclusion of some concepts already whilst others are vested with decisive importance.<sup>13</sup> In substantive criminal law the events of a real life occurrence are reflected as questions of a set of criminal legal concepts: A case – for example – in which drunken Jack was attacked without provocation by similarly drunken 7 months pregnant Jill (who was physically abused by Jack for years) with a kitchen knife and Jack, in order to avoid being stabbed, kicked Jill in the belly, after which a premature birth started and the baby died because it was not yet properly developed, will appear as a problem similar to such as ‘how we treat intoxication’, ‘what are the rules of self-defence’, ‘is there a battered women syndrome’, ‘when does human life start’, ‘what type of causation do we accept’, etc. By putting the real life events through the shredder of criminal law concepts, we abstract some elements and formalise these events.

I referred in my earlier work to Kramer, who claims that ‘it is not the ambiguity of the rules and patterns, but their generality or universality that must keep them undecidedly open till the events that constitute them have occurred.’<sup>14</sup> Ambiguity is different from generality as far as the rules are concerned, and indeed both are inherent features of rules; generality is of universal importance since it is the structural feature of presence, which is expounded from the basic generality of IS, as opposed to IS NOT.<sup>15</sup> Generality, therefore, is an attribute of every rule/structure which ‘can unfold in countless ways at each point in time, and only in retrospect will it have compelled a certain pathway or set of pathways of evolution.’<sup>16</sup> Generality is inclusive, comprising all the possibilities which are not not-it. As such, in the structure/event setting, generality is structure-specific whilst ambiguity is event-specific. As a consequence, courts might have a general understanding of murder, self-defence, or intoxication; however, when trying to answer questions of the particular meaning of these concepts with respect to specific events, the generality becomes ambiguity. Answers to questions such as whether using substitutes for money in vending machines is theft or fraud, what appropriation actually means,<sup>17</sup> whether a car can

<sup>12</sup> J. Habermas, *The Discourse Theory of Law and Democracy* (Stanford Law Books 2011, Stanford).

<sup>13</sup> R. Alexy, *Theorie der juristischen Argumentation (Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung)* (2nd edn, Suhrkamp 1983, Berlin).

<sup>14</sup> Kramer (n 6) 1991, 18.

<sup>15</sup> Generality must also be distinguished from universality. Attention is drawn to this by Alexy, who claims that it is not the generality of rules that is relevant in order for them to qualify as moral principles but their universality. Alexy (n 13) 67.

<sup>16</sup> Kramer (n 6) 1991.

<sup>17</sup> For example consider *D.P.P. v. Gomez* (1993) A.C. 442; Smith (1994), 134-147; Smith and Hogan (1996) 514-528.

qualify as a carriage under certain circumstances,<sup>18</sup> whether an aeroplane or roller skates are vehicles,<sup>19</sup> or electricity is a physical object as far as theft is concerned,<sup>20</sup> make ambiguity out of structural generality. Generality is therefore the formal quality of a norm, which at the same time is the very source of its ambiguity in specific cases, which threatens its normative essence. The answers given to this ambiguity redefine the general rule. Therefore – as Kramer puts it – ‘what a pattern or rule is cannot be precisely answered before we know the particularised applications that determine its course.’<sup>21</sup> In other words, like other rules, legal rules cannot mark out their own application and, therefore, the need for interpretation cannot be circumvented,<sup>22</sup> because ‘statutory interpretation represents the legal moment when a court confronts the product of the legislative branch and must assign meaning to a contested provision.’<sup>23</sup> The ambiguities which are thus inherent in law do not mean that the outcome of every case is uncertain, but do not mean either that there is not some degree of interpretation in every case.<sup>24</sup>

As we see, generality is therefore the formal quality of a norm, which at the same time is the very source of its ambiguity in specific cases. In the setting of the current argument, generality also adds to the gap between objective truth and the application of substantive criminal law because, by the application, both normative rule and objective past facts are modified in order to resolve the inherent ambiguity of the very norms applied. This distortion can even reach the level of fiction; that is, some substantive legal concepts are known to be untrue but must be accepted as true in order to guarantee the legal result required by the self-referential structure of criminal norms. A pertinent example could be the qualification of crimes committed whilst under the influence of alcohol or drugs. Different legal systems deal with this problem in different ways. It is clear that a fully intoxicated person cannot possess a *mens rea* (criminal mind, intention) in the traditional sense;<sup>25</sup> therefore, the doctrine of the ‘actus amounts to a crime only when it is accompanied by the

<sup>18</sup> C. Roxin, *Strafrecht, allgemeiner Teil, Band I*. (2nd edn, CH Beck'sche 1992, München) 104. However there are decisions in which the court overstepped this line.

<sup>19</sup> H. L. A. Hart, *The Concept of Law* (Clarendon Press 1994, Oxford) 126. One should recall the famous pronouncement of Justice Holmes in *McBoyle v. United States*, 283 U.S. 25 (1931) (interpreting interstate transportation of a stolen ‘motor vehicle’ to exclude an aeroplane): ‘Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.’ Ibid 27.

<sup>20</sup> 29 RGSr 111; 32 RGSt, 165. Roxin (1992), 77. Compare with Krey (1977), 137ff RGeI. I S. 288. Today it is section 248c of the StGB. Naucke (1991), 75. Smith (1994), 375; Smith and Hogan (1996), 529; *Low v. Blease* [1975] Crim. L. R. 513, D.C. Nagy (1997), 159; III Act of 1907 in Hungary.

<sup>21</sup> Kramer (n 6) 18.

<sup>22</sup> Compare with Alexy (n 13), 178-9.

<sup>23</sup> J. S. Schacter, ‘Metademocracy: the changing structure of legitimacy in statutory interpretation’ (1995) 108 Harvard Law Review, Cambridge 593.

<sup>24</sup> Compare with Alexy (n 13) 8.

<sup>25</sup> ‘Actus non facit reum nisi mens sit rea’ Smith, J. – Hogan, B., *Criminal Law* (8th edn, Butterworths, London/Dublin/Edinburgh, 1996), 30. See *R v. Caldwell* [1982] AC 341 a new definition of recklessness was adopted. See R. A. Duff, *Intention, Agency and Criminal Liability* (Blackwell 1990, Oxford) 5ff.

appropriate mens rea<sup>26</sup> has to be modified in some way. Any solution will be thus unjust in respect to this principle; additionally, it will operate with some degree of fiction as far as the *mens rea* of the intoxicated person is concerned. Substantive criminal law thus necessarily derails truth in at least two ways, first by simply applying its method of abstraction, secondly by creating and applying presumptive, fictional concepts; both these causes can be traced to the generality of norms. Of course, if we did not try to fix our notion of justice to objective truth, we could avoid this predictable clash of truth and justice, at least in substantive law. But what other point of departure could one define if justice is to be served at the level of a large scale system?

Alexy examines Hare's theory of moral reasoning<sup>27</sup> and observes that it is not the generality of rules that is relevant for them to qualify as moral principles but their universality.<sup>28</sup> That is, if it is always possible to say that all cases like *a* should be treated like *a*, that already constitutes a rule.<sup>29</sup> Alexy concludes that normative expressions, such as 'good' and 'ought,' do not refer to any kind of non-empirical object (as assumed by intuitionism), nor are they reducible to empirical expressions (as claimed by naturalism).<sup>30</sup> It is necessary to recall here the deconstructive approach suggested by Kramer who, as quoted above, argued that 'generality or universality [...] must keep [laws] undecidedly open until the events that constitute them have occurred.'<sup>31</sup> Whilst the difference between ambiguity and generality/universality of norms has already been discussed, there is a further distinction to be drawn between generality and universality.

As observed, generality is inclusive and comprises all the possibilities which are not not-it. Hence, in the structure/event setting, generality is structure-specific whilst ambiguity is event-specific. Generality, this formal quality of a norm is complemented by a substantive quality: the moral force of the norm.

Moral force – which is a prerequisite if any moral reading should take place – may or may not derive from sources and factors advocated by naturalism, intuitionism etc. It is vital, however, that such should be anchored in some sort of authority serving as justification. In cases of popular support, such authority is readily available under the democracy principle. Nevertheless, if adjudication runs counter to majoritarian sentiments, the enforcement of minority morality has to be vindicated by – as Alexy proposes – the universality of norms. Universality in this sense has three dimensions: first, a dimension of time, which means that, in a historical perspective, *a* was treated as *a*; second, a majoritarian dimension, which reflects the beliefs of the majority as regards whether *a* should be treated like *a*; and third, integrity, as described by Dworkin,<sup>32</sup> which, in this respect, means that treating *a* as *a* does not cause any contradiction within the structure of the

<sup>26</sup> J. C. Smith, B. Hogan, *Criminal Law* (8th edn, Butterworths 2003, London/Dublin/Edinburgh) 30.

<sup>27</sup> See in general Hare (1952); Hare (1963).

<sup>28</sup> Alexy (n 13) 67.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.* 177.

<sup>31</sup> Kramer (n 6) 1991, 61.

<sup>32</sup> R. Dworkin, *Law's Empire* (Harvard University Press 1986, Cambridge) ch 6-7; R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996, Cambridge) 10-11, ch 4.

law. The parallels between the dimension of time and the hermeneutic approach, the majoritarian requirement and the democracy principle<sup>33</sup> and finally the integrity of law and the Radbruch Formula<sup>34</sup> are striking and of great significance.

Even if one of the dimensions of universality is missing, the other two components endow a norm with the necessary universality. This seems to be true in respect of both legislative acts and judicial decisions. The lack of majoritarian support for a moral principle in a norm created by a judicial decision does not make it immoral, as long as the historical approach and integrity support such a reading.<sup>35</sup>

The necessity of removing the otherwise infinite regress of justifications<sup>36</sup> makes it unavoidable that at some point a justification should be accepted without causing any surprise or demand for further justifications and reasons.<sup>37</sup> It is true that the above argument re-circulates the question of substantive justification using a procedural tautology. However, the very nature of criminal adjudication rests on the premise that the inquiry into substantive, material truth can be turned into procedural, formal requirements, which, if satisfied, define substantive truth in retrospect.<sup>38</sup> This is no surprise because, as far as moral rules are concerned, no possibility exists to establish a discourse:<sup>39</sup> every definition is self-reliant, and can be justified through the belief in the procedure by which the definition has been reached.<sup>40</sup>

<sup>33</sup> Ibid, Chapter II.2.4.

<sup>34</sup> G. Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht' [1956] *Süddeutsche Juristenzeitung* 83; Also *Rechtswörterbuch* (12th edn, CH Beck 1994, München) 934.

<sup>35</sup> Consider the decision of the Hungarian Constitutional Court abolishing the death penalty. Decision 23/1990. (X. 31.) AB of the Constitutional Court of Hungary, ABH 1990, 88. The death penalty was favoured by the majority of the adult population of Hungary.

<sup>36</sup> See Alexy (n 13) 178. Discussion Chapter I.2.

<sup>37</sup> Compare with the justification of legality in criminal law offered in Chapter II.1.

<sup>38</sup> See A. Ashworth, *The criminal process. An evaluative study* (Oxford, Clarendon Press 1994, Oxford) 10-14, for some thoughts on miscarriages of justice. Also consider Glanville Williams' timeless thoughts on mistaken and invented evidence. G. L. Williams, *Criminal law: the general part* (2nd edn, Holmes Beach 1961, Florida) chapters 5-6. Dworkin argues that there is a strong case for maintaining that at all points in criminal justice the procedures should put the proper value on the fundamental harm of wrongful conviction. R. Dworkin, Principle, policy, procedure. in C. Tapper (ed), *Crime, proof and punishment: essays in memory of Sir Rupert Cross*, p. 193. (Butterworths 1981, London) 212.

<sup>39</sup> Such a statement seems to be at odds with Habermas's communicative approach to legal reality. Consider J. Habermas, *Theory and practice* (Beacon Press 1973, Boston); J. Habermas, *Legitimation crisis* (Beacon Press 1975, Boston); J. Habermas, *The theory of communicative action. Volume I: Reason and the rationalization of society* (Heinemann 1984, London); J. Habermas, *On the logic of the social sciences* (Polity Press 1988, London); J. Habermas, *Between facts and norms: contributions to a discourse theory of law and democracy* (MIT Press 1995, Cambridge). Habermas, in rejecting traditional correspondence theories of truth (see, for example, A. Tarski, *Introduction to logic and to the methodology of deductive reasoning* (2nd edn, Oxford University Press 1946, New York), accepts as the criterion of truth a consensus of all discourse participants, and identifies the standard to which he measures truth in the 'ideal speech situation', which is defined by formal and procedural characteristics. Habermas (1984), chapter 3. Precisely because of this proceduralisation of the truth criterion it is possible to assert that the validity claims depend on procedural correctness [compare with Alexy (1989), 219ff] precisely what substantive moral discourse is not. Consider Rosenfeld (1995).

<sup>40</sup> Ibid. Refer to Chapter II. See decision 11/1992. (III. 5.) AB of the Constitutional Court of the Republic of Hungary, ABH 1992, 77. as quoted in Chapter II.1. Consider also BVerfGE 25, 269; but see BVerfGE 23, 98.

This is exactly why, however, Kelsen's Basic Norm is static in a legal sense – that is, its legal validity and meaning remains the same, whereas its moral justification and meaning may change with time – and does not have to confront questions of justification.<sup>41</sup>

Indeed, this search for a method which might lead to the identification of extra-legal values has been an ongoing process for a considerable time. According to Pound,

philosophical jurists have devoted much attention to deducing some method of getting at the intrinsic importance of various interests so that an absolute Formula may be reached with which it can be assured that the intrinsically weightier interest shall prevail [...] The quest of such a method [...] grows out of the need of equality of operation, predictability, and assured certainty of result.<sup>42</sup>

In this context, the issue to be looked at is whether criminalisation or criminal adjudication outweighs or infringes certain values in such a way as to divest the criminal justice system from its a priori justification. One is actually searching for the 'speed of light' in the criminal justice system, against which – it being constant – everything can be measured. It is clear by now that objective truth cannot serve as our speed of light.

## II Human Dignity and the Speed of Light

### 1 The Resurrection of Human Dignity

Starting from the 1990's, criminal law has undergone a tremendous change, challenging some of the most sacred principles of classical legal thinking (whatever they might be). This process (some would recoil from calling it development) had several historical reasons. As a counterpoint to the biased, often politically motivated socialist (communist) criminal justice system, criminal lawyers in the former Eastern Bloc states turned to the classical criminal legal schools representing proportionate punishment, individual accountability, in-determination and retribution, foreseeability etc.<sup>43</sup> At the same time the collision of formal justice (rule of law) and the subjective notion of justice posed itself in the form of the question of ex post facto (retroactive) justice for crimes committed during the communist area which went unpunished. More, international and non-international armed conflicts ensued on the territory of the former Yugoslavia and later in Rwanda, in the course of which grave atrocities were committed, re-raising the questions connected to core international crimes. Finally, a duty to criminalise certain acts has been gradually developed by the European Court of Human Rights.

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<sup>41</sup> See H. Kelsen, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure Theory of Law* (Clarendon Press 1934, London) 55ff.

<sup>42</sup> Pound, *Jurisprudence* (West Publishing 1959, St. Paul) Vol. III, 330.

<sup>43</sup> An example could be the parallel opinion of András Szabó in the decision 23/1990. (X. 31.) AB of the Constitutional Court of the Republic of Hungary on the abolition of the death penalty.

To summarise the above: a) the collision between the formal rule of law and subjective justice had to be addressed at a national and also international level; b) national laws and the CHR have recognised an intrinsic duty to criminalise certain activities; c) the development of international criminal law resulted in the recognition of human dignity as a theoretical basis which enables positive law to be overridden in order to protect the human condition. As a result of these changes in both national and international law, human dignity, which can also be derived from 'the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience',<sup>44</sup> became the fundament of law once again.

## 2 On the Road

The proponents of any philosophy have to make a choice as to whether it is an absolute or relative theory, in other words, whether it poses a guiding principle as the bases of 'Life, the Universe and Everything'<sup>45</sup> or whether it believes that any and every rule (be it a rule of nature or moral) is true only in relation in a randomly accepted system or coordinates. Of course even the latter can be labelled as an absolute theory in which the single absolute rule is the non-existence of such a rule.

In this setting, a pure positivist legal system can be described as a relative theory. Accepting that even a meta-legal value-based legal theory can be relativist in the above sense (since the value may not be put forward as a single unchallengeable truth), I can avoid the pointless and nonsensical argument favouring either absolutism or relativism. However, it will not be possible to escape an answer to the question of how I view human dignity in the legal setting, classifying by this my legal theory as absolutist or relativist.

As we have seen, the development of law during the last hundred years has outlined with convincing precision what this underlying principle might be. International humanitarian law through the Martens Clause, for example; international criminal law by giving new meaning to the idea of *obligation erga omnes*, and finally by developing the notion of the duty of criminalisation, which in turn has been interpreted by the European Court of Human Rights as setting standards for national criminal laws even with regard to common crimes have all drawn the contours of the focal point of reference for criminal law in general. One does not have to believe in transcendental beings – at most Albert Einstein's remark 'I believe in Spinoza's God,

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<sup>44</sup> 'Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.' *Laws and Customs of War on Land (Hague IV)*, 18 October 1907.

<sup>45</sup> The number 42 has received considerable attention in popular culture as a result of its central appearance in Douglas Adams, *The Hitchhiker's Guide to the Galaxy* as the 'Answer to The Ultimate Question of Life, the Universe, and Everything'.

who reveals Himself in the lawful harmony of the world'<sup>46</sup> may come to mind – but in the equality of people; this is the principle that is reflected in the Radbruch Formula.

But what is the defining ingredient of the equality of people that is relevant for criminal law? People are equal as beings born to other human beings: anyone born to a human being is a human being through the idea of human dignity. Human dignity is the concept which makes it impossible – as Sólyom, the president of the Hungarian Constitutional Court, put it in his concurring opinion on the prohibition of the death penalty – to be treated as objects; that is why nobody may, for example, become the property of another.

The most important case on point is *Ireland v. UK* (1978),<sup>47</sup> decided by the ECHR. Fawcett, the British member of the European Commission on Human Rights, phrased the question whether Article 3 of the ECHR indeed enshrines an absolute illimitable right.<sup>48</sup> (The definition of the rights imbedded in Article 3 of the ECHR as absolute has not only appeared slowly in the human rights literature,<sup>49</sup> but was supported by the judicature of the Strasbourg institutions.)<sup>50</sup> The Court expressly stated that this Article protects one of the most fundamental values of a democratic state<sup>51</sup> and its application is independent of the acts of the person in question.<sup>52</sup>

Indeed, both the Commission and the Court have stressed that Article 3 protects absolute rights and this protection is irrespective of what the person under its protection had done or what sort of behaviour he is showing at the time.<sup>53</sup>

In 1997 the Hungarian courts struggled with the problem of how a situation in which the victims, who had been held hostage and had been threatened with being tortured to death upon the expiry of the deadline, had escaped by killing their unwitting guard, could qualify as self-defence.<sup>54</sup> The problem lay clearly in the absence of any immediate attack; however, the Supreme Court correctly held that the immediacy of an attack has to be construed more broadly than

<sup>46</sup> In 1929, Einstein was asked in a telegram by Rabbi Herbert S. Goldstein whether he believed in God. Einstein responded by telegram: 'I believe in Spinoza's God who reveals himself in the orderly harmony of what exists, not in a God who concerns himself with the fates and actions of human beings.' *The New York Times*, 25 April 1929. Retrieved 8 September 2009. Answer to Rabbi Herbert Goldstein (1929).

<sup>47</sup> *Ireland v. United Kingdom*, 18 January 1978, Series A no. 25.

<sup>48</sup> *Com. Rep., Ireland v. UK*, B 23-I, 502. Addo, M. and Grief, N. undertook a detailed analysis of this issue: Addo, M. and Grief, N., 'Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?' (1998) 9 *European Journal of International Law* 510-524. See also Koji Teraya, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights' (2001) 12 (5) *Oxford Journals EJIL* 917-941.

<sup>49</sup> D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths 1995, London.) 55-59; K. Reid, *A Practitioner's Guide to the European Convention on Human Rights* (Sweet & Maxwell 1998, London) 376; F. G. Jacobs and R. C. White, *The European Convention on Human Rights* (2nd edn, Clarendon Press 1996, London)

<sup>50</sup> *Tyrer v. U.K.* 25 April 1978, Series A no. 26; *Soering v. U.K.*, 7 July 1989, Series A no. 161; *Tomasi v. France*, 27 August 1992, Series A no. 241-A; *Herczegfalvy v. Austria*, 24 September 1992 Series A no. 242-B; *Klass v. Germany*, 22 September 1993, Series A no. 269; *Costello-Roberts v. U.K.*, 25 March 1993 Series A no. 247-C; *Ribitsch v. Austria*, 4 December 1995, Series A, no. 336; *Akdivar v. Turkey*, 16 September 1996.

<sup>51</sup> *Soering*, 88.

<sup>52</sup> *Tomasi*, 115.

<sup>53</sup> *Ireland v. The United Kingdom* (n 47) 163.

<sup>54</sup> BH 1997. 512.

usually and must encompass situations in which an illegal situation is upheld by the attacker. This judicature has been further ameliorated by the Curia's (the renamed Supreme Court) 4/2013. decision, which is binding on all courts.<sup>55</sup>

In 1997 and 2003 two somewhat similar cases divided legal opinion in Germany.<sup>56</sup> In both cases, people had been kidnapped and a ransom was demanded but the perpetrators were caught without knowing where the victim was being held. The question was what methods are allowed to the police, when interrogating the perpetrators, in order to establish the whereabouts of the victims before they die of starvation, dehydration and exposure. In the 2003 case, the chief of police in charge of the investigation took it upon himself to officially record that he was threatening the suspect with torture (beating) if he did not disclose the location of the victim.<sup>57</sup>

The practical use of torture seems to be impossible in a democratic society. At the same time, democratic legal systems still find ways to authorise the state to deprive someone of his right to life, be it in the form of the death penalty, the use of armed forces in international relations or simple cases of the legal usage of firearms by representatives of the state [e.g. Article 2 para 2 point c) ECHR]. Obviously the right to be free from torture is not as highly ranked as the right to life. Why is it then that the right not to be tortured must not yield to the right to life? The only answer is that both are rooted in human dignity; the state, which does not have the right to limit human dignity, cannot regulate situations in which human dignities clash.

The road leading to the changes outlined above is known to the well-read lawyer, nevertheless, a few examples shall be put forward to avoid charges of quickly skating on thin ice.

During the existence of the East German state it was a criminal offence to cross or to try to cross the border to the West, and this was prevented by all means, frequently by killing people who dared to attempt such an escape. Since the re-unification, several criminal prosecutions and convictions have resulted from these shootings.<sup>58</sup> One of these famous cases involved a defendant convicted of shooting a seventeen year old boy who tried to reach West Berlin by swimming across the river Spree in 1962.<sup>59</sup> The daily briefing given to the border-guards included an order that border violators who do not react to a call and a warning shot have to be 'eliminated': escape to the West must be prevented if necessary, even by aimed deadly shots. Both the defendant and the leader of the unit fired aimed shots at the victim, who was eventually hit and killed by one of the unit leader's bullets. Three days later the defendant received a medal for exemplary border service.

After the re-unification the State Court (*Landgericht*) convicted the defendant as a second principal in a murder and sentenced him to two years' suspended imprisonment.<sup>60</sup> At the time of the commission of these acts there were no statutory regulations in East Germany on the usage

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<sup>55</sup> 46/2013. BJE.

<sup>56</sup> Jeßberger, F., 'Wenn Du nicht redest, füge ich Dir große Schmerzen zu' (2003) 25 (10) JA 711.

<sup>57</sup> Ibid.

<sup>58</sup> See, for example BGHSt 39, 1, NJW 1993, 141; BGHSt 39, 168, NJW 1993, 1932; BGHSt 39, 199, NJW 1993, 1938; BGHSt 39, 353, NJW 1994, 267; BGHSt 40, 48, NJW 1994, 2237; BGHSt 40, 113, NJW 1994, 2240; BGHSt 40, 218, NJW 1994, 2703; BGHSt 40, 241, NJW 1994, 2708; NJW 1995, 1437; NJW 1995, 2728; NJW 1995, 2732.

<sup>59</sup> NJW 1995, 2728, BGH, Urt. v. 20.3. 1995 – 5 StR 111/94 (LG Berlin).

<sup>60</sup> Ibid 2728.

of firearms at the border. The service regulations of the border-guards, however, in conjunction with other ordinances of the Minister of the Interior, stated that firearms have to be used against border violators who cannot be stopped by other means.<sup>61</sup> The State Court's reasoning, which was corrected on appeal by the Federal Court (BGHSt), differed significantly from the latter's argument. The State Court denied that the Minister of the Interior's ordinance was a justification for the conduct, since – as the Court reasoned – it contradicted the East German Constitution in force at that time. This Constitution guaranteed freedom of immigration, which could be limited by statute only.<sup>62</sup> Similarly the criminal law which prohibited the unauthorised leaving of the state did not provide for such justification. Moreover, the ordinance in question – which was not sanctioned by any statute – grossly violated the basic ideas of justice and humanity. The Court further observed that criminal liability has not lapsed because – according to the judgement of the Federal Court<sup>63</sup> – the limitation period in East Germany was dormant during the communist party's rule, as a result of a so-called *quasi-statutory prosecution obstacle* (*quasigesetzliche Verfolgungshindernis*).<sup>64</sup> This meant that, according to the practice of the East German State, such actions were not prosecuted. The Federal Court found that the State Court erred in stating that, at the time of the killing, there was no statutory foundation for the deadly use of firearms on the borders of East Germany prior to 1982 when the relevant statute was passed.<sup>65</sup> As the BGHSt had observed in its previous decision,<sup>66</sup> the relevant orders by the Minister of the Interior – referred to above – could count as sufficient formal legal grounds for satisfying the constitutional requirement. Following 1982, the Border Act came into force, which in Section 27 § 1 provided for the use of firearms at the border. According to these regulations, the use of a firearm should only be the last resort, and could only be utilised if no other method would seem successful. However, lives should be spared as far as possible. The practice followed in East Germany sharply diverged from these rules. In a similar case the Federal Court had previously found first that a justification which gives preference to the enforcement of the prohibition to leave the GDR in comparison to the right to life is

invalid because of the obvious unbearable violation of elementary commandments of justice and human rights protected by international law [...] The breach weighs so heavily in this case that it violates the conviction of justice based on the human values and dignity commonly shared by all nations; positive law (*positives Recht*) must yield to justice (*Gerechtigkeit*) in such a case (the so-called 'Radbruch Formula').<sup>67</sup>

<sup>61</sup> *Dienstvorschrift für den Dienst der Grenzposten* DV III/2 vom 12.9.1958; *Befehl des Ministers des Innern* Nr. 39/60 i.d.F. vom 28.6.1960, 26.8.1961 und 19.3.1962. *Id.*, 2729.

<sup>62</sup> Article 10 III of the East German Constitution.

<sup>63</sup> The court refers to BGHSt 40, 113 (116ff), 7 NJW 1994, 2240; BGHSt 40, 48, NJW 1994, 2237.

<sup>64</sup> This is in accordance with Article 1 of the Statute about the Resting of the Limitation Period (BGBl I, 392).

<sup>65</sup> NJW 1995, 2728, BGH, Urt. v. 20.3. 1995 – 5 StR 111/94 (LG Berlin), 2729. In 1982 the East German Border Act came into force.

<sup>66</sup> *Ibid* 2730 citing BGHSt 40, 241, NJW 1994, 2708 (2709).

<sup>67</sup> Emphasis added. The first 'Berlin wall sniper' case is of primary importance (BGHSt 39, 1ff, NJW 1993, 141) because later cases followed the same path: BGHSt 39, 168ff, NJW 1993, 1932; BGHSt 40, 218, NJW 1994, 2703.

According to the judgement, these basic principles are made concrete by international documents in force at the time of the act.<sup>68</sup> Second, the Court observed that, as a consequence, even if a justification had specifically allowed the killing of people who wanted nothing more than to cross the internal German border, and did so without weapons and without endangering or harming anyone else's rights, such justification would have to be disregarded and the punishment of the border guards does not violate Article 103 II of the Basic Law, since the justification would never have acquired legal validity.<sup>69</sup> Lastly, the Court expressed an opinion that the same was true as regards the East German state's practice which disregarded an interpretation of the relevant law, which would have been possible under the existing rules and which would have been observant of the generally effective and accepted human rights.<sup>70</sup>

The Court then pointed out that the *unbearable injustice* incorporated by the relevant law of East Germany can be deduced from the fact that it placed the escapees' right to life in the background, especially with a view to the special motivation of those people had who tried to escape. Additionally, the general circumstances at the borders were also taken into account.<sup>71</sup> Notwithstanding the critical literature, the Court, whilst acknowledging the incomparability of the cruelty of Nazi laws and the deadly shootings at the East German border, found that the Radbruch Formula is applicable in the present case. In the adjudication of the arising cases, the courts oriented themselves by the Radbruch Formula.<sup>72</sup> Whilst Radbruch was never a classical positivist, it must be conceded that the traumas of the Fascist regime contributed to a certain change of accent in the relationship between legal certainty and substantive justice in his legal thinking.<sup>73</sup> Radbruch defined his Formula as follows:

The conflict between justice (*Gerechtigkeit*) and legal certainty (*Rechtssicherheit*) might be solved in a way that positive law (*positives Recht*), which is ensured by statute and power, takes precedence also in cases when with respect to its content it is unjust and unwise, unless the contradiction between the positive statute (*positives Gesetz*) and justice reaches such an unbearable level, that the law, being a "wrong law", (*unrichtiges Recht*) has to yield to justice. It is impossible to draw a sharper line between cases of lawful injustice (*gesetzliches Unrecht*) and that of laws which are valid despite their incorrect content; a different definition of the borders can be, however, undertaken with full vigour: where justice is not even being aspired to, where equality, which provides the core of justice, has been intentionally denied when creating positive law; there law is not simply "wrong law" (*unrichtiges Recht*) much rather it is deprived totally of its legal nature.<sup>74</sup>

<sup>68</sup> The judgement refers to the *Covenant of Civil and Political Rights*, and the *Universal Declaration of Human Rights*. This latter concretises the UN Charter's references to human rights. See BGHSt 40, 241, NJW 1994, 2708 (2709).

<sup>69</sup> BGHSt 40, 218, NJW 1994, 2703, 2730.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid 2731.

<sup>72</sup> Consider decisions BGHSt 39, 1ff, 7 NJW 1993, 141; BGHSt 39, 168ff, NJW 1993, 1932; BGHSt 40, 48ff, NJW 1994, 2237 for example.

<sup>73</sup> A. Kaufmann, 'Die Radbruchsche Formel vom gesetzlichen Unrecht und vom übergesetzlichen Recht in der Diskussion um das im Namen der DDR begangene Unrecht' [1995] Neue Juristische Wochenschrift 82.

<sup>74</sup> Radbruch (1956) 83; Radbruch (1973) 352-353.

The German Federal Constitutional Court<sup>75</sup> upheld the constitutionality of the Federal Court's decisions.<sup>76</sup> It stated, amongst other things, that

the strict prohibition of retroactivity of Article 103 II GG is justified within the rule of law by the special trust which criminal laws carry if created by a democratic legislature bound by the fundamental rights. This special trust is lacking if those representing the state power excluded criminal liability through justifications in cases of the most serious criminal injustice [...] The strict protection of trust through Article 103 II GG has to yield in these instances.<sup>77</sup>

The ECHR in its judgment *Streletz, Kessler and Krenz v. Germany* (2001)<sup>78</sup> upheld the above-described decisions of the German courts. It must be mentioned that, first, the Hungarian Constitutional Court declined to allow retrospective criminal liability for acts committed during the communist area;<sup>79</sup> later, however, by referring to international criminal law and its *ius cogens* concerning war crimes and crimes against humanity, it opened the door to prosecuting those responsible for mass shootings during the '56 revolution.<sup>80</sup>

Article 1 of the ECHR requires the contracting parties to secure the rights and freedoms included in the Convention. This has been interpreted as imposing both negative and positive obligations on the states.<sup>81</sup> A positive obligation is one where a state must take action in order to secure a human right.<sup>82</sup> Such positive obligations are not limited to the right to life.<sup>83</sup> Indeed one of the most significant cases concerning positive obligations of the state is *X. and Y. v. the Netherlands*,<sup>84</sup> involving a violation of Article 8, the right to respect for private and family life, home and correspondence and specifically a woman's right to effective measures under criminal law against rape. More importantly, however, this case also addressed the issue of the so-called *Drittwirkung*.

<sup>75</sup> BVerfGE (2. Kammer des Zweiten Senates), Beschl. v. 12. 7. 1995 – 2 BvR 1130/95.

<sup>76</sup> BVerfGE 95, 96 (140). If this case were to be considered by the European Court of Human Rights, the Court most likely would have to take the view that the GDR laws in the focus of the problem were justifications. On such a basis, in order to maintain the coherence of their jurisprudence, the outcome of such a possible complaint would resemble the cases ECHR, *S.W. and C.R. v. the United Kingdom* (1995) A no. 335-B and C.

<sup>77</sup> BVerfGE 95, 96 (140).

<sup>78</sup> *Streletz, Kessler and Krenz v. Germany*, Judgment of 22 March 2001, Reports of Judgments and Decisions 2001-II.

<sup>79</sup> Decision 11/1992. (III. 5.) AB of the Constitutional Court of Hungary (n 40).

<sup>80</sup> Decision 53/1993. (X. 13.) AB of the Constitutional Court of Hungary, ABH 1993, 323.

<sup>81</sup> D. J. Harris, M. O'Boyle and C. Warbrick: *Law of the European Convention on Human Rights* (Butterworths 1995, London) 19; M. E. Villiger: *Handbuch de Europäischen Menschenrechtskonvention* (Schulthess Polygraphischer Verlag 1993, Zürich) 102-104.

<sup>82</sup> D. Feldman, *Civil liberties and human rights in England and Wales* (Clarendon Press 1993, Oxford) 96-97.

<sup>83</sup> See, for example, *Marckx v. Belgium*, 13 June 1979, A no. 31. In this case positive obligation was violated because Belgian law did not recognise a child born out of wedlock as a member of the mother's family. Or consider *Young, James and Webster v. the United Kingdom*, 13 August 1981, A no. 44, in which the Court held that it was a breach of the right not to join a trade union when the law permitted the employer to dismiss the applicants on the grounds that they refused to join.

<sup>84</sup> *X and Y v. the Netherlands*, 26 March 1985, A no. 91.

*X. and Y. v. the Netherlands* involved a sixteen year-old mentally handicapped girl, who was sexually assaulted in a private institution by an adult male of sound mind. It was not possible to bring a criminal charge against the offender under Dutch law because a criminal procedure for sexual assault could only be started at the request of the victim; this, however, was not valid if it was initiated by a *doli incapax*. The Government's defence that civil remedies were available and guaranteed the respect for private life, as required by Article 8 of the Convention, was brushed aside by the Court: 'fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal law provisions'.<sup>85</sup> The Court thus declared that the state has a duty to protect women from rape by means of criminal law, and this duty must be enforced.<sup>86</sup>

In 1995 the Court introduced a new conceptual reasoning and indeed principles in its judgements in *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom*.<sup>87</sup> In essence, they agree with the House of Lords' ruling in *R. v. R*<sup>88</sup> and effectively find that it was not the 'abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife'<sup>89</sup> by the House of Lords which violated the Convention, but that the existence of the immunity was not 'in conformity...with a civilized concept of marriage...with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.'<sup>90</sup> Properly understood, the underlying reasoning is that the integrity of law – or in other words a timely understanding of the Radbruch Formula<sup>91</sup> – may override the majoritarian/democracy principle when absolute rights are not protected by the state.

Moreover, in *A. v. the United Kingdom*<sup>92</sup> the nine year-old applicant was beaten by his stepfather with a garden cane with considerable force on several occasions. The stepfather was acquitted following his defence of reasonable chastisement. The Court found a violation of Article 3 and held that 'states were under an obligation to take measures, such as the provision of effective deterrence, to ensure that individuals within their jurisdiction were not subjected to torture or inhuman or degrading treatment or punishment, including that administered by private individuals.'<sup>93</sup> Additionally, in *Osman v. the United Kingdom*,<sup>94</sup> although the Court found no violation of Article 2, it is most significant that it stated that this Article does not only require the state 'to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives

<sup>85</sup> *X and Y v. the Netherlands* (n 84) A no. 91, para 27.

<sup>86</sup> Compare with BVerfGE 39, 1 for example in respect of constitutional duty imposed on the state to protect human life. GG Kommentar, Abs. II. Article. 103, Rnd. 176.

<sup>87</sup> *S.W. and C.R. v. the United Kingdom*, 22 November 1995, A no. 335-B and C.

<sup>88</sup> (1992) 1 A.C. 599.

<sup>89</sup> *S.W. and C.R. v. the United Kingdom* (n 87) A no. 335-B and C, paras 44, 42.

<sup>90</sup> *Ibid.*

<sup>91</sup> Radbruch (1956) 83; Radbruch (1973) 352-353.

<sup>92</sup> *A. v. the United Kingdom*, 23 September 1998, [1998] Crim. L. R. 892.

<sup>93</sup> *Ibid* 892-893. Emphasis by author.

<sup>94</sup> *Osman v. the United Kingdom*, 28 October 1998, [1999] Crim. L. R. 82.

of those within its jurisdiction, including taking preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual'.<sup>95</sup>

It appears that some rights, amongst them the right to life – which has a representative value as regards criminal law – have a fundamentally different status to other rights: the state is obliged to take positive action in the form of creating and enforcing criminal norms in order to protect these rights even from violation by private individuals. This substantive constitutional duty to criminalise is, therefore, part of legality. The inevitable question is, hence, what happens if two *primary rights* collide?

This is not as easily answered as might be presumed. A workable example was provided by Justice Sólyom's opinion in the Hungarian Constitutional Court's decision on the death penalty.<sup>96</sup> The majority opinion stated that the right to life and human dignity is an absolute right, indivisible and not limitable and a source and precondition of several other fundamental rights.<sup>97</sup> The decision relied on the Hungarian Constitution, according to which the right to life and human dignity is innate, inviolable and inalienable, and nobody can be deprived of it arbitrarily.<sup>98</sup> Justice Sólyom, in his parallel opinion, observes that, because the Hungarian Constitution prohibits the *arbitrary* taking of life, the answer to the question of whether the death penalty is unconstitutional lies in the definition of arbitrariness. However, nobody can be arbitrarily deprived of any of his rights, and therefore the prohibition of arbitrariness, as regards the deprivation of life and human dignity, has to entail some further guarantees which are specific to these rights. One reason for arbitrariness might be if the court which has to decide on whether to inflict the death penalty has too wide a discretion.<sup>99</sup> Such a formal requirement might be met by adjusting the system by which the death penalty is imposed.<sup>100</sup> The difficulty of potential substantive arbitrariness is, however, not countered by such actions. Sólyom examined the nature of human dignity and found that this is a constant source (that is, 'mother right') of several other rights, with a 'core' prohibiting the use of any man as an object or tool – that is, the dehumanisation of man. Indeed, this core, which is untouchable by the state or other persons, is the legal difference between a natural and a legal person. The abstract right of human dignity can only fulfil its function, however, if it is not separated from the right to life. Since human dignity is innate, everybody possesses the same human dignity which, because of its inseparability from the right to life, means that everybody is equal in death as well as in life. As such, no person is more deserving of life than any other.<sup>101</sup>

<sup>95</sup> Ibid 82-83.

<sup>96</sup> Decision 23/1990. (X. 31.) AB Constitutional Court of Hungary.

<sup>97</sup> See Horváth (1991).

<sup>98</sup> 'Article 54 (1) In the Republic of Hungary every human being has the innate right to life and the dignity of man, and no one may be arbitrarily deprived of these rights.'

<sup>99</sup> Decision 23/1990. (X. 31.) AB of the Constitutional Court of Hungary, Justice Sólyom's parallel opinion. This was basically one of the reasons that death penalty laws have been found unconstitutional in the USA. *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Douglas concurring.

<sup>100</sup> This is exactly what some States did following the Furman decision. This solution was then accepted by the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153.

<sup>101</sup> Ibid.

Sólyom's opinion further emphasised that the death penalty is not unconstitutional because it imposes a limitation on the essential content – that is, core – of a fundamental right, but rather that the right to life and human dignity is *per se* illimitable.<sup>102</sup> A right which is illimitable cannot be outweighed or limited by balancing it against other rights.

Justice Sólyom further suggested that, in those cases in which the defendant kills the attacker in self-defence, the law does not authorise the killing, but rather acknowledges the unregulated character of the situation. As he puts it, the law does not prohibit or allow anything, because the state has no power over human life. It cannot empower the defendant to take the attacker's life, but for the same reason cannot prescribe that the defendant should not protect himself against a deadly attack. In these situations, therefore, the natural state returns, in which pure instinct for survival will direct the course of events.<sup>103</sup> Only once the collision of the rights to life has been resolved does the law return. It can only address the question of whether a self-defence situation existed and, if yes, whether it really threatened the defendant's life.<sup>104</sup> Hence, in cases involving deadly attacks, only the necessity but not the proportionality of the act of self-defence can be examined.<sup>105</sup>

Sólyom's opinion suggests that, in such cases, once again a substantive issue must be dealt with under procedural requirements, as in all cases in which substantive questions lead theorists into a *cul-de-sac*. In other words, without balancing the colliding interests, the circumstances of the collision are defined, and it is their existence which justifies the neutrality of the legal system towards the violation of one of these primary rights.

Security Council resolution 827 (1993)<sup>106</sup> established the International Tribunal for the Former Yugoslavia (ICTY) and 955 (1994) the International Tribunal for Rwanda (ICTR).<sup>107</sup> After a long evolution, international criminal law was finally codified at least to the extent of the statute of an *ad hoc* tribunal. The justification of retroactively punishing such acts – as was expounded in the Nuremberg judgment – lies with the other side of human dignity.

In summary, it can be observed that the duty of the courts is to see that justice is done, a task best performed by guarding the integrity, that is, the universality, of criminal law. If the legislature has failed by itself to do so (that is, absolute rights are not protected by criminal law, or laws are passed which fundamentally violate the universality of criminal law), it is up to the courts to protect law from undermining itself, if needs be through judicial law-making.

Human dignity as a meta-juristic and metaphysical concept prevailing – at the same time – over legal relevance has a reverse side. This other side not only protects the individual by drawing an inviolable boundary for the state and everybody else, it also places an immovable duty upon the human being. Human existence, which distinguishes us from everything else by birth, not only empowers

<sup>102</sup> Decision 23/1990. (X. 31.) AB Constitutional Court of Hungary (n 35) 96-108 (Judge Sólyom).

<sup>103</sup> See for the most famous exponent of natural state. Hobbes (1996).

<sup>104</sup> Decision 23/1990. (X. 31.) AB of the Constitutional Court of Hungary (n 35).

<sup>105</sup> Supreme Court, 15<sup>th</sup> Theoretical Guideline.

<sup>106</sup> S.C.R. 827 (1993).

<sup>107</sup> S.C.R. 955 (1994).

but also commits. This obligation makes it possible to remove the principle of *mens rea* in cases of the most severe violations of human dignity and create a duty to criminalise even retroactively. Someone born as a human being will be criminally liable for acts violating absolute rights (grossly injuring another's human dignity) even if he did not know of the criminal nature of his action.

### 3 Light Speed

According to Einsteinian physics, it does not matter whether one approaches an object which is traveling at the speed of light at 100 km/h or leaves the same object: the speed in relation to said object is not the speed of light minus or plus 100 km/h; the speed of light will stay constant and absolute. However, even Einstein's general relativity theory cannot as yet be brought into accordance with Heisenberg's theory of probability or Feynman's 'sum over histories'.<sup>108</sup> For the understanding of the seemingly true but inconsistent theories of the 'same objective' Stephen Hawking and Leonard Mlodinow, in their 2010 book, *The Grand Design*<sup>109</sup> coined the term 'model-dependent realism'. Model dependent realism is a view of scientific inquiry which focuses on the role of models of phenomena. It tries to explain why and how contradicting explanations can describe the same events correctly from different points of view; it states that reality should be interpreted based upon these models. Model dependent realism asserts that all we can know about 'objective reality' consists of networks of world pictures that explain observations by connecting them by rules to concepts defined in models. (It is hard to fail to notice the similarities between model dependent realism and the Buddhist parable of the blind men and the elephant.)

It is unquestionable that human thinking can only work in models. Even, for example, in criminal proceedings, when an expert witness establishes that the sample must be from Mr. X because the DNA found on the sample matches the DNA of Mr. X, what he actually says is that a certain number of loci match, and we believe that deoxyribonucleic acid (DNA) is a molecule which encodes the genetic instructions used in the development and functioning of all known living organisms. DNA is located in the cell nucleus, the genetic information in a genome is held within genes, and the complete set of this information in an organism is called its genotype. A gene is a unit of heredity and is a region of DNA that influences a particular characteristic in an organism. We believe this because it is supported by our experience, on the bases of which we created the model of the DNA and its place in the living organism.

Or the idea that a crime must have an *actus reus* and a *mens rea* element is a model as well. The real question for us, therefore, is how we can make a model of human dignity and its functions within the criminal justice system.

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<sup>108</sup> Ibid 95-107.

<sup>109</sup> Stephen W. Hawking and Mlodinow Leonard, *The Grand design* (Bantam Books 2010, London) Chapter 3: What Is Reality? 39–59.

## 4 Corruption and Human Dignity

Then Satan entered into Judas, called Iscariot, who was one of the twelve disciples. 4 So Judas went off and spoke with the chief priests and the officers of the Temple guard about how he could betray Jesus to them. 5 They were pleased and offered to pay him money. 6 Judas agreed to it and started looking for a good chance to hand Jesus over to them without the people knowing about it.<sup>110</sup>

It is intriguing to compare the betrayal of Judas with the parable of Mary and Martha.<sup>111</sup> Jesus visits the home of the sisters of Lazarus of Bethany, Martha of Bethany and Mary of Bethany; according to the Gospel of Luke:

As Jesus and his disciples were on their way, he came to a village where a woman named Martha opened her home to him. She had a sister called Mary, who sat at the Lord's feet listening to what he said. But Martha was distracted by all the preparations that had to be made. She came to him and asked, 'Lord, don't you care that my sister has left me to do the work by myself? Tell her to help me!' 'Martha, Martha,' the Lord answered, 'you are worried and upset about many things, but only one thing is needed. Mary has chosen what is better, and it will not be taken away from her.'

The two conflicting types of behaviour depicted by the sisters represent different interpretations of what the norm (behaviour expected by Jesus) requires.

The question first of all is what is the relationship between the perceived rule-following represented by the actions of Martha and Mary? Moreover, what is the motivation of the rule-following?

The parable of the Prodigal Son is one of the most well-known teachings of Jesus. According to the Gospel of Luke, a father gives the younger of his two sons his inheritance before he dies. The younger son, after wasting his fortune, starves during a famine and returns home, where the father holds a feast to celebrate his return. The older son refuses to participate, stating that whilst he always worked hard for the father, he did not even give him a goat to celebrate with his friends. His father, however, reminds him that he – the older – is everything to the father; nevertheless, the return of the younger son has to be celebrated because he had been lost but was found again. This parable is the third and final part of a cycle on redemption, following the Parable of the Lost Sheep and the Parable of the Lost Coin.<sup>112</sup> Pope Benedict XVI, in his work *Jesus of Nazareth*, gives a detailed analysis of this allegory.<sup>113</sup> It is striking how the teaching of the Prodigal Son is reflected in the redemption of one of the criminals during the crucifixion,<sup>114</sup> when Jesus answers

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<sup>110</sup> Luke, 22:3-6.

<sup>111</sup> Luke 10:38-40.

<sup>112</sup> Luke 15:11-32.

<sup>113</sup> Pope Benedict XVI, *Jesus of Nazareth: The Infancy Narratives* (Image Books 2012, Colorado Springs).

<sup>114</sup> Luke 23:26-43.

one of the criminals and says: 'Truly I tell you, today you will be with me in paradise.' In this scene one is faced again with the act of redemption following and despite of a life of sin, similar to the case of the prodigal son's return to the father.

The antagonisms which oppose each other here (the prodigal son and his brother, Mary and Martha, Judas and Jesus's norm system, the two crucified criminals etc.) represent the opposition of a self-centred, own-good oriented norm setting to a rule system oriented on the common good or even on metaphysical values. If one equates common-good/metaphysical values with a norm system then the violation of these norms (crime) can never be completely comprehended by an individual human. Thus Jung – in this setting at least – rightly observes that human recognition of Sin is not possible,<sup>115</sup> since ignorance is the ultimate Sin for the 'Logos', because complete knowledge is impossible and without complete knowledge the metaphysical value (truth) is unattainable. Konrad Lorenz notes that Men's real sin is his genetic instinct which necessarily comes into conflict with moral imperatives.<sup>116</sup>

The collision of pure self-interest and the common good or metaphysical truth poses daily challenges to us: do we decide as biological or moral beings? The same conflict is depicted with utmost severity in the Old Testament when Abraham is ordered by God to kill Isaac.<sup>117</sup>

Indeed, does Sigmund Freud commit a crime (bribery), when he pays the SS officer in order to escape from Vienna to London? When criminalising bribery (corruption), we rely on the primacy of moral imperatives as opposed to self-interest. However, the law which is supposed to carry out this comparison might be flawed itself from the moral point of view.

Our problem in relation to the above is the following: if human dignity serves as a point of reference for criminal law, and additionally human dignity is an inalienable characteristic of our human existence, what if our existence collides not with other human dignities but some sort of supposed common good?

### III Models of Human Dignity

#### 1 The Spinozan or Global Model of Human Dignity


The first model of human dignity I would call the Spinozan model or Global human dignity model.<sup>118</sup> Crudely stated, no individual human being has a personalised human dignity; instead, all mankind possesses a common human dignity. This model does not speak about individual

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<sup>115</sup> C. J. Jung, *The Archetypes and the Collective Unconscious*. (2nd edn, Collected Works Vol.9 Part 1 1981, Princeton).

<sup>116</sup> Konrad Lorenz, *Civilized man's eight deadly sins* (Harcourt Brace Jovanovich 1974, Madison).

<sup>117</sup> Gen 22:1-14 KJV.

<sup>118</sup> Spinoza argued that God exists and is abstract and impersonal, everything that exists in Nature is part of the same Reality (truth, substance) and there is only one set of rules governing the whole of the reality which surrounds us and of which we are part. God – in his view – does not rule over the universe, but is itself the deterministic system of which everything is part. He held good and evil to be relative concepts, claiming that nothing is intrinsically good 

human dignities which may collide; rather, it treats human dignity as a commonly shared value, something akin to the idea imbedded in the Martens Clause.

## 2 The Individual Model of Human Dignity

The second model of human dignity – which we might call the individual human dignity model – is quite the opposite. The problem with this model was highlighted above: if absolute rights, which are inextricably linked to human dignity, collide then neither can yield since this would diminish the absolute value of human dignity and would allow for its limitation.

The explanation that, in cases of colliding absolute rights, we have to leave a legal gap in order not to regulate an un-regulatable situation is unsatisfactory.

If a norm is ambiguous it might seem that there is no specific answer to the actual case in question; that is, it might appear that there is a gap in the law. This affects the relationship between inherent ambiguity, interpretation and legal gaps.

Kelsen maintains that genuine gaps do not exist. If they were to exist, it would mean that a legal dispute could not be settled in accordance with the prevailing norms, because the law lacked provisions to address the case in question.<sup>119</sup> In an absolutist system of reference Kelsen is right. If there is a Basic Norm then any further rule is an elucidation of the Basic Norm. In an IT and NOT-IT setting, every rule is redefining and detailing IT whilst differentiating IT<sup>2</sup> from IT in which conception IT becomes NOT-IT as regards IT<sup>2</sup> and this latter NOT-IT becomes NOT-IT<sup>2</sup> and so on. However, if Kelsen is right, then this would imply that there is no need for interpretation, or rather every interpretation is a further redefinition if IT.

Kelsen bases his assumption upon his argument that every legal dispute consists of one party making a claim against another party, and that the decision granting or rejecting the claim is dependent upon the law endorsing one or the other position. Since there is no third option, even a decision rejecting the claim on the grounds that the law does not address such questions is made by appealing to the prevailing legal system.<sup>120</sup>

An objection to Kelsen's claim which comes to mind is that even a decision stating that a particular claim has no legal grounds establishes a rule. Whether that will be the first 'brick' with which this rule will be built, or whether it is already an additional element, is beside the point. Since there must be a case of first impression (claim) with respect to every conceivable matter, a *real gap* in the law is exposed until the matter has been decided upon authoritatively.

This, however, only holds true – and in this sense one must agree with Kelsen – if we assume that there is a trans-legal value and the Basic Norm does not and/or its redefinitions do not follow the trans-legal value. In such a case, any departure from the trans-legal value would mean a *real gap*.

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or bad except relative to a particularity. [See e.g. S. Nadler, *Spinoza: A Life Paperback* (Cambridge University Press 2001, Cambridge); R. Scruton, *Spinoza: A Very Short Introduction*, (Oxford University Press 2002, Oxford).

<sup>119</sup> Kelsen (n 41) 84.

<sup>120</sup> *Ibid.*

Judges cannot refuse to decide a matter properly brought before them; therefore they either 'employ the explicit concept of the declaratory power',<sup>121</sup> which also means that lacking explicit positive law they have to produce extra legal reasons,<sup>122</sup> or they have to employ analogy as a form of interpretation, or may – in criminal matters – find that the act in question is not criminal.

Even though a court does not find conduct of a criminal nature for which the defendant was prosecuted,<sup>123</sup> the judges decide on the criminality of the conduct brought before them one way or the other.<sup>124</sup> It is suggested that the most significant consequence of this assertion is that even if the court decides not to create a new crime which would fit the conduct before it, and finds a defendant innocent, it makes law by not criminalising the particular behaviour. This follows from the assertion that the duality of criminal law results in the extension or reduction of behavioural freedom on both sides, regardless of criminalisation or decriminalisation in the traditional sense.<sup>125</sup> The fact that courts decided to refuse to find an act criminal reveals that there was a *real gap* in the law which became exposed by the prosecution until the matter was decided upon authoritatively.

The theoretical question that such an approach poses is whether 'non-criminalisation' by a court is basically the same as judicial decriminalisation. As already elucidated, there is no difference between the expansion of criminalised behaviour and its reduction. Any narrowing of the limits of the freedom of behaviour simultaneously expands it. This paradox, however, cannot be limited to the *creation* and *abolition* of norms. 'Non-creation', as opposed to creation and abolition, also depends on these latter concepts, without which it would be rendered meaningless.

Returning to Kelsen's argument, it must be conceded that he is correct in an absolute sense. If there is no agreed need to regulate certain conducts then a legal system which is composed of a single rule – namely that there are no rules – and which dismisses every claim by reference to that single rule, will meet Kelsen's description. If, however, one adds only one additional rule – for example, 'thou shalt not kill' – then by the application of this norm it will multiply into numerous sub-rules, thus acknowledging the existence of gaps. These gaps will be legal gaps in the sense that they will refer to areas of human behaviour to which the rule is now applied, even though previously it was not. Additionally, these matters differ from earlier matters, which the rule had been previously used to regulate. Nevertheless, if one presumes – as this work does – that there are states and legal systems which operate in and establish value structures, then the coherence of these value structures demands positive legal regulation of certain relationships.

<sup>121</sup> S. C. Styles, 'Something to declare: a defence of the declaratory power of the High Court of Justiciary' in Hunter, R.F. (ed), *Justice and Crime: essays in honour of The Right Honourable The Lord Emslie, M.B.E., P.C., LL.D., FR.S.E.*, p. 211. (T&T Clark 1993, Edinburgh) 230.

<sup>122</sup> I. D. Willock, 'Judges at work: making law and keeping to the law' [1996] *The Juridical Review Discussion Chapter V:2.1.* 98.

<sup>123</sup> Consider for example *Grant v. Allan* 1988 S.L.T. 11; 1987 S.C.C.R. 402 in which the court held that the making of computer printouts with the intent to supply them to the trade rival of the accused's employer was not recognised as a crime by the law of Scotland.

<sup>124</sup> Willock (1996) 99.

<sup>125</sup> See Chapter I.1.1.

This does not preclude the possibility of giving a legal response stating that a certain human behaviour needs to remain unregulated.<sup>126</sup>

It follows from the proposition that every criminalisation simultaneously extends and limits the permitted boundaries of human behaviour that not criminalising certain activities may appear to be a lack of legal protection on the other side of the relationship.<sup>127</sup>

Kelsen, furthermore, claims that when gaps are spoken of it does not mean that a solution is logically impossible because norms are lacking, but rather that decision-makers, whilst such a decision is logically possible, do not find it to be practicable or just.<sup>128</sup> This extreme form of positivism, although often true is, as argued above, not of general validity, and proves indeed to be quite unhelpful as far as criminal law is concerned. This is especially so when one takes into consideration that Kelsen does not even find a gap in cases where the statute is nonsensical, or even lacking in meaning altogether. He says rather that one cannot extract from a norm by interpretation what the norm never had.<sup>129</sup> However, in criminal law, such necessities do arise from time to time.

### 3 Individual-cumulative Model of Human Dignity

The third model of human dignity might be labelled as the individual-cumulative model. As one can imagine different infinities, one may also assume absolute rights of different qualities. In the same way as one may place an infinite number of dots on a line, one may also draw infinite

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<sup>126</sup> The constitutional right to freedom of expression forbids the legislature to pass content based limitations on expression in the United States. Very famous are the 'Skokie cases' [Lawrence (1993), 673, note 2] consisting of two cases arising from the attempt by a group of Nazis to hold a march in the predominantly Jewish Chicago suburb of Skokie, Illinois in 1977 and 1978. The first case is *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977); 366 N.E.2d 347 (Ill. App. Ct. 1977); 373 N.E.2d 21 (Ill. 1978). The more discussed second case is *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1977), *aff'd*, 578 F.2d 1197 (7<sup>th</sup> Cir. 1978), *cert. denied*, 439 U.S. 916 (1978). The court invalidated the ordinances which forbade Nazis to march through a town, reasoning that the legislation was content-based, since 'any shock effect ... must be attributed to the content of the ideas expressed'. *Ibid*.

<sup>127</sup> For discussion of these cases and the connected legal issues D. Downes, *Contrasts in Tolerance: Post-War Penal Policy in the Netherlands and England and Wales* (Clarendon 1988, Oxford); A. Kinoy, *Rights on trial: the odyssey of a people's lawyer* (Harvard University Press 1983, Cambridge); D. Kretzmer, *Freedom of speech and racism* [1987] *Cardozo Law Review*; A. Neier, *Defending my enemy: American Nazis, the Skokie case, and the risk of freedom* (E. P. Dutton 1979, New York); A. Neier, *An Arthurian tale. Book review of KINOY, A. (1983), Rights on trial: the odyssey of a people's lawyer.* (Harvard University Press 1985, Cambridge). Also consider the Canadian case *Boucher v. R.* (1951) 2 DLR 369, and the English case *R. v. Chief Metropolitan Magistrate, ex parte Choudhury* (1991) 1 All ER 306. For discussion consider M. Tregilgas-Davey, 'Ex parte Choudhury: An opportunity missed' [1991] *Modern Law Review*; Feldman (n 82) 674-683, 811-814. For racial hatred offences see A. T. H. Smith, *The offences against public order (including the Public Order Act 1986)* (Sweet & Maxwell, Police Review Publishing 1987, London) ch 9; G. Robertson, *Freedom, the individual and the law* (7th edn, Penguin Books 1993, London) 95-99. As regards European human rights law see *Glimmerveen v. the Netherlands*, 18 D. R. 187. In Hungary see Constitutional Court decision 30/1992. (V. 26.) AB; B. J. Gellér, 'Hate speech in Hungarian criminal law' (1995) 6 *Acta Juridica Hungarica*; A. I. Wiener, 'The necessity test relevant to the codification of criminal law' (1995) 6 *Acta Juridica Hungarica*.

<sup>128</sup> Kelsen (n 41) 85.

<sup>129</sup> *Ibid* 87.

numbers of these dotted lines on a sheet of paper. Moreover, infinite numbers of these sheets might be placed upon each other. If we assume that a dotted line having infinite dots symbolises an individual's human dignity we still may conclude that an infinite number of such lines is qualitatively if not mathematically more than a single – be it infinitely dotted – line.

This model allows us to measure several lives against a single life but still lacks a proper explanation in cases in which single absolute rights have to be weighed against each other.

#### **4 Individual-cumulative Erodible Human Dignity**

The question presents itself of how it would be possible to maintain the principle of equality of people and accommodate the collision of absolute rights (human dignities). In connection with this, another question begs answering: is human dignity a concept which accompanies human life without any change or could the behaviour of the individual affect his human dignity?

It is clear that metaphysical thinking may associate human existence with a soul; further it may link human dignity with the human soul and find the possibility to reward or punish human action in – for example – the afterlife. Such thinking might be open to suggestions of ameliorating or diminishing human dignity through human behaviour. For all intents and purposes I would guard against drawing conclusions for legal thinking from metaphysical thoughts, with the exception of postulating the possibility of a metaphysical rule structure.

Nevertheless, the principle of equality of human beings and the principle that it may not be violated by the state does not preclude the extension of this latter model in a way which allows for the erosion of dignity through one's own actions. Plainly put: why would a democratic legal system have to cling to the idea that a person killing thousands of innocent people has the same human dignity as anyone else? If one were to allow for the erosion of human dignity it is possible to settle issues such as self-defence. This would also have a profound effect on the justifications for punishment since, if action can erode, it would be possible to regain human dignity through action.

Finally, it must be conceded that not all remaining problems are swept out of the way. It has to be seen how problems of necessity and armed conflict can be explained under this model, or which different model has to be created in order to maintain a coherent logical system.

András Koltay\*

## **Elements of Protecting the Reputation of Public Figures in European Legal Systems**

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### **I Introduction**

Personality rights enjoy strong protection under the various legal systems as a result of 20<sup>th</sup> century legal developments. For a long time, it did not even occur to anyone that the level of this protection should be differentiated according to the type of statements that are harmful to an individual's reputation, or that this level should be reduced for certain types of persons. False statements and statements that are harmful to an individual's reputation were naturally regarded as constitutionally unprotected statements, until the emergence of the idea that certain statements relating to public debates and which may be harmful to the reputation of public figures should be afforded special protection. Such special protection is necessitated by the paramount importance of the freedom to engage in public debates. The development of the protection of reputation in modern times is difficult to reconcile with the recognition of privileged statuses and the fact that an individual is active in public life is regarded as one that automatically reduces the scope of such protection. This approach is essential to a fundamental feature of democratic societies: open debates on public matters are more important – up to a certain limit – than the protection of the personality rights of the persons being criticised. Persons participating in public life voluntarily waive their opportunity to enforce their personality rights in general. The limited protection of the reputation and honour of public figures thus became acknowledged in all legal systems which recognise the above distinction.

It is an almost uniform feature of European legal systems that this reduction of the scope of the protection of the reputation of public figures is not provided for in codified law; the manner of the application of the law in this special case is left to the case law of the courts. Only a couple of states form an exception to this but, even in their case, it is usually only in the field of criminal justice that the legal code of the branch of the law offers any guidance. Common European law, respecting the specific, organically evolved solutions applied by the member states, has not attempted a uniform resolution of this issue; however, the European Court of Human Rights, which is traditionally very active in these areas, has successfully drawn up the foundations that the various states are required to take into account when applying the law.

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## II Issues of Terminology, Clarification of Concepts

The protection of the honour and reputation of public figures constitutes a complex set of legal problems, because it requires the identification of the rules and the limits of the application of several branches and areas of the law (criminal law, civil law, media regulation), as well as several distinct personality rights that can be interpreted independently of each other: reputation, honour and human dignity. As a result, even the internal coherence of some of the individual legal systems may be wanting; the overall European picture is certainly diverse and not free from contradictions.

Reputation, honour and human dignity are personality rights closely related to each other. Different legal systems protect these rights in different ways. Certain systems differentiate between several different rights (thereby giving them different meanings), and view them as independent rights, whereas others do not define them independently but protect them collectively, under their anti-defamation rules, without any differentiation.

Reputation protects the individual from (society's) external value judgement, which can primarily be harmed by the statement of falsehoods, within either the system of civil law or criminal law. The exact meaning of the term 'honour' is hard to grasp in terms of the law. While it is not appropriate to generalise, honour refers to the individual, innate values of the personality; harming these does not demean the external perception of the given person, but causes 'internal' harm to him/her. Hence, reputation fundamentally means the value judgement of other persons about one's personality, while honour means the *immanent* core of one's personality, which is rather hard for the law to grasp.

The notion of human dignity can only be defined in law with great difficulty. However, its breaches can easily be identified. The right to human dignity, where it is protected as a personality right, can be violated (similarly to honour) by seriously offensive, unjustifiably harmful or humiliating opinions. The protection of reputation, honour and dignity are therefore strongly connected as far as freedom of speech is concerned, and in most instances they cannot actually be separated from each other.

The manner of the discussion of the subject here does not allow a separate examination of the right to reputation and the right to honour; the reason for this is that several legal systems regulate these two together and identically and so differentiating them is an issue that belongs more to jurisprudence than to the legal provisions themselves. (The purpose of this study is primarily to explore the solutions provided by codified law.) The law of defamation or law of libel is thus viewed in its totality.

Another important preliminary remark to be made is that we have tried to dwell as little as possible on the general aspects of the protection of honour and reputation, not because these topics are not worthy of consideration in themselves, but simply because this would have broadened the scope of the problem under examination to an unmanageable extent. As such, we shall only deal with general issues not related to the protection of the personality of public figures inasmuch as these are required for an understanding of our subject, or if such general provisions have a significant effect with regard to public figures.

### III Comparative Overview of Certain Issues Related to the Protection of the Reputation and Honour of Public Figures<sup>1</sup>

#### 1 The Nature of the Branch, Area and Source of Law Regulating the Protection of Personality

Characteristically, several different branches and areas of the law play a role in the defence of honour and reputation. It is clearly common to all European legal systems that natural and, in parallel, legal personality enjoy the protection of both civil and criminal law. That is, in the member states of the European Union, it is characteristically the large general codes, the civil and the criminal codes, that contain the general rules on the protection of personality. In England and Ireland special laws on defamation (the Defamation Act) deal with this issue, intentionally leaving the resolution of certain important problems to judicial legislation. In the states of Europe, therefore, the violation of reputation and/or honour exists generally as both a civil law and a criminal law delict, although the intensity of the application of these rules in practice may vary significantly.

The previous provisions on criminal libel have only been abolished or repealed in a few of the legal systems of the Member States. The English, Irish,<sup>2</sup> Romanian, Estonian and Latvian regulations and the regulations of Cyprus are among these.<sup>3</sup> In Estonia the new criminal code of 2001 contained no general provisions on libel; however, it did provide for special instances: the criminal offence of libel may still be committed against representatives of the state, protectors of law and order and courts and judges.<sup>4</sup> The amendment of the Latvian criminal code of 9<sup>th</sup> December 2009 abolished the offence of criminal libel; however, it should be noted that the act still provides for the criminal offence of 'bringing into disrepute', which consists of making injurious statements that are known by the imparter to be false.

At the same time, the provisions on the protection of reputation and honour may also appear within the regulations that are specific to the media. This may be realised in one of two ways: either the provision over and above the general protection of personality is present in a press law or similar that is applicable to all media, or it is only present with regard to certain media (eg audio-visual services) in a sectoral act of law regulating that given type of media. At the same time, it can be misleading that certain countries (France, for example) include criminal law regulations in their press laws; thus, in actual fact, the press law not only consists of independent 'sectoral' regulations, but also overlaps with the field of criminal law.

<sup>1</sup> In our review of the regulations of the various individual states we have relied heavily on the international study conducted for the Hungarian National Media and Communications Authority by DLA Piper Hungary in 2011–2013.

<sup>2</sup> Article 35 of the Defamation Act of 2009 abolished the common law offences of defamatory libel, seditious libel and obscene libel.

<sup>3</sup> Aidan White, 'Ethical Journalism and Human Rights' in *Human Rights and a Changing Media Landscape* (Council of Europe Publishing 2011, Strasbourg) 57.

<sup>4</sup> Criminal Code of Estonia (6 June 2001), arts 275 and 305.

Beyond this, there exist provisions directed at the protection of honour and reputation in the various self- and co-regulatory codes too.

Furthermore, it is important to stress the actual or quasi-legislative role of the courts, too. Under the system of common law, due to the conscious retreat of legislative regulation (whereby the law only settles certain issues related to the protection of reputation), the courts may take on the role of *de facto* legislator (in England and Ireland). At the same time, as we shall see, in most countries of the continental legal system there is no special legislation on the protection of the personality of public figures either, and so its outlines are also shaped by judicial practice.

It should also be stressed that in Europe, in general, the application of the provisions on the protection of personality does not fall under the powers and responsibilities of the media authorities; the individual legal systems usually leave this to the courts.

The following section reviews the regulations of those states where the issues of the protection of reputation and honour are (inter alia) provided for within the regulation of the media.

The Austrian media act<sup>5</sup> provides for the sectoral rules for the protection of reputation and honour in general, with regard to all media. According to the act, in ongoing criminal proceedings the injured party may demand indemnification if the defendant is a media enterprise. If criminal proceedings have not been launched, the injured party may initiate this independently.<sup>6</sup> In addition to civil and criminal law, the act provides for a set of regulations governing the protection of certain inherent personal rights and remedies. Section 6 states that ‘if an offence is committed in the media, such as defamation, libel, slander, insult or ridicule, the person affected is entitled to claim from the media owner indemnity for the injury suffered’.

Similarly, the French press act<sup>7</sup> establishes general (criminal law type) rules for all media. According to Article 29 of the Press Act, defamation is defined as ‘any allegation or imputation of a fact affecting the honour or reputation of a person.’ It is considered as a criminal offence committed by means of the press.

Luxembourg’s free expression act<sup>8</sup> also prohibits defamation in all media. The prohibition of defamation and infringement of good reputation (*droit au respect de son honneur et de sa réputation*) must at all times be complied with. When this obligation is not complied with, a judge can take all necessary measures to end such non-compliance, at the cost of the party responsible.

In Malta, the Press Act<sup>9</sup> makes it an offence, punishable by a fine, for anyone to libel any person by means of the publication or distribution in Malta of printed matter, from whatsoever place such matter may originate, or by means of any broadcast.

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<sup>5</sup> Media Act (*Mediengesetz*), Federal Act on the Press and other Publication Media 12 June 1981, (1981) 314 Federal Law Gazette.

<sup>6</sup> Media Act (*Mediengesetz*), Federal Act on the Press and other Publication Media 12 June 1981, (1981) 314 Federal Law Gazette, art 8(a). See Cameron Doley, Alastair Mullis (eds), *Carter-Ruck on Libel and Privacy* (6th edn, LexisNexis 2010, Butterworths) 1090.

<sup>7</sup> Press Act of 1881.

<sup>8</sup> Act of 8 June 2004 on the Freedom of Expression in the Media, Chapter V, art 16.

<sup>9</sup> Act XL of 1974, art 11.

In Italy, under the Press Law, libel is punishable.<sup>10</sup> The criminal responsibility rests on the author of the article, and also on the editor if the latter failed to carry out the necessary checks to prevent the libel.<sup>11</sup>

Certain provisions of the Greek media regulations apply exclusively to audio-visual services; others to all media services (television and radio), while some of them are only applicable to public service media. Article 7 of Presidential Decree 109/2010 provides for the obligation of all programmes transmitted by the audio-visual media to respect personality, honour and reputation. The same provisions are included in article 3 of law no. 2328/1995 regarding the Greek National Council for Radio and Television, which expands these obligations, in relation to personal rights, to commercial communications broadcasted by the radio and television stations. In addition, according to article 3 of law 1730/1987, the programmes transmitted by the public broadcaster should respect, inter alia, the personality and privacy of people.

In chapter 7 article 4 para 14 of the Swedish Freedom of the Press Act,<sup>12</sup> there is a special provision which states that defamation is an offence against the freedom of the press, and as such is punishable.

Spanish media regulations only prescribe the respect of honour with regard to audiovisual services. Article 4.4 of the General Audiovisual Law<sup>13</sup> requires audio-visual communications to respect the honour of individuals.

The Slovakian media regulations also only provide for obligations additional to the general civil and public law rules with regard to the audio-visual media, and do not expressly cite the protection of reputation and honour. The protection of personal rights is stipulated in Article 19 of the Act on Broadcasting and Retransmission: according to the provisions of this Article, media services must not, through their processing and content, impact on human dignity and the basic rights and freedoms of others.

The Danish and the Irish legal systems are examples of the relegation of the protection of reputation and honour to the area of self- and co-regulation. The Danish Ethical Guidelines<sup>14</sup> contain the following clause:

Safeguarding freedom of speech in Denmark is closely connected to the freedom of the mass media to collect information and news and to publish it as correctly as possible. Free comment is part of the exercise of the freedom of speech. In attending to these tasks, the mass media should recognise that the individual citizen is entitled to respect for his personal integrity [...] and the need for protection against unjustified violation thereof.

<sup>10</sup> Law 8 February 1948, no. 47 (Printed Press Law), art 13.

<sup>11</sup> Roberto Mastroianni, Amedeo Arena, *Media Law in Italy* (Kluwer Law International 2011, Alphen a/d Rijn) 51–52.

<sup>12</sup> Freedom of the Press Act [In Swedish: *Tryckfrihetsförordningen* (2002:908)].

<sup>13</sup> General Audiovisual Law 7/2010.

<sup>14</sup> A detailed set of ethical guidelines (in Danish *Reglerne for god presseskik*) can be found in an annex to the Media Liability Act (no. 85 of 9 February 1998).

As these guidelines have a serious impact on the interpretation of section 34 of the Media Liability Act, this provision might be deemed violated if particular mass media do not respect the inherent rights. The Press Council<sup>15</sup> has the right to commence a case regarding violation of the ethics of journalism on its own volition if the Ethical Guidelines have obviously been violated.

In Ireland, the Code of Practice for the print press (supervised by the Press Council) also contains protection for individual rights in the Press Media. Principle 4 obliges member publications to respect certain personal rights, and notes that ‘everyone has constitutional protection for his or her good name’ and goes on to state that ‘newspapers and periodicals shall not knowingly publish matter based on malicious misrepresentation or unfounded accusations, and must take reasonable care in checking facts before publication.’<sup>16</sup>

In summary, the regulation of the protection of reputation and honour may appear in the following branches and sources of law:

- civil law (civil code);
- criminal law (criminal code);
- media regulation (press or media acts);
- self-regulation or co-regulation (codes of conduct);
- judicial practice (in common law countries by intentionally passing the role of lawmaker to the courts, elsewhere by providing the appropriate interpretation of the legal provisions).

## 2 The Definition of Public Figures

I have found no example of the legal definition of the category of public figures in Europe. The absence of such a definition is not surprising, since the sphere of public figures is constantly changing in parallel with the changing world of the media and the public; accordingly, it is up to judicial practice to define this group of people, since judicial practice is able to adapt to this state of constant flux. Where the codified norm does apply taxonomy to define a given sphere of persons, the purpose of this is usually to provide additional protection. An example of this, albeit one independent of freedom of speech issues, is the definition of public officers, against whom violent conduct applied during the performance of their public functions is punishable more severely. As we shall see later on, somewhat surprisingly, we have even encountered in Europe a legal system that provides a stricter than general protection of the personality rights, including honour and reputation, of a certain circle of individuals.

German jurisprudence and legal literature differentiate between absolute public figures (*absolute Personen der Zeitgeschichte*) and relative public figures (*relative Personen der Zeitgeschichte*).<sup>17</sup> To allocate a person under these classifications it is necessary to conduct an individual

<sup>15</sup> The Danish Press Council handles complaints from all media under the Media Liability Act. The Council can start a case of its own volition if the Ethical Guidelines have been violated.

<sup>16</sup> Eoin Carolan, Ailbhe O’Neill, *Media Law in Ireland* (Bloomsbury Professional 2010, Dublin-Haywards Heath) 502–504.

<sup>17</sup> Horst-Peter Götting, Christian Schertz, Walter Seitz (eds), *Handbuch des Persönlichkeitsrechts* (CH Beck 2008, München) 225–234.

assessment of the information interest of the public and the personal rights of the person depicted.

Absolute public figures are those who stand out from the masses due to their exceptional behaviour or particular roles. Irrespective of a particular event, those persons receive public attention. This category includes, *inter alia*, important politicians, high ranking representatives of the economy, members of reigning royalty, well-known actors, TV presenters, musicians, athletes and scientists. However, photographs of absolute public figures may only be published without their consent if such publication aids in the formation of opinions in regard to questions of general interest.

Relative public figures only become visible to the wider public for a certain period of time in connection with an event in contemporary history. The information of interest in this category is limited to the respective event which renders the person a public figure. This category includes, *inter alia*, criminals, if their offence is out of the ordinary and causes general sensation, other participants in spectacular criminal proceedings, such as judges and lay judges, prosecutors and counsels for the defence, witnesses and victims of crimes. Furthermore, family members and partners of absolute public figures are relative public figures but may only be depicted in connection with the absolute public figure.

The Spanish Constitutional Court has, on a subjective basis, made a triple classification of public figures: (i) in a strict sense, public figures are those people with a public job (eg public authorities or other people indirectly related to them); (ii) public figures are those individuals who are not connected to public institutions but who are well-known because of their occupation; and (iii) celebrities, ‘famous’ people without any other feature or profession, at least known, than the fame or notoriety with which they are attributed, which usually arises from the public exhibition of their private lives.<sup>18</sup>

While the extension of the group of public figures is a worldwide trend, the theoretical foundations of this – sometimes apparently boundless – expansion are yet to be clarified. As discussed above, the limited personality protection afforded to public figures is justified by the effectiveness of democratic order and by the need to conduct public debates. However, this argument is hardly applicable to certain new waves of expanding the group of public figures (eg to include ‘celebrities’). It is not possible to determine, with absolute certainty, who has an impact on the development of public matters and to what extent. While persons who are unknown to the public but, in the background, make important decisions for society enjoy unlimited personality protection, other people who become known for a short period of time as celebrities and have no influence on public matters whatsoever qualify as public figures.

This imbalance may be eliminated if the legal focus – and the scope of limited protection – shifted from people to matters of public interest. The practice of the European Court of Human Rights clearly emphasises the definition of those situations where lesser than customary protection of personality is called for, rather than the public figure status of individuals. In other words, the fact of appearing publicly (public matter) is more important than the public figure

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<sup>18</sup> Constitutional Court judgments 165/87, 107/88, 20/92, 320/94.

(the person) him- or herself.<sup>19</sup> The scope of activities and information about public figures, persons exercising state powers, and persons carrying out public functions that may be disclosed to the public is of fundamental importance. The protection of the personality rights of such persons may be limited occasionally, even beyond the scope of carrying out their public functions and public appearances. For example, the family life of a Member of Parliament may be regarded as information of public interest if it may influence the decisions of voters.

### 3 The Measure of the Protection of Public Figures

There are hardly any European states where a codified rule – a legal act – provides for the decreased level of protection of honour and reputation granted to public figures and the differentiated application of certain procedural rules in their case.

According to the Finnish Criminal Code,<sup>20</sup> criticism that is ‘directed at a person’s activities in politics, business, public office, public position, science, art or in comparable public activity and that does not obviously overstep the limits of propriety’ does not constitute criminal defamation. There is no clear-cut rule as to what is considered as obviously overstepping the limits of propriety. Instead, this is assessed by the court on a case by case basis. The criticism can be sharp and pejorative but, in order to be acceptable, it must limit itself to the public activities of the person and not relate to their personality.

In Poland, pursuant to article 213 section 2 of the Criminal Code,<sup>21</sup> whoever raises or publicises a true allegation regarding the actions of an individual holding a public function or in defence of a justifiable public interest shall be deemed to have not committed an offence. Therefore, if the allegation is true but none of the other conditions apply, the statement may constitute an offence. (This rule applies as truth on its own is not a defence against criminal libel; the defendant also has to prove that the publication served the public interest.)

In Luxembourg, similar rules apply to criminal libel cases. With regard to libel, defamation and infringement of good reputation against persons of public life, article 447 of the Criminal Code<sup>22</sup> provides for specific rules. The suspect accused of such an offence ‘for allegations based on facts relating to their functions, either against persons in authority or any public person, or against a legal person’ has, at all times, the right to prove the alleged facts. These rules apply, for example, to members of parliament.<sup>23</sup>

<sup>19</sup> See *Bladet Tromsø and Stensaas v. Norway* (no. 21980/93, judgment of 20 May 1999); *Nilsen and Johnsen v. Norway* (no. 23118/93, judgment of 27 February 2001); *Thorgeirson v. Iceland* (no. 47/1991/299/370, judgment of 28 May 1992). See also Eric Barendt, *Freedom of Speech* (2nd edn, Oxford University Press 2005, Oxford – New York) 222–225.

<sup>20</sup> Finnish Criminal Code (39/1889) ch 24 s 9.

<sup>21</sup> Criminal Code of 6 June 1997, (1997) 88 (553) *Journal of laws*.

<sup>22</sup> Luxembourg Criminal Code (Loi du 16 juin 1879).

<sup>23</sup> Cour 30 janvier 1904, Cass. 25 mars 1904, P. 8, 395.

In Denmark, the Criminal Code contains a special defence which can be applied in cases concerning public or political debates. Section 269 of the Criminal Code provides for the ‘lawful protection of obvious public interests’, and therefore open public debate, when a publication breaches one’s right to reputation or honour.<sup>24</sup>

Despite the fact that the principle of the reduced protection of the honour and reputation of public figures is generally prevalent in European legal systems, some states define certain special legal cases whereby – contrary to the general European approach – certain public figures of prominent importance are granted additional protection with regard to their personality rights. In practice these rules are not applied or are applied only very rarely, and their compatibility with the judicial practice of the European Court of Human Rights is, at best, doubtful.

Despite the fact that the position of the Bulgarian Constitutional Court favoured the broad protection of opinions directed against politicians, government officials and the government,<sup>25</sup> the amendment of the Criminal Code in 2000 provides for stricter penalties in the event of slander against official persons or the members of popular representative organs.<sup>26</sup>

The Estonian Criminal Code does not prohibit libel in general; however, it does constitute an offence if it is against representatives of the state, defenders of law and order and the judges; i.e. in their case, the law provides for a higher level of protection than for private individuals.<sup>27</sup>

In Malta, under the Press Act<sup>28</sup> it is an offence for anyone, by means of the publication or distribution in Malta of printed matter, to ‘impute ulterior motives to the acts of the President of Malta’, or to ‘insult, revile or bring into hatred or contempt or excite disaffection against, the person of the President of Malta’, and shall be liable on conviction to imprisonment for a maximum term of 3 months and to a fine.

The German Criminal Code<sup>29</sup> contains a very widely applicable differentiation between public figures and private persons. According to section 188 StGB, if the defamation or intentional defamation is directed against a person standing in political life, stricter sanctions may apply.

If an offence of defamation (section 186) is committed publicly, in a meeting or through the dissemination of written materials [...] against a person involved in popular political life based on the position of that person in public life, and if the offence may make his public activities substantially more difficult, the penalty shall be imprisonment from three months to five years. (...) An intentional defamation (section 187) under the same conditions shall entail imprisonment from six months to five years.

The defamation of other persons in public life is not covered by this increase in the penalty. Section 115 of the Danish Criminal Code prescribes that the maximum penalty be doubled if

<sup>24</sup> Sören Sandfeld Jakobsen, Sten Schaumburg-Müller, *Media Law in Denmark* (Kluwer Law International 2011, Alphen a/d Rijn) 64.

<sup>25</sup> Judgment no. 7 of 1996 of the Constitutional Court.

<sup>26</sup> Criminal Code, s 148 para 1(3), see Doley, Mullis (n 6) 1118.

<sup>27</sup> Criminal Code (6 June 2001), arts 275 and 305.

<sup>28</sup> Chapter 248 of the Laws of Malta, pt II s 5(1).

<sup>29</sup> Criminal Code (*Strafgesetzbuch, StGB*), 15. 05. 1871.

the defamed person is the king, or the head of the Danish government. According to the literature, this section has never been applied in practice.<sup>30</sup>

In summary, it may be said that the various legal systems typically leave the task of deciding the most important issues concerning the protection of the reputation and honour of public figures to the courts to a much larger extent than is customary for the tasks and responsibilities routed to the judiciary. The handful of relevant legal provisions – coupled with the (also rare) provisions for the protection of personality that deviate from, and are stricter than, the main rule – are exceptions. Also typical is that, even within the given legal system, these are not meant to provide general solutions and are only relevant to the limited application of criminal law.

#### **4 The Distinction between Statements of Fact and Statements of Opinion**

The distinction between statements of fact (or allegations) and statements of opinion is one of the most important issues related to the protection of reputation and honour. Usually, however, the provisions of codified law do not deal with this issue but leave it to the courts to consider the content of statements found to be injurious. It makes a major difference to the judgement of the infringement whether the court qualifies a piece of content as fact or opinion. Statements of fact may be subjected to demonstration, i.e. both the communicator and the injured party are granted the opportunity to prove or refute their veracity. As such, exemption from legal liability in cases involving the publication of assertions that cannot be proven to be true is only possible in exceptional cases. At the same time, opinions cannot be subjected to demonstration; the most that can be examined is whether they have any factual basis or not. Moreover, with regard to certain opinions, even this factual basis cannot be subjected to examination (e.g. if a politician is called a Nazi then it is possible to examine whether any parallels exist between the politician's activities and Nazi politics, but if the opening performance of a play is deemed to be terrible then – due to the very nature of this opinion – no such factual basis may be sought). In such cases, as well as when the opinion is based on factual grounds, criticism is granted broader protection than false statements of fact, since its publication is accompanied by a significant interest of society. At the same time, extremist and abusive opinions may not meet this condition. These general principles, however, rarely appear in codified legal provisions. The libel laws of the various European countries typically forbid libel and defamation in general but it is usually clear which of the possible grounds for exemption are applicable to statements of fact and which apply to statements of opinion.<sup>31</sup>

A distinction between facts and opinions is not a main characteristic of the English law of libel. Opinions enjoy protection (on the basis of 'honest opinion') if they are grounded in fact

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<sup>30</sup> Sandfeld Jakobsen, Schaumburg-Müller (n 24) 66.

<sup>31</sup> E.g. the English protection of 'honest opinion' obviously extends over opinions, while the protection of the 'truth' concerns statements of fact.

and are not expressed in bad faith.<sup>32</sup> That is, abusive opinions that transgress the limits of admissible criticism do not enjoy protection as they are not grounded in fact. Defining the limits of admissible criticism is not easy. For example, the actor Steven Berkoff prevailed in a libel civil action against a critic who wrote that he was ‘hideously ugly.’<sup>33</sup> The English law of libel does not, then, separate the protection of honour and the protection of reputation.<sup>34</sup> Libel is possible even if the statement cannot be proven (e.g. saying that someone is ugly is a subjective value judgement).

## 5 Causes of Exemption from Liability

The various legal systems in Europe provide for the grounds for exemption from liability in cases of communications injurious to honour or reputation; legal liability for injurious communications is therefore not objective and not unlimited.

The causes of exemption are not codified in all states; where no legal provisions define these causes they are shaped and defined by judicial practice. In the following review we shall not discuss these, and limit ourselves to causes of exemption as defined by statutory law with the exception of the English common law system (where the law – in fact, several legal acts – also provides for defamation, but these do not cover the entirety of the field of libel law).

A general cause of exemption is if the content of the communication is proven to be true, i.e. if the communicator is able to demonstrate, before a court of law, the truth of the statements made (see, e.g. England,<sup>35</sup> Austria,<sup>36</sup> Cyprus,<sup>37</sup> Luxembourg,<sup>38</sup> Sweden,<sup>39</sup> France<sup>40</sup>). At the same time, under some of the legal systems, proof is only admitted in criminal procedures if the publication served a valid public interest (eg an expression related to a public issue), or, perhaps, an appreciable private interest. In the absence of such an interest, even statements of fact that are demonstrably true may qualify as libellous (and according the procedural rules, the demonstration of their truth is not admitted).<sup>41</sup>

An extenuating circumstance may be if the libelled party had previously consented to publication<sup>42</sup> or if the party against whom the lawsuit was initiated had only indirectly contributed to the injury

<sup>32</sup> Defamation Act 2013, s 3.

<sup>33</sup> *Berkoff v. Burchill* [1997] EMLR 139, CA.

<sup>34</sup> Barendt (n 19) 228.

<sup>35</sup> Defamation Act 2013, s 2.

<sup>36</sup> Media Act (*Mediengesetz*, Federal Act on the Press and other Publication Media 12 June 1981, (1981) 314 Federal Law Gazette) s 6 para (2) item 2(a).

<sup>37</sup> Civil Wrongs Act, ch 148 s 19.

<sup>38</sup> Luxembourg Criminal Code (Loi du 16 juin 1879) art 443, Act of 8 June 2004 on the Freedom of Expression in the Media, ch V art 17.

<sup>39</sup> Freedom of the Press Act [*Tryckfrihetsförordningen* (2002:908)], ch 7 art 14 para 14.

<sup>40</sup> Press Act of 1881, art 35, pp 55–56.

<sup>41</sup> See e.g. Hungary 1998. évi XIX. törvény a büntetőeljárásról (Act XIX of 1998 on Criminal Procedure); Danish Criminal Code, s 270; in Sweden, Freedom of the Press Act [*Tryckfrihetsförordningen* (2002:908)], ch 7 art 14 para 14.

<sup>42</sup> English common law, and Irish Defamation Act 2009, s 25.

(i.e. was an ‘innocent’ party to it), and so newsagents, postmen and printers are not liable for any libellous statements published in a press product.<sup>43</sup>

It is important to note that – presumably not independently from the ever-growing case law of the European Court of Human Rights – some of the legal systems that had previously applied extremely strict rules and only provided exemption from legal liability in very few cases when the published statements were not proven (i.e. were false) now exempt the party making the defamatory statements, even if such statements are factually false, but were made in good faith and concern public affairs. That is, in certain clearly defined cases, even false statements may be granted protection; in the majority of cases the considerations to be taken into account are shaped by case law, although under certain legal systems they have already become part of codified law.

The generally prevalent rule is that fair criticism (i.e. criticism based on facts, or value judgements that require no proof as they have no factual basis), however injurious or damaging it may be, cannot be considered to be defamatory if its publication was necessitated by the public interest;<sup>44</sup> setting the limitations is also left to judicial practice in most legal systems.

A basis for exemption, recognised by several legal systems, is if the given medium does not itself make the slanderous statement, but merely reports on the slanderous opinion of someone else, i.e. it only passes on that opinion. We shall examine this exception in more detail later on (see section 3.6.).

#### a) Special circumstances

Some legal systems provide for certain special circumstances, under which exemption from liability is even granted in the event of the publication of slanderous statements. Under English law, *absolute privilege* protects certain statements made under special circumstances and provides full immunity from legal liability to the publisher (such statements include those made in Parliament, during court proceedings or government work, as well as the re-publication of such).<sup>45</sup>

Danish judicial practice accepts the right of lawyers to make defamatory remarks when defending their clients in the courtroom or during a legal procedure.<sup>46</sup> The Danish Criminal Code contains a unique exemption from liability: Section 272 provides that if the offensive (defamatory or abusive) remarks are retaliatory (ie the person who made the remarks was reacting to a previously made, similarly offensive remark made against him or her) they may not be sanctioned.<sup>47</sup>

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<sup>43</sup> England’s Defamation Act 1996, s 1; Irish Defamation Act 2009, s 27.

<sup>44</sup> English Defamation Act 2013, s 4 ‘publication on matter of public interest’, ‘honest opinion’ in Ireland’s Defamation Act 2009, s 20, Civil Wrongs Act of Cyprus, s 19.

<sup>45</sup> Bill of Rights 1688, art 9, Defamation Act 1996, s 14. See also Ireland’s Defamation Act 2009, s 17.

<sup>46</sup> Sandfeld Jakobsen, Schaumburg-Müller (n 24) 64.

<sup>47</sup> Ibid 65–66.

In Austria, there is a defence for the broadcaster if the defamatory remarks were made during a live broadcast and employees or agents of the broadcaster were not guilty of neglecting the journalistic diligence required.<sup>48</sup>

### b) Public interest and good faith

As has been noted, under certain legal systems statements concerning public affairs may enjoy protection, even if they are proven to be false, if they were made in good faith.

Under English law, if certain conditions are met, *qualified privilege* provides exemption from liability (the basis of such exemption is always the interest of the community and the good of society).<sup>49</sup> The scope of statutory *qualified privilege* was substantially expanded by application of the ‘Reynolds defence’.<sup>50</sup> According to the judgement, the protection of freedom of speech must be expanded, subject to certain conditions, to those events when the disclosing party publishes false allegations in matters of public interest. However, this cannot mean total protection independent from the circumstances of the given disclosure.<sup>51</sup>

The Defamation Act 2013 however brought about radical changes in this field. The Act guarantees statutory defence regarding allegations published on a matter of public interest.<sup>52</sup> The precondition of this exemption is that their publication must be made on a matter of public interest, and also that the disclosing party must reasonably believe that publication is in the public interest. Originally, the bill (draft law) intended to enact certain points of the Reynolds judgement almost word-for-word but, in the end, the final text only stipulated that in examining the defence to an action for defamation ‘the court must have regard to all the circumstances of the case.’ This probably means that the courts will keep on investigating the cases according to the criteria of the Reynolds judgement, since that ruling used great effort and circumspection to enumerate the scope of circumstances that are relevant and hence can be examined. Probably this is expected to happen, even though the Defamation Act 2013 [Section 4 para (6)] abolished the Reynolds defence (being a common law excuse from liability) with due consideration of the new statutory defence. At the same time, the criteria specified there can also be taken into account upon making a reasoned judgement by the judge, at the time of application of the statutory provisions.

<sup>48</sup> Media Act (*Mediengesetz*, Federal Act on the Press and other Publication Media 12 June 1981, (1981) 314 Federal Law Gazette) s 6 para (2) item 3.

<sup>49</sup> Defamation Act 1996, s 15 and sch 1.

<sup>50</sup> *Reynolds v. Times Newspapers* [2001] 2 AC 127.

<sup>51</sup> Lord Nicholls, the judge drawing up the explanation (reasoning), in order to make court decisions uniform and consistent, added a list of ten criteria against which attempts to use the Reynolds defence should be judged. For further details, see András Koltay, *A szólásszabadság alapvonalai – magyar, angol, amerikai és európai összehasonlításban. [The Basic Aspects of the Freedom of Speech in Hungarian, British, American and European Comparison]* (Századvég 2009, Budapest) 388-389.

<sup>52</sup> Defamation Act 2013, s 4.

The protection of *honest opinion* is also considered to serve the public interest.<sup>53</sup> This protects the freedom of opinion, but only if the opinion is grounded in fact and the party making the statement is acting in good faith.

Ireland's Defamation Act<sup>54</sup> is rather similar to the laws of England; it is the codification of the previous common law judicial practice. Accordingly, the instances of exemption are also very similar (*truth, absolute privilege, qualified privilege, honest opinion, consent, innocent publication*). Exemption on the basis of '*fair and reasonable publication*' is most often applicable in cases of defamation against public figures; this rule has incorporated most elements of the English *Reynolds* decision and has elevated them to the status of an act of law. The Reynolds rule, then, is in a certain sense also present in the Irish legal system.<sup>55</sup>

Examples of the protection of false (unproven) statements made in good faith regarding public affairs may be found in other states, too.

In Denmark, section 269 of the Criminal Code provides that there is no liability 'if the issuer of the allegation in good faith has been under an obligation to speak or has acted in lawful protection of obvious public interest or of the personal interest of himself or others'; this exemption only applies to false and defamatory statements, and not to abusive remarks.<sup>56</sup> As such, good faith and public or private interest are both needed for this exemption from legal liability to be applied. Apart from the exemption set out in section 269(1), the Criminal Code, in section 269(2), provides an opportunity for the courts to relieve the defendant from punishment 'where evidence is produced which justifies the grounds for regarding the allegations as true'. It means that, even when the allegations are not true and there was no public/private interest in publishing them, the person who made the allegations may have the sentence remitted if he or she had serious reasons to believe that the allegations were true (and thus acted in good faith).<sup>57</sup>

In Austria, under the media legislation, no claims may be raised by the injured party if the public had a predominant interest in the publication or when in the application of the journalistic diligence required, there was sufficient reason to take the statement for true.<sup>58</sup>

In Poland, under article 12 of the Press Act,<sup>59</sup> journalists are excused from liability, even in the event of untrue publications, provided they acted fairly and with due care.

In Luxembourg, when a publication to the public entails the defamation of a person, the person responsible for that publication cannot be held liable if the responsible party proves that it has sufficient reasons for concluding that the facts were accurate and when it is justified by the right

<sup>53</sup> Defamation Act 2013, s 3.

<sup>54</sup> Defamation Act 2009.

<sup>55</sup> Carolan, O'Neill (n 16) 165–181.

<sup>56</sup> Sandfeld Jakobsen, Schaumburg-Müller (n 24) 61.

<sup>57</sup> Ibid 61–62.

<sup>58</sup> Media Act (*Mediengesetz*, Federal Act on the Press and other Publication Media 12 June 1981, (1981) 314 Federal Law Gazette) s 6 para (2) item 2(b).

<sup>59</sup> Press Act of 26 January 1984.

of the public to have knowledge of such facts.<sup>60</sup> The demonstration of the truth in criminal procedures is only possible in certain instances permitted by the law, such as the publication of injurious statements about the representatives of the authorities or other persons in public service.<sup>61</sup>

The Portuguese Criminal Code also exempts imparters of false statements who acted in good faith and had compelling reason to believe the statements to be true from liability.<sup>62</sup> In Italy, too, the media are exempted from criminal liability if they exercised their right to provide information or formulate dissenting opinions.<sup>63</sup> Italian judicial practice has extended this rule to procedures related to the protection of personality rights, providing that anyone (i.e. not only journalists proper) publishing statements in the media may plead this.<sup>64</sup> In Estonia the public interest served by the publication may be grounds for exemption from civil law liability.<sup>65</sup>

Finally, in Sweden, media outlets are exempt from legal liability in cases in which – in the circumstances – it is justifiable to communicate information in the press, and 'if proof is presented that the information was correct or there were reasonable grounds for the assertion.'<sup>66</sup>

## 6 Dissemination

In cases where information received from others is passed on or slanderous statements made by others are reported on (dissemination), certain legal systems grant exemption to the imparter (usually the media) of such statements. At the same time, a large proportion of such rules belong to the domain of case law and are rarely part of the written sources of law.<sup>67</sup>

The English and Irish rule of *absolute privilege* described in the previous section may be regarded as similar; according to this, the media's reporting on defamatory statements made under certain special circumstances (during court proceedings, in Parliament, etc.) is granted exemption from legal liability.

In Austria a similar absolute privilege exists: in the event of a true report on a hearing in a public session of the National Council, the Federal Council, the Federal Assembly, a State Parliament or any committee of the above general bodies of representation, no claims can be

<sup>60</sup> Act of 8 June 2004 on the Freedom of Expression in Media (*Loi du 8 juin 2004 sur la liberté d'expression dans les médias*), s 17 para (1) item b), Criminal Code art. 443.

<sup>61</sup> Criminal Code, art 445, s 2. See Doley, Mullis (n 6) 1266.

<sup>62</sup> Criminal Code, art 180, no. 2. See Doley, Mullis (n 6) 1299.

<sup>63</sup> Criminal Code, art 51. See Doley, Mullis (n 6) 1239.

<sup>64</sup> *Ibid* 1241.

<sup>65</sup> Law of Obligations Act, ss 1046(1), (2). See Doley, Mullis (n 6) 1187.

<sup>66</sup> Freedom of the Press Act [*Tryckfrihetsförordningen (2002:908)*], ch 7 art 4 para 14.

<sup>67</sup> For example, in Denmark (see Sandfeld Jakobsen, Schaumburg-Müller (n 24) 65) and in Hungary in certain cases judicial practice grants exemption to slanderous statements without relying on codified law. On the basis of Hungarian case law the media's presentation of information published by the Parliament, local governments, national and local public administration bodies, the courts and the public prosecutor's office cannot serve as the basis for defamation cases (see Supreme Court Decisions No. EBH 2001. 407., BH 2002. 51., BH 2003. 357., EBH 2005. 1289.). In the present section, however, we shall mainly deal with the provisions of codified law.

raised.<sup>68</sup> Apart from this rule, a much wider – general – defence exists in the media law for defamatory allegations originally made by third parties: if it is a case of an accurate quotation of the statement of a third party and the public had a predominant interest in obtaining knowledge of the statement quoted, then no claims may be raised by the defamed person.<sup>69</sup> The wide protection that Austrian statutory criminal law provides for defamatory statements is unique in Europe.

In Luxembourg, the defendant cannot be held liable if the defamatory publication concerns a communication previously made to the public, on the condition that all measures are taken to avoid such defamation and provided that the identity of the person responsible for the communication concerned is mentioned. There is also no legal liability when the publication concerns the correct reproduction of a quote by a third party, on the condition that it is clearly indicated as such, the identity of the author of the publication is mentioned, and the publication of the quote is justified by the right of the public to have knowledge of it.<sup>70</sup>

#### **IV Protection of the Reputation of Public Figures in Hungary**

In Hungary, reputation and honour are protected by civil law and criminal law in parallel. However, the limited protection of the personality rights of public figures has only a very narrow statutory basis (under the new Civil Code entering into force in spring 2014). The starting point in the Hungarian legal system is Decision 36/1994. (VI. 24.) of the Constitutional Court. The decision was based on a motion challenging the constitutionality of the crime of ‘defamation of authorities or official persons’, a crime specified in the old Article 232 of the Criminal Code. This Article threatened persons who used expressions capable of harming the honour of authorities with more severe punishment than for the crime of defamation committed against other private persons. The provision was found unconstitutional and was repealed because the Constitutional Court established that the freedom of expression and of the press are requisites – and therefore fundamental rights of utmost importance – for the existence and development of a democratic society (statement of reasons, point II/1). According to this decision,

it follows from the positions taken so far by the Constitutional Court on the constitutional value of the freedom of expression and the freedom of the press, as well as the significant roles they fulfil in the life of a democratic society, that this freedom requires special protection when it relates to public matters, the exercise of public authority and the activity of persons with public tasks or in public roles (statement of reasons, point III/1).

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<sup>68</sup> Media Act, s 6 para (2) item 1.

<sup>69</sup> Media Act, s 6 para (2) item 4.

<sup>70</sup> Act of 8 June 2004 s. 17 para 2. Luxembourg Criminal Code (*Loi du 16 juin 1879*), art 443.

As such, while the constitutionality of protecting the honour and reputation of the above-mentioned persons by means of criminal law may not be excluded, the freedom of the press – in comparison to private persons – may be limited to a rather narrow extent, and only in order to protect persons exercising state powers.

Furthermore, the Constitutional Court laid down certain constitutionality requirements as to the applicability of the crimes of libel and defamation, the examination of which was otherwise not requested by the petitioner, and, accordingly, was not examined any further. A ‘constitutionality requirement’ specified in the operative part that:

An expression of a value judgement capable of offending the honour of an authority, an official, or a politician acting in public, and expressed with regard to his or her public capacity is not punishable under the Constitution; and an expression directly referring to such a fact is only punishable if the person who states a fact, or spreads a rumour capable of offending one’s honour, or uses an expression directly referring to such a fact, knew the essence of his or her statement to be false, did not know of its falsehood because of his or her failure to pay attention or exercise the caution reasonably expected of him/her pursuant to the rules applicable to his or her profession or occupation, taking into account the subject matter, the medium and the addressee of the expression in question.

Accordingly, the expression of an opinion is unlimited within the scope thus defined, while the statement of a fact may not be punished, unless the perpetrator was aware of the fallacy thereof, or was not aware of such a fallacy due to their failure to exercise the level of due diligence that may be expected from them. This test establishing the liability of the perpetrator for deliberate lies or in the event of negligence is rather similar to – but is not identical with – the Sullivan rule developed by the US Supreme Court.<sup>71</sup>

Jurisprudence shows that the influence of the 1994 Constitutional Court decision can be detected. However, this does not mean that the test used there has been exclusively and consistently used ever since. For instance, contrary to the intentions of the above-mentioned decision, defamatory opinions are most often considered by the courts to constitute a breach of the law, even in the lawsuits of public figures.

Criminal law (including the Criminal Code that was in effect until the summer of 2012, as well as the new Criminal Code replacing it) does not contain any explicit provisions regarding the reduced protection of the personality rights of public figures. As such, criminal law judges have only one reference point; the Constitutional Court decision.

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<sup>71</sup> See *New York Times v. Sullivan*, 376 U.S. 254 (1964). On the universal significance of the decision and its impacts on foreign legal systems see András Koltay, ‘Around the World with *Sullivan* – The *New York Times v. Sullivan* Rule and its Universal Applicability’ (2006) 3–4 *Iustum Aequum Salutare* 101–115; András Koltay, ‘The Development of Freedom of the Media in a Newborn Democracy: The Hungarian Perspective’ (2010) 2 (1) *Journal of Media Law* 25–41; Kyu Ho Youm, ‘Actual Malice’ in U. S. Defamation Law: The Minority of One Doctrine in the World? (2011) 4 (1) *Journal of International Media & Entertainment Law* 1–30.

The new Civil Code (Act CXX of 2009, which was passed in 2009 but not put into force, then withdrawn in 2010), intended to introduce a test similar to that used in Constitutional Court decision no. 36/1994. (V. 26.) and also by the US Court in the *New York Times v. Sullivan* case, for the violation of reputation and defamation committed by the media. Anyone proving that 'his/her actions [conduct according to the facts of the case] were not wilful or grossly negligent' (Article 2:94) would have been exempted from the possibility of the sanctions being applied.

A newer draft of the new Civil Code, published in early 2012, contained a general clause regarding the limited protection of the personality rights of public figures. According to the original draft:

Article 2:44 [*Protection of the personality rights of public figures*] The protection of the personality rights of public figures shall not pose unnecessary restrictions on the fundamental rights guaranteeing the free discussion of public affairs.

It should be noted that this text aimed to protect the 'free discussion of public affairs' so that, in addition to a stronger statutory protection of freedom of speech, and with an instance of judicial practice supporting this kind of interpretation, the scope of 'public affairs' and 'public figures' which evolved during previous judicial practice would be restricted and 'tabloid events' and 'celebrities' would thereby be excluded from it.

The respective provision of the adopted and promulgated new Civil Code (Act V of 2013) was changed as a result of a motion for amendment and the approved and final text is as follows:

Article 2:44 [*Protection of the personality rights of public figures*] The exercise of fundamental rights guaranteeing the free discussion of public affairs may limit the protection of the personality rights of public figures on the grounds of legitimate public interest, to a necessary and proportionate extent, without violating human dignity.

Similarly to the original draft, the amended, final text allowed the scope of 'public figures' and 'public affairs' to be restricted, as long as the general scope of personality rights is restricted only to serve the 'free discussion of public affairs'. However, the text adopted raises several concerns.

The head of the codification committee, Lajos Vékás, put forward his concerns immediately before the final vote on the Act. This is confirmed by the first commentary to the new Civil Code, edited by him.<sup>72</sup> These concerns are:

- the necessity/proportionality test is inapplicable in private law disputes (with the content established by the Constitutional Court); it does not have any private law content;
- the 'legitimate public interest' represents an unnecessary and problematic restriction;
- any violation of personality rights necessarily harms human dignity; hence, if the addition of the words '[may limit ...] without violating human dignity' is interpreted literally, freedom of

<sup>72</sup> Lajos Vékás, 'Bírálat és jobbitó észrevételek az új Ptk. Törvényjavaslatához (a zárószavazás előtt)' [*Criticism and recommendations to the draft law of the new Civil Code (prior to the final vote)*] (2013) 1 Magyar Jog 1-7. László Székely, Lajos Vékás, 'Személyiségi jogok' [Personality Rights] in Lajos Vékás (ed), *A Polgári Törvénykönyv magyarázatokkal* [*The Civil Code with explanations*] (CompLex 2013, Budapest) 58-59.

speech should be subordinated to personality rights in all disputes, although this could not have been the aim of the legislator.

In the summer of 2013, Máté Szabó, Commissioner for Fundamental Rights, filed a motion on the grounds of the unconstitutionality of the provision.<sup>73</sup> According to him, the part of the provision which requires a 'legitimate public interest' for the personality rights of public figures to be restricted represents an unconstitutional restriction of freedom of speech. According to the motion, the requirement of public interest represents a sufficient restriction in itself. The further requirement of being 'legitimate' represents an unjustified and disproportionate limitation and moreover, due to its problematic interpretation, it violates the requirement of clear norms and legal certainty. The motion had not been judged by the Constitutional Court by the time the present manuscript was finalised.

## V Conclusions

This comparative review yields certain general conclusions on the nature and application of the provisions on the protection of the reputation and honour of public figures in Europe (or, more specifically, in the Member States of the European Union that form the primary subject of our investigations).

A) In the legal systems of the various states, the provisions on the protection of reputation and honour are dispersed and appear in several different places; as such, the parties suffering the infringement may initiate several different proceedings in parallel with each other. Criminal law prohibits the violation of reputation and honour in almost all European states, usually threatening the offenders with fines and imprisonment.

B) The role of judicial practice is definitive with regard to the issues of the protection of the reputation and honour of public figures, irrespective of the branch of law applied. This is equally true with regard to the definition of the scope of persons concerned and the standards applicable to them.

C) The scope of public figures is not precisely defined; rather, it is constantly changing and growing; furthermore, the protection extended to such people may also be differentiated depending on their personal status.

D) Very few states provide for stricter standards applicable to the protection of the reputation and honour of public figures in legal acts; such provisions only appear in the criminal codes (one exception is the new Hungarian Civil Code). The provisions also leave much to the interpretation and application of the law by the courts.

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<sup>73</sup> The text of the motion (in Hungarian) can be downloaded from the website of the Commissioner for Fundamental Rights (in Hungarian): <<http://www.ajbh.hu/documents/10180/111959/201302249Ai.pdf/a767f7f2-1a6d-4360-9240-8e8465a1057e?version=1.0>> accessed 04 November 2013.

E) A slightly surprising finding of the research is that, in certain states, there still exist rules that provide for stronger than standard protection of the personality rights (and, consequently, the honour and reputation) of public figures. According to the legal literature, these provisions are not applied in practice; however, their very existence is hardly compatible with the practice of the European Court of Human Rights.

F) The distinction between and the differentiated legal treatment of facts and opinions is one of the fundamental issues regarding the protection of reputation and honour. In the various states this differentiation is also left to judicial practice.

G) In instances of conduct that constitutes a violation of reputation and honour, the possibility of exemption from legal liability is always given. That is, liability is not objective; sometimes the grounds for exemption are provided for by law, but much more often they are shaped by judicial practice.

H) The examination of the public interest involved (and, in several countries, the issue of good faith) is of paramount importance in the proceedings related to public figures. If a publication is deemed to be of public interest because it serves the interests of democratic publicity then even the publishers of false statements of fact may be exempted from liability.

Helmut Koziol\*

## Harmonising Tort Law in the European Union: Advantages and Difficulties

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### I Necessity of Harmonising European Tort Law?

The call to harmonise private law and thus, among other areas, also of tort law, can often be heard and several groups of scholars have already been designing future tort law, whether as part of a whole code<sup>1</sup> or as a separate draft<sup>2</sup>. However, it can be questioned whether harmonisation is really a necessity or, at least, brings advantages. Doubts in this respect seem reasonable when looking at the USA: While it is a sovereign state and not only a more or less loose community of national states as is the EU, 50 different legal systems nevertheless exist within the USA. However, one has to take into regard that the legal systems of the EU Member States vary a great deal more than the legal systems of the states in the USA. Not only is there a fundamental difference between common law in England and Ireland and Continental civil law but there are also divergences between the civil law systems. The Member States have been independent countries for centuries and, therefore, their legal cultures – originally partly based on Roman law<sup>3</sup> – pursue different paths. This is obvious, of course, with regard to the ‘legal families’, for example, the Germanic and the Romance families. However, there are decisive differences even between the legal systems of the German speaking countries.

Bearing this in mind, the rationale for harmonisation is that the differences between the legal systems hinder commercial cross-border transactions in Europe:<sup>4</sup> Entrepreneurs who offer their wares or services in other Member States are disadvantaged in comparison to competitors who are only active nationally, because while domestic providers only have to inform themselves of the legal frameworks in their own legal system, a foreign provider is forced to inform itself about a legal

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<sup>1</sup> Christian von Bar, Eric Clive, Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference* (European law publishers 2009, Munich).

<sup>2</sup> European Group on Tort Law (ed), *Principles of European Tort Law. Text and Commentary* (Springer 2005, Vienna – New York).

<sup>3</sup> Cf. Reinhard Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (2nd edn Oxford University Press 1996, New York); Ibid, ‘Savignys Vermächtnis. Rechtsgeschichte, Rechtsvergleichung und die Begründung einer Europäischen Rechtswissenschaft’ [1998] *Juristische Blätter* 273-293.

<sup>4</sup> Cf Christian von Bar, ‘Untersuchung der Privatrechtsordnungen der EU im Hinblick auf Diskriminierungen und die Schaffung eines Europäischen Zivilgesetzbuchs’ (1999) in European Parliament PE 168.511, available at <[http://www.europarl.europa.eu/workingpapers/juri/pdf/103\\_de.pdf](http://www.europarl.europa.eu/workingpapers/juri/pdf/103_de.pdf)>.

system that diverges from its domestic law and to comply with such. This gives rise to transaction costs that may prove to be barriers to market entry, particularly for small and medium-sized enterprises. Differences in the stringency of liability rules may not only restrict market access but also have the effect of distorting the market, since the liability rules in the land of origin affect cost calculations. Areas further removed from the financial field, such as the liability of parents for their children or of those who keep animals, do not lead directly to distortion of competition but may indirectly have repercussions in the single market via the *liability insurance system*.

However, even in cases purely related to the law of damages, the differences between the legal systems play a considerable role. Let us take, as an example, a road traffic accident which occurs in close proximity to the border between Germany and Austria, in which both drivers are injured and their respective spouses killed. The law of the place of accident has to be applied<sup>5</sup> and the applicable legal system decides over the content and scope of the resulting compensation claims. Thus, it may be of utmost importance whether the accident occurred in Austria or in Germany, since there are differences not only with respect to the maximum amounts of compensation possible but also with respect to what damage is recoverable. There are major differences under the national legal systems between the entitlements to compensation for pecuniary damage resulting from bodily injury or death, such as medical expenses, loss of earnings and other consequential expenses, but also to an even greater extent regarding claims for compensation for non-pecuniary harm sustained by the injured person or those bereaved.<sup>6</sup> In many European countries (e.g. Austria, Belgium, France), those who have lost a close relative in a traffic accident have a separate claim to damages for pain and suffering directed at compensating the suffering occasioned by the death, which is not dependant on their own health being impaired (e.g. shock caused by news of the death). In several other EU Member States (e.g. Germany or the Netherlands), such pain and suffering on the part of relatives is not accorded compensation. This may lead to completely different sums being awarded for pain and suffering in respect of the bereaved person's own injuries but may also mean that someone is awarded compensation for the loss of his spouse that would never be awarded at home or, of course, vice versa, that someone cannot make a claim in this respect though his domestic system would have granted such as a matter of course.

Since the question of applicable law is of material importance when it comes to compensation claims involving other countries, the frequent differences of opinion over resolving the conflict of laws often hinder an amicable settlement of disputes and thus cause substantial litigation costs. A harmonisation of European liability law could thus lead to a noticeable decrease in legal disputes and hence of the consequential expenses involved in compensation cases with international aspects. Moreover, European citizens – who are encouraged to move around in the European Union – fail to understand these differences, since the result is that, in the event of an accident, they may be treated very differently depending on which legal system is applicable.

<sup>5</sup> Art 3 The Hague Convention on the Law Applicable to Traffic Accidents, opened for signature 4 May 1971, 965 UNTS 416 (entered into force 3 June 1975).

<sup>6</sup> See in more detail William Vaughan Horton Rogers (ed), *Damages for Non-Pecuniary Loss in a Comparative Perspective* (Springer 2001, Vienna – New York); Bernhard A Koch, Helmut Koziol (eds), *Compensation for Personal Injury in a Comparative Perspective* (Springer 2003, Vienna – New York).

When all negative aspects associated with the existence of the many different legal systems relating to international compensation claims are taken into consideration, it seems natural to dream of a uniform law.<sup>7</sup> This is certainly still a dream at present, which nonetheless does seem at least partially feasible, in particular in respect of contract law<sup>8</sup> as well as the law of damages<sup>9</sup> and limited to the European Union. However, a question yet to arise is whether it is a good dream or a nightmare.

## II Today's State of Affairs

The European Union is already advancing the unification, or at least harmonisation, of the private law of the Member States, namely by way of directives and regulations; these are mainly in the area of contract law<sup>10</sup> but also to some extent of tort law, the most important example under tort law being in the area of product liability.<sup>11</sup>

Furthermore, the decisions of the European Court of Justice contribute to harmonisation and sometimes create totally new rules. The most sensational example is the development of state liability: Consumers, for example, have a claim against the state if it does not correctly implement EU directives which have a protective purpose in respect of consumers and a consumer consequently suffers a loss. As a result, the state is liable even for the legislative acts of its Parliament – a liability which was previously almost unknown to Member States.<sup>12</sup>

<sup>7</sup> See on this topic – partly in English, partly in German – Michael G Faure, Helmut Koziol, Sonja Puntscher-Riekmann, *Vereintes Europa – Vereinheitlichtes Recht. Die Rechtsvereinheitlichung aus politikwissenschaftlicher, rechtsökonomischer und privatrechtlicher Sicht* (Verlag der Österreichischen Akademie der Wissenschaften 2008, Vienna); further Michael G Faure, 'How Law and Economics may Contribute to the Harmonisation of Tort Law in Europe' in Reinhard Zimmermann (ed), *Grundstrukturen des Europäischen Deliktsrechts* (Nomos 2003, Baden-Baden, 31-82); Thomas Kadner Graziano, 'Die Zukunft der Zivilrechtskodifikation in Europa – Harmonisierung der alten Gesetzbücher oder Schaffung eines neuen?' (2005) 13 *Zeitschrift für Europäisches Privatrecht* 523-540; Fernando Gomez, Juan Jose Ganuza, 'An Economic Analysis of Harmonization Regimes: Full Harmonization, Minimum Harmonization or Optional Instrument?' (2011) 7 *European Review of Contract Law* 275-294; Stefan Grundmann, 'The Future of Contract Law' (2011) 7 *European Review of Contract Law* 490-527; Ulrich Magnus, 'Harmonization and Unification of Law by the Means of General Principles' in Morten Fogt (ed), *Unification and Harmonization of International Commercial Law* (Wolters Kluwer Law & Business 2012, Alphen aan den Rijn, 161-174).

<sup>8</sup> See in particular the Communication from the Commission to the Council and the European Parliament on European contract law, COM (2001) 398 final, Official Journal C 255 of 13 September 2001, 1-44.

<sup>9</sup> There are already two proposals for the future drafting of a European law of damages, one from the European Group on Tort Law, which collaborates with the Research Institute for European Tort Law of the Austrian Academy of Sciences, and one from the Study Group on a European Civil Code.

<sup>10</sup> See recently Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' COM (2011) 635 final; furthermore, for example Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L304/64.

<sup>11</sup> Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210, 07/08/1985.

<sup>12</sup> See on this topic with further details Luboš Tichý (ed), *Odpovědnost státu za legislativní újmu. Staatshaftung für legislatives Unrecht* (Univerzita Karlova 2012, Prague).

As realists we therefore, have to accept that the question is no longer whether we want harmonisation or the unification of the laws in the EU: they are already facts which cannot be denied and we must come to terms with that development. Thus, what is on the agenda is not whether there should be a harmonisation or unification of the law, but rather how and how far harmonisation and unification should take place.<sup>13</sup>

As to the quality of harmonisation, it must be said that, in seeking to strike a balance, the European Union's attempts to harmonise private law have unfortunately produced a very negative result: The respective directives or regulations of the EU cover narrowly defined areas.<sup>14</sup> Such *selective harmonisation* runs counter to this aim, to a *double fragmentation of the law*.<sup>15</sup> First, the national legal systems become infiltrated by foreign provisions; second, the EU's directives and regulations are not based on a consistent concept and therefore very often are not in accordance with one another. Every directive of the European Union is a compromise and the outcome depends on national interests as well as the nationality and personality of the members of the Commission and, within this context, which legal system gets the upper hand over the other legal systems.

This view can easily be illustrated in an objective manner by the directive on product liability, the most important example of harmonisation in the area of tort law. This directive provides for very strict liability on the part of entrepreneurs for damage caused by defective products. However, it is open to debate whether this provision fits into any overall plan which takes regard of the whole area of liability of entrepreneurs. For example, why is liability for services not included, why not for immovables, e.g. bridges, and what about the relationship with other sorts of strict liability? Further: Is it really reasonable that strict liability is applicable for the carpenter if a set of steps breaks down, as the ladder he made is a moveable, but another entrepreneur is not strictly liable if the bridge he designed breaks down, as the bridge is not a moveable?

Besides the area of directives and regulations, the lack of a basic concept can also be ascertained in the case law of the European Court of Justice. An impressive example in tort law is the jurisprudence on Member States' liability for violations of EU Law.<sup>16</sup> In this respect the European Court has established a liability which looks like a form of result-oriented liability which is independent of any misbehaviour by the state. Such liability contrasts with the legal systems of nearly all the Member States. Further, the Court has very strange opinions with regard to causation, which do not fit with the approaches of most of the national legal systems in respect of this issue.

<sup>13</sup> On this and the following with further details Helmut Koziol, 'Comparative Law – A Must in the European Union: Demonstrated by Tort Law as an Example' (2007) 1 *Journal of Tort Law* 1-18, 4ff.

<sup>14</sup> Sometimes because of the limited competence of the European Union.

<sup>15</sup> See, e.g. Reinhard Zimmermann, *Die Europäisierung des Privatrechts und die Rechtsvergleichung* (De Gruyter 2006, Berlin) 13; Peter Hommelhoff, 'Zivilrecht unter dem Einfluss europäischer Rechtsangleichung' (1992) 192 *Archiv für die civilistische Praxis* 71-107, 102; Ivo E. Schwartz, 'Perspektiven der Angleichung des Privatrechts in der Europäischen Gemeinschaft' (1994) 2 *Zeitschrift für Europäisches Privatrecht* 559-584, 570; Helmut Koziol, 'Ein europäisches Schadenersatzrecht – Wirklichkeit und Traum' [2001] *Juristische Blätter* 29-38.

<sup>16</sup> In more detail Helmut Koziol, 'Staatshaftung für die Nichtbeachtung von EU-Recht. Some critical points' in Tichý (n 13) 145-156, 150 ff; Birgit Schoisswohl, *Staatshaftung wegen Gemeinschaftsrechtsverletzung* (Springer 2002, Vienna-New York) 273ff.

In addition, it must be pointed out that those who design the EU's directives and regulations but also the European Court have a deplorable lack of knowledge of the fundamental functions, prerequisites, aims and legal consequences of the individual legal instruments and also of their interplay. In this connection, it appears that the awareness of the necessity for specific requirements to be appropriately linked to specific legal consequences is diminishing. For example, according to Directive 2007/64/EC on payment services,<sup>17</sup> in of non-performance of a transfer order, the payer's payment service provider has to refund to the payer the amount of the non-executed payment transaction if there is liability (Art 75). Although the wording gives the impression that liability under the law of damages is at stake, it is astonishing to see that fault is not required. Ultimately this may be justified because, in substance, the provider's obligation derives from the law of unjust enrichment. However, if one accepts this, it seems quite unreasonable that art. 78 rules that no liability at all exists in the case of abnormal and unforeseeable circumstances beyond the provider's control. Such grounds for exemptions are acceptable if compensation for imputable damage is at stake but not under the law of unjust enrichment: irrespective of the reasons for non-execution, there is no justification at all for granting the provider the amount he should have transferred.

Another example is set by the European Court: according to the recent judgment in the cases of *Gebr. Weber GmbH* and *Putz*, the non-fault based guarantee claims of a consumer when there is a delivery of faulty goods also include the costs of dismantling the non-conforming good and installing the replacement; however, other damage sustained by the acquirer as a consequence of the non-conformity is still not covered in the eyes of the CJEU either. As the costs for the removal of the non-conforming good or installation of the replacement are no longer part of the performance within the equivalence ratio, it already runs contrary to the fundamental principles that these costs be deemed covered by the guarantee rights, since these rights are aimed at creating the balance intended by the parties between performance and counter-performance.<sup>18</sup> This is not about delivering the promised performance itself but about bearing the consequential damage that was triggered by the inadequate performance; thus, there is no sufficient grounds to impose liability for the damage upon the trader without considering any grounds for imputation at all. It must be stressed that granting a non-fault based claim for compensation for the expenses of installation and removal, i.e. of damage consequential to the defect, massively departs from a basic tenet of legal systems, namely that legal consequences must be balanced against the elements of the offence they derive from: This is the only way to achieve an overall system that is consistent and complies with the principle of equal treatment and hence the fundamental concept of justice.<sup>19</sup> Moreover, the CJEU case law leads to a barely resolvable conflict of values, insofar as it only foresees non-fault based liability for the installation and

<sup>17</sup> Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC OJ L319/1.

<sup>18</sup> Franz Bydlinski, *System und Prinzipien des Privatrechts* (Springer 1996, Vienna-New York) 181f; Michael Hassemer, *Heteronomie und Relativität in Schuldverhältnissen* (Mohr Siebeck 2007, Tübingen) 271ff.

<sup>19</sup> See Helmut Koziol, *Grundfragen des Schadenersatzrechts* (Jan Sramek Verlag 2010, Vienna) no 2/90.

removal expenses, but not for all other damage consequential to the defect, for example, the disadvantages that arise until the defect is remedied due to the uselessness of the goods delivered or the things in which the defective goods were installed. To say the least, no convincing arguments are discernible in favour of a distinction – producing serious consequences – between different types of damage consequential to defects.

In addition to all these deficiencies, one has to stress that quite often the quality of the respective directives or regulations and also the judgments<sup>20</sup> is deplorable, as some of the single provisions are not based on a convincing idea and the concepts they are based upon are not understandable. This can again be shown by the directive on product liability. The reasons given for this directive point out that entrepreneurs' liability encompasses only defective goods which have been produced industrially. The idea behind this was that industrial mass production causes a special danger, namely the unavoidable risk of delivering defective products; the problem of the so-called 'Ausreisser' or 'runaways.' Even with all possible care, it is not possible to produce only flawless goods, or at least to withdraw all defective products from circulation. However, this idea would not justify establishing liability for defects caused by product design. What is even worse, the final version of the directive does not take any account of the above reason for strict liability and also includes defective products made by craftsmen, innkeepers, farmers and artists. It seems highly problematic that a great part of the directive's provisions are in clear contrast to the only valid reason for it which was explicitly stated at the beginning of the drafting process. Moreover, the lawmaker has never even attempted to justify the extended application of strict liability and it seems difficult to find any convincing arguments in favour of such broad and very strict liability – at least nobody has been able to come up with any.

All these shortcomings mean that the European legal systems are drifting away from a well thought-out, consistent system which follows the idea of equal treatment. *Pierre Widmer*<sup>21</sup> therefore rightly diagnosed that, in the area of tort law, the EU provisions are even more inconsistent than the national provisions and that there is no recognisable overall concept. As a result, Community tort law is merely a torso and so the legal systems correspond less and less with the fundamental idea of justice.

### III How to Proceed?

Of course, a significant number of the deficiencies could be avoided by taking more time and more care in designing directives, regulations and judgments. Nonetheless, there can be no doubt that unification and harmonisation are awkward processes which run into fundamental

<sup>20</sup> Stefan Lorenz, 'Ein- und Ausbaupflichtung des Verkäufers bei der kaufrechtlichen Nacherfüllung' [2011] *Neue Juristische Wochenschrift* 2041-2044, 2242, this referred to the standard of the decision in the CJEU on 16 June 2011, C-65/09 *Gebr. Weber GmbH v Jürgen Wittmer* and C-87/09 *Ingrid Putz v Medianess Electronics GmbH* ECR I-05257 as shocking.

<sup>21</sup> Pierre Widmer, 'Die Vereinheitlichung des europäischen Schadenersatzrechts aus der Sicht eines Kontinentaleuropäers' (1999) 1 *Revue Hellénique de Droit International* 87-102.

difficulties:<sup>22</sup> The national legal systems are part of the traditional culture of the respective countries and determine the social life of that country. A general European codification, but also the unification or harmonisation of some areas, could be a far-reaching break from tradition, although – as mentioned before – parts of the European legal systems, especially the law of obligations, are formed by Roman law and thus correspond to some extent. Moreover, as the many European legal systems developed independently from one another over centuries, the largely divergent legal cultures and habitual ways of thinking have to be reconciled. It will therefore be a time-consuming, strenuous and hard (as well as, to some extent, frustrating) process to reach the urgently needed goal of a general consistent concept for the unification of European private law. Nevertheless, one should not condemn the EU as a whole or simply complain about the situation and the difficulties, but instead try to improve the EU, try to influence the harmonisation process and to do it better by overcoming the hurdles. Hence, the decisive question is how we can improve harmonisation of the legal systems of the Member States.

I am convinced that we can reach the goal of reasonable harmonisation or unification of tort law in the EU only by drawing up, as a first step, a new and consistent concept which is acceptable to all or at least to most of the Member States. I am also convinced that this aim will be attainable only by embarking on intensive comparative law work:<sup>23</sup> First of all, we have to know more about other legal systems to better understand each other, to explore the different legal cultures and the ways of thinking in other countries. In this way, we will recognise the common bases, receive many valuable stimulations, be inspired by alternative solutions and discover new tools for solving problems, become more open-minded to different ideas and increase our understanding of fundamental perspectives; we will learn which differences in legal culture we have to take and will know which largely divergent habitual ways of thinking have to be reconciled.

However, it must also be pointed out that the more different the foreign legal systems, the more dangerous it is to drawing inspiration from these systems. When I say ‘different’ I not only refer to the differences in parts of private law, e.g. tort law, or the whole of private law, but also to fundamental divergences in the overall legal systems,<sup>24</sup> including, for example, the social security system or criminal law, because these may be of greatest influence on tort law.

<sup>22</sup> See on this Helmut Koziol, ‘Rechtsvereinheitlichung auf europäischer Ebene aus privatrechtlicher Sicht’ in Faure, Koziol, Puntischer-Riekmann, *Vereintes Europa – Vereinheitlichtes Recht* (n 8) 50ff.

<sup>23</sup> See the recommendation by Basil S Markesinis, *Comparative Law in the Courtroom and Classroom* (Hart Publishing 2003, Oxford) 157 et seq. See also Basil S Markesinis and others, ‘Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)’ (2004) 52 *American Journal of Comparative Law* 133-208.

<sup>24</sup> Cf. Markesinis, *Comparative Law* (n 23) 167 et seq.

## IV Different Legal Cultures<sup>25</sup>

First of all, one has to consider the differences between the common law system and the Continental civil law systems: The characteristic feature of Continental legal systems is that they are based on codes, unlike the case law systems of the UK and Ireland. However, there is also quite significant divergence between the ‘legal families’ under civil law, e.g. the German and the French, and even members of the same legal family show fundamental differences. Let us take, for example, two German speaking countries: the Austrian and the German Code date from different times – 1811 and 1900 – and therefore the Austrian Code is a product of the ‘Age of Enlightenment’ whereas the German Code is strongly influenced by the theory of Pandectism, which is based on Roman law. The basic ideas behind them have a lasting influence on the respective legal systems as a whole.

There are also significant differences as regards allocating the duties between the legislator and the courts; not only between the common law countries with the dominant role of case-law designed by the courts, but also between the Continental civil law systems based on codifications. It is, for example, obvious that on the one hand the French Code civil, the Austrian Allgemeines Bürgerliches Gesetzbuch (ABGB), the Dutch Code and also the new Hungarian Code prefer flexible general principles over detailed casuistic provisions, thus entrusting the courts to apply the provisions of the law to individual cases, whereas, on the other hand, the German Bürgerliches Gesetzbuch (BGB) tends to strict and detailed rules without scope for development.

However, I do not intend to deal with these general characteristics of culture in more detail as they are well known; instead I want to introduce some differences in culture which are decisive for the design and development of tort law.

I begin my book on ‘Basic Questions of Tort Law from a Germanic Perspective’<sup>26</sup> by pointing to the old Roman rule *casum sentit dominus*, expressing the idea that the person who suffers damage must, in principle, bear this damage himself. There must be particular reasons to justify allowing the victim to pass the damage on to another person. The accent is thus more on corrective justice than on distributive justice. The same is true for the United Kingdom,<sup>27</sup> among others. On the other hand, France – usually differing from the other Continental European countries – emphasises a victim-oriented approach<sup>28</sup> in tort law and thus underlines the idea of distributive justice. According to *Askeland*,<sup>29</sup> distributive justice solutions also enjoy

<sup>25</sup> To be recommended is the special issue of the Journal of European Tort Law (JETL) on Cultures of Tort Law in Europe: Ken Oliphant, ‘Culture of Tort Law in Europe’ (2012) 3 JETL 147-157; Jean-Sébastien Borghetti, ‘The Culture of Tort Law in France’ (2012) 3 JETL 158-182; Jörg Fedtke, ‘The Culture of German Tort Law’ (2012) 3 JETL, 183-209; Håkan Andersson, ‘The Tort Law Culture(s) of Scandinavia’ (2012) 3 JETL 210-229; Richard Lewis, Annette Morris, ‘Tort Law Culture in the United Kingdom: Image and Reality in Personal Injury Compensation’ (2012) 3 JETL 230-264.

<sup>26</sup> Helmut Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (Jan Sramek Verlag 2012, Vienna).

<sup>27</sup> Oliphant, (2012) JETL 156.

<sup>28</sup> Borghetti, JETL 2012, 158 f; Olivier Moreteau, ‘French Report on Basic Questions’ in Helmut Koziol (ed), *Basic Questions of Tort Law in a Comparative Perspective* (forthcoming).

<sup>29</sup> His paper will be published in 2014 in Koziol, *Basic Questions of Tort Law in a Comparative Perspective* (n 28). See also Andersson (n 25) (2012) JETL 216ff.

broad support in Scandinavia. It is thought fair that he who has caused damage should pay compensation.

These differences in tort law are less important in the area of personal injury because there they are largely levelled out by the social security systems. This seems to be true for all EU Member States, at least for the German speaking countries<sup>30</sup> as well as for the United Kingdom,<sup>31</sup> France,<sup>32</sup> Hungary<sup>33</sup> and the Scandinavian countries,<sup>34</sup> in contrast to the much less exhaustive American social security system. Nonetheless, while the varying cultures of compensation under tort law are to an extent adjusted by social security systems, the differences in the social security systems create astonishing differences in respect of tortfeasors' liability. The extensive compensation of victims in Scandinavia, as well as in Poland, is accomplished by overlapping tort law in the area of personal injuries to a large degree with the rules of insurance and social security schemes; however, it is most impressive that the legislator has additionally abolished the social security institutions' right of recourse.<sup>35</sup> Therefore, with regard to personal injuries, the Scandinavian and the Polish legal systems combine far-reaching compensation of the victim with the offender's far-reaching release from liability.

Providing for the victim's extensive compensation for losses caused by personal injuries via the social security systems makes the provision of comprehensive compensation under tort law less urgent. Hence, the argument that the highest-ranking protected interest deserves the most extensive protection by tort law no longer seems to apply as another legal instrument already ensures such protection. From the *victim's perspective*, protection under tort law is required in this area only as far as social security does not provide full compensation. Probably such loopholes do not usually concern the most important interests of the victim. Seen from the *compensation perspective*, we therefore come to the conclusion that the principle that 'the highest-ranking interests deserve the highest degree of protection' is no longer convincing; indeed, one can say that the opposite is true.

Looking at the – in most countries broadly accepted – preventive effect of tort law, no problem arises as long as the social security system has the right to claim recourse from the tortfeasor. From the *offender's perspective*, so to speak, there is no change if there is simply a replacement of the creditor. However, if such recourse is abolished, as under Scandinavian and Polish law, then the question arises as to whether other legal instruments – e.g. criminal law – have to be reinforced.

By means of these examples, we can learn that the interplay of tort law and social security law is of the highest importance when designing tort law provisions. This realisation may be of some influence when rating the product liability rules provided by the EU – the EU's main product in the field of tort law. As in the case of damage to property, only the consequential loss is covered

<sup>30</sup> Helmut Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (n 26) no 2/74ff.

<sup>31</sup> Lewis, Morris, (2012) JETL 232ff.

<sup>32</sup> Borghetti, (2012) JETL 164ff.

<sup>33</sup> Attila Menyhár, 'Hungarian Report on Basic Questions' in Koziol, *Basic Questions of Tort Law in a Comparative Perspective* (n 28).

<sup>34</sup> Andersson (n 25) (2012) JETL 219ff.

<sup>35</sup> Andersson (n 25) (2012) JETL 220.

and only if the property has served mainly for private purposes; the field of application is above all personal injury. However, this is – as we have just learned – exactly the area where victims enjoy extensive protection by the social security system and no urgent need for their additional protection by tort law can be diagnosed. Thus, one could say that the producer's strict liability is solely an advantage for social insurers who can claim redress, but even this is not true under those legal systems which have abolished the recourse against the offender. Moreover, under these legal systems, there is no preventive effect of the product liability provisions either. Bearing all this in mind, the question as to which reasons or – in other words – which elements of liability can justify such quite strict producer's liability, gain importance and one begins to have one's doubts as to whether there was really such an urgent need to provide for such strict liability of the producers.

Quite different legal cultures in the area of tort law itself can be recognised in respect of accepting strict liability; this area is also interesting because of the interplay between tort law and the system of compulsory insurance: in the area of strict liability, European legal systems show much more diversity than in other areas of tort law.<sup>36</sup> On the one hand, the scale begins with the very far-reaching French strict liability of the holder of a thing, the *gardien*. This strict liability is not based on the special dangerousness of factories or things but is really independent of such ideas. This leads to some astonishing results: A four-year-old child was sitting in the upper floor on the windowsill drawing a picture with a pencil on a piece of paper. Unfortunately the child – in looking down – lost its balance and fell down with its pencil still in its small hands. The child was lucky as it fell on a pedestrian and not on the pavement but it hurt the pedestrian with its pencil. The French court was of the opinion that the child is the *gardien* of the pencil and therefore strictly liable for the damage caused by the pencil.

Much more convincing is the modern Hungarian general clause on 'Liability for extra-hazardous activity', pointing out that it is high dangerousness which justifies strict liability. section 6:535 reads: 'The operator of an extra-hazardous activity shall be obliged to compensate loss resulting from it'.

Perhaps in the middle is Germany's legal system; special legislation establishes strict liability for the keepers of a variety of dangerous things. England is at the other end of the scale; the English legal system is very reluctant to recognise strict liability. The absence of any strict liability for motor vehicles is perhaps the most marked difference between English law and that of most European countries.

The majority of European legal systems have introduced rules on strict liability and it is important to note that they have coupled their liability rules with the imposition of some compulsory insurance schemes as well as compensation funds. Consequently, while dangers resulting from the object as such (for example, motor vehicles which can move at high speed and bring about substantial harm) were certainly considered by the legislators in those

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<sup>36</sup> See in more detail Bernhard A Koch, Helmut Koziol, 'Comparative Conclusions' in Bernhard A Koch, Helmut Koziol (eds), *Unification of Tort Law: Strict Liability* (Kluwer Law International 2001, The Hague / London/Boston) 395ff.

jurisdictions, an overall view supports the impression that *Israel Gilead's* following statement<sup>37</sup> not only applies to Israel: 'The absolute liability attached to motor vehicles has been designed and actually functions as a tool for channelling the burden of road accidents to insurers.' Therefore, at least some notion of loss-spreading amongst those who profit from traffic seems to justify strict liability in those countries.

A further serious difference between the common law and Continental European legal systems is that common law countries, especially the USA, but also – to a lesser degree – England and Israel, think highly of punitive damages while Continental European countries reject them.<sup>38</sup> This contrast stems from a fundamentally different way of thinking and from focussing on different aims of tort law. Common law countries underline the preventive function of tort law; nevertheless, by accepting punitive damages under tort law one oversteps the borderline between private and criminal law and thus neglects criminal law's fundamental principles, namely, e.g. *nulla poena sine lege* and rules on burden of proof.

It is astonishing that Continental European lawyers seem to feel much less need for punitive damages than their colleagues in the USA and England. The reasons underlying this phenomenon may be some differences between the legal systems. It seems possible that, under US law, punishment under *criminal law* is of less importance than in Continental Europe,<sup>39</sup> this may be true to an even higher degree in the area of *administrative penalty law*. Thus, there may be a greater need for punitive damages in the USA than in Europe. But there are a number of other possible reasons, which have been elaborated elsewhere.<sup>40</sup>

## V Different Ways of Thinking

When trying to harmonise European law, one must further consider the difficulties caused by the various ways of thinking; these are very different and involve different levels in the various legal families.<sup>41</sup> An illustrative example is the difference between the English, French and German ways of legal thinking.<sup>42</sup> The difference between the English case law system and the Continental civil law system is obvious: English lawyers have to look out for similar cases; Continental lawyers start with an abstract rule provided by the code. However, there are even astonishing differences

<sup>37</sup> Israel Gilead, 'Israel in Koch', Koziol (eds), *Unification of Tort Law: Strict Liability* (n 36) no 45.

<sup>38</sup> An overall view is provided by the country reports in Helmut Koziol, Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009, Vienna – New York); Lotte Meurkens, Emily Nordin (eds), *The Power of Punitive Damages: Is Europe Missing Out?* (Intersentia 2012, Cambridge – Antwerp – Portland).

<sup>39</sup> Esther Sonntag, *Entwicklungstendenzen der Privatstrafe* (Berliner Wissenschafts-Verlag 2005, Berlin) 348ff.

<sup>40</sup> Helmut Koziol, 'Comparative Report and Conclusions' in Koziol, Wilcox (eds), *Punitive Damages* (n 38) 54ff.

<sup>41</sup> See Filippo Ranieri, *Europäisches Obligationenrecht* (3rd edn, Springer 2009, Vienna – New York) 2f.

<sup>42</sup> See Basil Markesinis, 'Judicial Style and Judicial Reasoning in England and Germany' (2000) 59 *Cambridge Law Journal* 294-309; Basil Markesinis, 'French System Builders and English Problem Solvers: Missed and Emerging Opportunities for Convergence of French and English Law' (2005) 40 *Texas International Law Journal* 663-690; Ronen Perry, 'Relational Economic Loss: An Integrated Economic Justification for the Exclusionary Rule' (2004) 56 *Rutgers Law Review* 711-788, 719, who gives an interesting example in the area of pure economic loss.

between the legal systems on the Continent: Germans tend to adopt a very systematic way of thinking and usually try to give a convincing reason for the decision at both the legislative and the judicial stages. The French legislator and the Supreme Court almost never give sufficient reasons and therefore one never knows why a case is solved in a particular way and one never knows beforehand how the next case will be solved.

To overcome these differences, we need a consistent overall concept at European level, which can serve as a signpost for future directives by showing the European Union how directives can fit into a consistent system. Such a concept can further stimulate national legislators in respect of future development of their national legal systems and – maybe – ultimately provide a basis for a future common European tort law<sup>43</sup>. Designing such a concept will be not easy, will require much time, patience and openness to ideas which we are not used to at all, a willingness to accept compromises and last but not least hard work, first of all on comparative law. If all show goodwill and cooperate in a reasonable way, we will reach the goal; maybe not an ideal concept on the first go, but the basis for further improvement.

## VI Method of Designing the Draft

Different approaches may be taken in order to design such a concept and draft provisions. The European legislators have usually hitherto applied two different methods in this respect; on the one hand, firm, detailed rules, and, on the other hand, general, elastic rules which must be put into concrete terms by the courts.<sup>44</sup>

The basic rules of tort law provide very good examples of the difference. The German Civil Code, the Bürgerliches Gesetzbuch (BGB), clearly tends towards the first-named method of firm, detailed rules: ‘Whosoever unlawfully injures, intentionally or negligently, the life, body, health, freedom, property or other right of another person, has an obligation to the other person to compensate the resulting loss.’ [section 823 (1) BGB]<sup>45</sup>

The rules in the French Code civil and the Austrian ABGB, both of which are almost 100 years older than the BGB, on the other hand, are formulated in a more general and elastic manner: ‘Tout fait quelconque de l’homme qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.’ [Art 1382 Code civil] (*Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.*)<sup>46</sup>

<sup>43</sup> As to the different means of harmonisation and unification see Jochen Taupitz, *Europäische Privatrechtsvereinheitlichung heute und morgen* (Mohr Siebeck 1993, Tübingen).

<sup>44</sup> See Helmut Koziol, ‘Begrenzte Gestaltungskraft von Kodifikationen? Am Beispiel des Schadenersatzrechts von ABGB, Code civil und BGB’ in Constanze Fischer-Czermak and others (ed), *Festschrift 200 Jahre ABGB I* (Manzsche Verlags- und Universitätsbuchhandlung 2011, Vienna) 469-493.

<sup>45</sup> Translation by Jörg Fedtke, Florian Wagner- von Papp, ‘Germany’ in Ken Oliphant, Barbara C Steininger (eds), *European Tort Law: Basic Texts* (Jan Sramek Verlag 2011, Vienna, 91-103) 93.

<sup>46</sup> Translation by Olivier Moréteau, ‘France’ in Oliphant, Steininger (eds), *Basic Texts* (n 45) 85-90, 85.

Similar is the wording of section 1295 (1) ABGB: 'Every person is entitled to claim compensation from the wrongdoer for the damage the latter has culpably inflicted upon him; the damage may have been caused by breach of a contractual duty or independently of any contract;' [...]<sup>47</sup>

The new Hungarian Code also prefers the elastic style: section 6:519, the general rule of liability, reads 'Whosoever unlawfully causes damage to another person shall be liable for such damage'.

The precise list of protected goods in section 823 (1) BGB contains more information than is covered by the very generally worded blanket clauses in Art 1382 Code civil, section 1295 (1) ABGB and section 6:519 Hungarian Code. However, the fact that the German legislator has regulated far more details means that wrong decisions by the legislator also have a more noticeable effect due to the rigidity of the provisions, and statutory rules are also more likely to become inappropriate due to social, technical or economic changes, while the indefinite scopes of the Code civil and the ABGB allow the courts room to manoeuvre in order to keep up with progress.

Moreover, it must be noted that the German approach to formulating provisions has not led to legal certainty, one example being *pure economic loss*. Pure economic interests are not covered at all by section 823 (1) BGB. German jurists feel that this is too restrictive<sup>48</sup> and, therefore, have turned to section 826 BGB, the rule on liability in case of behaviour 'contra bonos mores' and have overstretched this provision. For example, intentional interference with contractual relations is always considered to be contrary to public policy and therefore, in essence contractual relations are generally protected against intentional interference. In addition, section 826 BGB requires intent, but courts and scholars take a very broadminded approach to the effect that gross negligence is equal to intent.

Moreover, Germans also pave the way for claims on compensation for pure economic loss by expanding the area of contractual liability, where pure economic loss has to be compensated. Therefore, culpa in contrahendo and positive *Forderungsverletzungen* (violation of duties of care between the parties to a contract, even if the contract is null and void) are declared to belong to the area of contractual liability, although the relevant duties are not established by agreement of the parties. German lawyers also use conjuring tricks to try to establish *Verkehrssicherungspflichten zum Schutz des Vermögen*; a construct so strange that it cannot be translated into English, but has been described by *Markesinis* as follows:

Whoever, by his activity, establishes in everyday life a source of potential danger which is likely to affect the pure economic interests of others is obliged to ensure their protection against the risks thus created by him.

Last but not least, the German lawyers accept a mysterious *Recht am Gewerbebetrieb* (right to the business establishment).

It seems that German lawyers have become accustomed to all of this because they have been indoctrinated since their legal childhood.<sup>49</sup> However, an outside observer gets a strong impression that, because of the strictness of the code, our German colleagues end up trying to get around

<sup>47</sup> Translation by Barbara C. Steininger, 'Austria' in Oliphant, Steininger (eds), *Basic Texts* (n 45) 1-13, 3.

<sup>48</sup> Münchener Kommentar/*Wagner*, BGB V (5th edn, CH Beck 2009, München) section 823 no. 186.

<sup>49</sup> Helmut Koziol, 'Glanz und Elend der deutschen Dogmatik. Das deutsche Zivilrecht als Vorbild für Europa?' 212 (2012) *Archiv für die civilistische Praxis* 1-62, 60.

its provisions in a rather illicit way, by circumvention of the statutes and by the famous ‘Flucht in die Generalklauseln’ (escape into the blanket clauses) – the commentaries on the general clauses section 242 and section 826 BGB really speak volumes (in every meaning of the word). Such – broadly speaking – illegal proceedings are a habit-forming drug and have led German courts and scholars to become accustomed to ignoring fundamental value judgements and decisions of the legislator without any sense of shame. I could give quite a few examples, but I call your attention only to the bypassing of provisions regarding form and time prescription. All of this produces an astonishing result: the more generous, even untidy, Austrians respect their code to a much greater degree than the orderly Germans.

A lesson on legal policy ought to be drawn from this: If the legislator tries to restrict the courts’ room to manoeuvre to an unreasonable extent with firm, detailed rules, then it ultimately achieves the opposite effect and legal certainty results to a lesser degree than with more elastic provisions.<sup>50</sup>

However, we must now take a glance at section 1295 ABGB and compare its solution for pure economic loss with the German version. At first sight, we see that this provision says nothing about the protection of pure economic interests. One can only infer from the wording that it seems possible to claim compensation for pure economic loss, as section 1295 rules that everyone is entitled to demand compensation from the person who did him harm by fault. Nonetheless, the decisive questions as to what extent pure economic interests enjoy protection and when causing pure economic loss violates a duty of care are not answered. The same seems to be true under the new Hungarian Code: according to section 6:520 lit d, it is decisive whether the conduct interferes ‘with legally protected interests of another person’, but it does not say how far pure economic interests are protected.

A glance at French tort law reveals how much room to manoeuvre is left by provisions like those of the ABGB on tort law: although the wording of the tort law provisions of the French Code civil is nearly the same as those of the ABGB, French tort law is not only totally different from today’s Austrian tort law, but also very different to French tort law at the beginning of the 19<sup>th</sup> century on the same legal basis as today.

Such open provisions already pose problems in a national legal system, but even more so in rules intended to unify European private law, because they will be interpreted in the individual Member States in very different ways, as the legal tradition in each country differs to quite some extent.

I feel that a middle course would be reasonable and that, therefore, the *flexible system*, designed by *Walter Wilburg*<sup>51</sup> on a comparative basis, can give valuable support.

*Wilburg* makes two fundamental observations.<sup>52</sup> First, he recognises the *plurality* of independent valuations and purposes inherent in large legal complexes. The law may thus *not* be understood, interpreted and applied from the perspective of a *single* guiding idea. However, this must not be allowed to lead to an equity jurisprudence of countless unpredictable ad hoc

<sup>50</sup> See Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (2nd edn, Springer 1991, Vienna – New York) 533f.

<sup>51</sup> Walter Wilburg, *Die Entwicklung eines beweglichen Systems im bürgerlichen Recht* (Kienreich 1950, Graz); idem, ‘Zusammenspiel der Kräfte im Aufbau des Schuldrechts’ 163 (1964) *Archiv für die civilistische Praxis* 346-379.

<sup>52</sup> Franz Bydlinski, ‘A “Flexible System” Approach for Contract Law’ in Herbert Hausmaninger, Helmut Koziol, Rabello, Israel Gilead (eds), *Developments in Austrian and Israeli Law* (Springer 1999, Vienna – New York, 9-20) 10.

viewpoints that may be alternately observed or ignored in isolated decision-making processes. On the contrary: all basic guidelines inherent in a given area of the law have to be observed in the light of their specific interaction in certain types of cases, that is to say in a generalised context. *Wilburg* calls these independent fundamental values ‘elements’ or ‘forces’; one could also say ‘factors’ or ‘system-forming principles’<sup>53</sup>. The plurality and autonomous weight of *Wilburg’s* principles clearly distinguish his theory from all attempts to explain and apply major areas of the law on the basis of any single fundamental idea. Such attempts always necessitate the overemphasis of some basic values and purposes by means of fictional extension and the downgrading of others, despite their autonomous effects. *Wilburg* therefore opposes all attempts to provide monocausal explanations based on exclusive principles. This view has already become widely accepted today.<sup>54</sup>

Aside from the plurality of principles in a major area of the law, *Wilburg’s* system emphasises their *gradation*; in other words, the ‘comparative’ character of the ‘elements’. The legal consequence in a specific case results from the comparative strength of the elements in their interplay. The elements thus exhibit a clear, multifaceted structure of ‘more or less’. In the case of colliding principles, a compromise must be found by determining priorities. It is important to point out that regard must be had not only to the gradations of the relevant elements in establishing a legal consequence but also the possibility of grading the *legal consequences*.

Criticism of the flexible system is very often based on the misapprehension that the disciples of this system are aiming at rules as flexible, uncertain and hazy as possible. However, this is not true at all and therefore akin to defamation. The leading scholar of the flexible system, *Franz Bydlinski*<sup>55</sup>, underlined quite a different basic idea:

Insofar as there are typical, clearly comprehensible facts, also as regards the consequences of a rule, the requirements of legal certainty and pragmatism, i.e. in this context predictable and simple application of law, and moreover also fairness and equality, support adherence to the system of fixed rules and prohibitions within the legislative system. Also, in cases where legal certainty is one of the particular aims of a law, there will be no (or at least very little) room for ‘flexible’ enclaves. A basically flexible law on bills of exchange, real property law, procedural or punitive law is certainly impossible.

Due to the complexity of the problems and the variety of the facts in different cases, it is by no means always possible to design firm rules in private law. But even then, *Wilburg* is not in favour of formulating sets of merely discretionary rules which can be either observed or ignored altogether in the decision-making process; at random; on the contrary. However, the flexible system offers a middle course between rules with firm and strict elements and vague general

<sup>53</sup> On the relation between *Wilburg’s* system and the ideas of the theory of principles, see Franz Bydlinski, ‘Die Suche nach der Mitte als Daueraufgabe der Privatrechtswissenschaft’ 204 (2004) *Archiv für die civilistische Praxis* 309-395, 329ff, as well as idem, ‘Die “Elemente des beweglichen Systems”: Beschaffenheit, Verwendung und Ermittlung’ in Bernd Schilcher, Peter Koller, Bernd-Christian Funk (eds), *Regeln, Prinzipien und Elemente im System des Rechts* (Verlag Österreich 2000, Vienna, 9-29).

<sup>54</sup> Koziol, *Basic Questions* (n 26) no. 6/1 ff.

<sup>55</sup> Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (n 50) 534.

clauses: by describing the decisive factors which the judge has to take into consideration, the legislator can reach a much higher level of concretisation and considerably restrict the discretion of the judge. As such, the decision of the court becomes foreseeable and understandable on the one hand and, on the other, still allows consideration to be made to the variety of facts in different cases in a guided manner. The interplay of the different factors, which may be present in different intensities, is decisive for the legal consequence.

One concluding remark: it is manifest that the flexible system not only has special merits as regards the development of national laws but in particular in respect of the harmonisation of laws, as it provides an appropriate way to satisfy two, opposing claims to the greatest extent possible, namely by not merely setting up blanket clauses in dire need of more specification on the one hand, or rigid rules on the other that cannot do justice to the multitude of individual cases and moreover hinder all adaptation to changed circumstances.<sup>56</sup> By stating the material factors to be taken into account by the judge, the system accomplishes a significant degree of specification, decisively limiting the discretion of the judge and rendering the decision foreseeable but also allowing consideration of the diversity of possible facts in a controlled manner. The flexible system is moreover highly suitable for the development of rules in which the factors deemed to be material in the various legal systems may be included and which take account of the variously weighted evaluations as far as possible.<sup>57</sup>

The European Group on Tort Law has tried to follow up this line of thought in setting signposts for judges by mentioning the relevant factors. Art 2:102 Principles of European Tort Law gives a good example; this provision reads:

Protected interests. (1) The scope of protection of an interest depends on its nature; the higher its value, the precision of its definition and its obviousness, the more extensive is its protection. (2) Life, bodily or mental integrity and liberty enjoy the most extensive protection. (3) Extensive protection is granted to property rights, including those in intangible property. (4) Protection of pure economic interests or contractual relationships may be more limited in scope. In such cases, due regard must be had especially to the proximity between the actor and the endangered interest, or to the fact that the actor is aware of the fact that he will cause damage even though his interests are necessarily valued lower than those of the victim. (5) The scope of protection may also be affected by the nature of liability, so that an interest may receive more extensive protection against intentional harm than in other cases. (6) In determining the scope of protection, the interests of the actor, especially in liberty of action and in exercising his rights, as well as public interests also have to be taken into consideration.

I feel that this method could be helpful in harmonising European law.

<sup>56</sup> Helmut Koziol, 'Das niederländische BW und der Schweizer Entwurf als Vorbilder für ein künftiges europäisches Schadensersatzrecht' (1996) 4 *Zeitschrift für Europäisches Privatrecht* 587-599.

<sup>57</sup> Helmut Koziol, 'Rechtswidrigkeit, bewegliches System und Rechtsangleichung' [1998] *Juristische Blätter* 619-627; idem, 'Diskussionsbeitrag: Rechtsvereinheitlichung und Bewegliches System' in Schilcher, Koller, Funk (eds), *Regeln, Prinzipien und Elemente im System des Rechts* (n 53) 311ff.

Kurt Siehr\*

# Unidroit Convention of 1995 and Unclaimed Cultural Property without Provenance

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## I The Unidroit Convention of 1995 and its Purpose

The Unidroit Convention of 24 June 1995 on Stolen or Illegally Exported Cultural Objects (the Convention) entered into force on 1 July 1998.<sup>1</sup> It has been ratified by 14 of the 27 Member States of the European Union,<sup>2</sup> including Hungary where the Convention has been in force since 1 November 1998.

### 1 Initiative of UNESCO

In the 1980s UNESCO asked the International Institute for the Unification of Private Law in Rome (Unidroit Institute) to prepare an international instrument on the return of illegally acquired cultural objects which should be more effective than the UNESCO Convention of 14 November 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the 1970 Convention).<sup>3</sup> This 1970 Convention, drafted in the post-colonial era, has one major disadvantage: It can rarely be applied directly because it mainly formulates obligations of states parties and relies on national implementation statutes which have been enacted by very few of the 123 states parties.<sup>4</sup> A diplomatic conference in June 1995 finally passed the Convention, which has two main parts on the restitution of stolen

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<sup>1</sup> Uniform Law Review N.S. 1 (1996) 110; International Journal of Cultural Property 5 (1996) 155. See also Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects, Acts and Proceedings, Rome 1996; Lyndel V. Pratt, *Commentary on the Unidroit Convention on Stolen and Illegally Exported Cultural Objects 1995*, (Institute of Art and Law 1997, Leicester); Explanatory Report: Uniform Law Review N.S. 6 (2001) 476.

<sup>2</sup> Croatia, Cyprus, Denmark, Finland, Greece, Hungary, Italy, Lithuania, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

<sup>3</sup> *UNESCO Convention of 14 November 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, opened for signature 14 November 1970 823 UNTS 231. (entered into force 24 April 1972).

<sup>4</sup> Some of these state parties with implementation statutes are the United States, Switzerland and Germany.

and the return of illegally exported cultural objects directly applicable in states parties which have ratified the Convention.

## 2 Two Parts of the Unidroit Convention

The Convention has two major parts: chapter II on the restitution of stolen cultural objects (Article 3–4) and chapter III on the return of illegally exported cultural objects (Articles 5–7).

### a) Restitution of Stolen Cultural Objects

If cultural objects have been stolen, four questions have to be answered: What is theft? Should stolen objects be given back? Should a bona fide purchaser be compensated? Is there any time limitation within which the claim for restitution should be raised?

(1) The terms *theft* and *stolen* are not defined by the Convention. One exception, however, is made. Article 3 (2) states that ‘a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the state where the excavation took place’. This qualification of ‘patrimony laws’, known in many countries (including Hungary)<sup>5</sup>, is recognised in Europe as well as in the United States.<sup>6</sup>

(2) A stolen cultural object *has to be given back* if the owner or former owner asks for restitution [Article 3 (1)]. There is no in rem protection of a good faith purchaser. Even a bona fide purchaser has to give back the object and can claim compensation for his loss.

(3) A *good faith purchaser* may ask for ‘fair and reasonable compensation’ [Art. 4 (1)]. Whether there has been a bona fide purchase, has to be decided under the guidance of Article 4 (4) which, inter alia, provides that there is no protection if the possessor did not ‘consult any reasonably accessible register of stolen cultural objects’. This passage refers to registers such as the Art Loss Register in London or the Lost Art Register in Magdeburg, Germany.

(4) There are two different *time limitations* for the owner’s claim for restitution; a relative one and an absolute one. According to Article 3 (3), a claim for restitution has to be brought within a period of three years from the time when the claimant knew the location of the object and the identity of its possessor, and in any case within a period of fifty years (or even longer Article 3 (4 and 5) from the time of the theft.

### b) Return of illegally exported cultural objects

Chapter III deals with the return of illegally exported cultural objects. Four questions also have to be answered here. (1) What is illegal export? (2) When must objects be returned? (3) Will

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<sup>5</sup> 2001. évi LXIV. törvény a kulturális örökség védelméről (Act LXIV of 2001 on the Protection of Cultural Heritage) s 8 para (1). This section 8 para (1) reads in English translation: ‘All archaeological finds on the ground, in the ground, in the beds of watercourses or hidden or recovered from elsewhere shall represent state property.’ Translation by the International Foundation for Art Research, New York.

<sup>6</sup> Europe: e.g. Oberlandesgericht Schleswig 10.2.1989, published in (1989) Neue Juristische Wochenschrift 3105 (concerning Greece); USA: *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003), certiorari denied 540 U.S. 1106 (2003) (concerning Egypt).

a bona fide possessor be compensated? (4) Is there any time limitation for bringing a claim for return?

(1) The *export* of the object must be forbidden by the requesting state of origin. There three types of export regulations with respect to cultural objects are no export prohibition (e.g. United States); export prohibition for some important listed objects (e.g. Germany); and export prohibition of all objects of cultural importance (e.g. France). Any of these prohibitions have to be respected and evaluated.

(2) Unlike in Chapter 2, *not every violation* of an export prohibition obliges the possessor to return the object. The requesting state has to establish the interest of the state of origin in order to get back the object [Article 4 (3)]. Let us assume that I bought an old second hand book in Zürich and found a letter of Gottfried Keller (1819-1890), the author of the book 'Der grüne Heinrich', in this book. Let us further assume that the export of this letter is prohibited by Swiss law and the Swiss government asks for its return because 'the object is of significant cultural importance' for Switzerland. If Switzerland were a state party of the Convention, the request might be declined and a copy of the letter be given to the requesting government in order to complete the edition of Keller's letters,

(3) The *requesting state* is in a different position to the owner of a stolen object. The state is not asking for title but for the return of the object to the state of origin. If I bought an illegally exported Hungarian cultural object in Germany bona fide, I would be obliged under the Convention to return the object and place it on permanent loan to the National Gallery in Budapest. If I chose the transfer, I would have a claim for fair and reasonable compensation (Article 6).

(4) The two types of *limitations* for claims for return are also here [Article 5 (5)].

### 3 Common Problems

There are at least four common problems dealt with in some special provisions, provisions already mentioned and in no provision at all.

#### a) Cultural objects

For the definition of cultural objects, Article 2 of the Convention refers to the Annex of the Convention, which is very close to that of the EU Directive of 1993 and to the enumeration in Article 1 of the 1970 Convention. Archaeological finds are also mentioned.

#### b) Restitution and return to country of origin

Two arguments were raised against restitution and the return of cultural objects; the first concerns the long statute of limitations and the other refers to the non-retroactivity provided by many state parties to the Convention. In such countries, retroactive legislation is a problem of constitutional law and cannot be solved easily. Article 10 therefore deals with this problem and excludes retroactivity.

### c) Reasonable compensation

Of course, the term 'fair and reasonable compensation' also found opposition as being insufficient to protect bona fide possessors.

### d) Plaintiff: owner or state of origin

The last problem to be listed is the problem in my lecture today. The Convention is based on the assumption that somebody is going to claim for restitution or the return of cultural objects, the owner from whom the object was stolen or the state of origin from which the object was illegally exported. But what happens if nobody asks for restitution or the return of an object which has been stolen and illegally exported?

## 4 Intermediate Summary

The contents of the Unidroit Convention may be summarised as follows:

1. The Convention has three major *positive aspects*:
  - a) It deals with the restitution of stolen and the return of illegally exported cultural objects.
  - b) There is no in rem protection of a bona fide purchaser. He may get fair and reasonable compensation.
  - c) There must be somebody who asks for restitution or the return of the objects.
2. Three *negative features* may be added:
  - a) The Convention does not work retroactively (Article 10).
  - b) No reservations are permitted (Article 18),
  - c) The Convention does not exclude the application of any other more favourable remedy for restitution or the return of cultural objects (Articles 9 and 13).

## II Problem of Unclaimed Cultural Objects

The problem which I want to discuss with you today concentrates on archaeological finds illegally excavated somewhere and surfacing in market states where they are offered to the public, to museums and to collectors. In many cases the state of origin is not aware of the loss and therefore does not want to spend a lot of money on a return claim in the market state. The result does not satisfy archaeologists in particular, who want to stop illegally executed excavations and who want to tell us where the object comes from. Even so, they are not allowed to keep the objects and were not permitted to return them to the state of origin.

Although not being a state party to the Convention, German courts have had to deal with some problems which the Convention does not solve either. Here, it is important to distinguish between three different remedies of the former owner or state for restitution or the return of stolen or illegally exported/removed objects:

- a) criminal remedies (international legal assistance or criminal proceedings) and seizure of the objects,
- b) administrative remedies for the return of illegally exported or removed objects (§ 13 I KultGüRückG),
- c) private law remedies for the restitution of stolen objects, i.e. rei vindicatio of ownership.

## 1 Stolen Cultural Objects that are State Property

### a) Stolen in Iraq

The first case to be mentioned is the dispute concerning a *golden bowl* which apparently had been illegally excavated in Iraq and sold at auction in Germany in 2004 as a product of Roman imperialism for € 1,400 or € 1,200. The sale took place under the condition that the Iraq does not claim to be the owner. Nobody cared for this transaction except the Iraqi ambassador and Michael Müller-Karpe, the curator of the Romano-Germanic Central Museum in Mainz.<sup>7</sup> Müller-Karpe had the suspicion that the object may have been illegally excavated in Iraq, knew that all antiquities excavated in Iraq are state property of Iraq and that the object must have been illegally exported from the country of origin. Müller-Karpe asked the police in Munich to seize the bowl, which was still in the art dealer's shop. This was done and the bowl was transferred to the museum in Mainz in order to find out where the bowl came from. Müller-Karpe, as an archaeologist and an art expert in antiquities from the Middle East, after careful research and evaluation came to the conclusion that the bowl very likely originated in Iraq and refused to give it back to the police or the art dealer after having finished his research. He was afraid of receiving stolen property and of committing a crime under § 259 of the German Criminal Code.<sup>8</sup> This fear was, however, unfounded because a person receiving the object to give their expertise does not do so 'in order to enrich himself or a third person [the Museum] [...] procure for himself or a third person' property which has been stolen from Iraq. Court proceedings were initiated against Müller-Karpe, asking him to return the bowl to the police. After some hesitation the bowl was given back and another expert confirmed Müller-Karpe's suspicions and came to the same conclusion of Iraqi provenance.<sup>9</sup> Finally the buyer of the bowl, being a collector and not a fence, returned the bowl to Iraq and the Iraqi ambassador in Berlin.

This case is interesting because of several peculiarities.

<sup>7</sup> Michael Müller-Karpe, 'Antikenhandel./ Kulturgüterschutz. Zur Missachtung des bestehenden Handelsverbots für archäologische Kulturgüter ungeklärter Provenienz am einem Beispiel' [2010] *Kunst und Recht*, 91-94..

<sup>8</sup> § 259 (1) of the German Criminal Code provides: 'Whoever in order to enrich himself or a third person, buys, otherwise procures for himself or a third person, disposes of, or assists in disposing of property that another person has stolen or otherwise acquired by an unlawful act directed against the property of another shall be liable to imprisonment of not more than five years or a fine.' Translation of Michael Bohlander, *The German Criminal Code. A Modern English Translation* (Hart Publishing 2008, Oxford), 166..

<sup>9</sup> As to this case see also Kurt Siehr, 'Prozesse über geschütztes Kulturgut in Deutschland' [2011] *Kunst und Recht* 3-9, 7-8.

(1) Neither party in these proceedings and disputes relied on illegal export or import. It was unnecessary to invoke the Council Regulation (EC) 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq<sup>10</sup> or the 1970 UNESCO Convention implemented by Germany.

(2) They did not rely on any international instrument but relied on German law, which, as provided by Article 9 (1) of the Unidroit Convention, is not excluded if it is more favourable to restitution or return than the Convention.

(3) The parties simply relied on German private law which provides three principles.

(a) There is no bona fide purchase of stolen goods except by sale in public auction (§ 935 of the Civil Code).

(b) A bona fide purchaser can acquire ownership after expiration of ten years by acquisitive prescription (*Ersitzung*, according to § 937 (1) of the Civil Code).

(c) There is no bona fide purchase if the sale took place under the condition that Iraq does not prove its own title. If the buyer had declined to give back the bowl voluntarily, the Iraq government would have brought a lawsuit against him for the restitution of the bowl.

Very often the title holder does not commence court proceedings and then, of course, the question arises of what to do with the stolen objects.

## **b) Stolen outside the European Union except Iraq**

### *ba) Antique Bowls*

In 2009, an antiquities dealer from Frankfurt am Main offered three antique bowls and two Byzantine smoke vessels which, according to the dealer, may have originated in Turkey or any other part of the Near East. He had bought the objects for € 200 from a couple in Munich, who had been teachers in Turkey. This couple, according to the dealer, had acquired the objects in 1980 from an Armenian carpet dealer in Istanbul who had already passed away. On 16 December 2009 the Ministry of Science and Culture of the state of Hessen seized the objects in order to prevent any sale and disappearance of the objects, and deposited them also with the Romano-Germanic Central Museum in Mainz. When the seizure was lifted, the art dealer sued the Museum for the restitution of the objects. The dealer finally prevailed; he got back the objects<sup>11</sup> and was sued by the Republic of Turkey for restitution of state property illegally excavated in Turkey and illegally exported from Turkey. On 19 August 2011, the *Landgericht Frankfurt* gave a judgment for the defendant.<sup>12</sup>

The plaintiff could not convince the court that title is with the plaintiff. There was no evidence of a Turkish origin of the objects, of illegal excavation and their illegal export to Germany.

<sup>10</sup> Council Regulation (EC) 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No 2465/96 OJ L169/6.

<sup>11</sup> Verwaltungsgericht Frankfurt/Main 2. 6.2010. [2011] Kunst und Recht, 68. To this court decision see Michael Müller-Karpe, *Antikenhandel./Kulturgüterschutz – Fortsetzung von KUR 2010, 91ff. Zur Förderung der Antikenehlerlei in Deutschland an einem weiteren Beispiel.* [2011] Kunst und Recht 61–67.; Suzan Topal-Gökceli, 'Verfahren um Herausgabe fünf antiker, mutmaßlich aus der Türkei stammender Bronzegefäße, [2011] 1 Bulletin Kunst & Recht, 64-65. (misinterpreting German law); correct: Siehr (n 9), 7-8.

<sup>12</sup> LG Frankfurt/Main 19.8. 2011, file 2/13 O 212/10, unpublished.

Even if the objects originate in Turkey, they are not to be qualified as stolen because the Republic of Turkey never came into possession of them. As such, the defendant could acquire the object bona fide from the couple in Munich.

Handling of foreign cultural objects without knowing of their potential provenance and illegal export is not unconscionable.

This judgment was confirmed by the *Oberlandesgericht Frankfurt/Main* on 4 February 2013.<sup>13</sup> Turkey did not get the objects.<sup>14</sup>

This case is remarkable because of three aspects:

(1) Turkey should have joined the trial with the Administrative Court in Frankfurt am Main by serving a summons to the defendant.

(2) The plaintiff in a civil law trial naturally has to present all facts and to prove his title.

(3) Illegally excavated objects are – contrary to the court decision – ‘stolen’ under German law.

#### *bb)* Ancient coins

In the East Balkans (perhaps Bulgaria or Serbia), more than 821 ancient coins had been illegally excavated, illegally exported to Germany and offered for sale on the internet auction and shopping site eBay before eBay agreed that, beginning on 1 July 2008, a certificate of provenance is needed for the sale of ancient coins via eBay. The coins were seized at the home of the potential seller and stored by the seizing public authority. Of course, the potential seller objected and asked the courts for the seizure to be lifted and the coins returned to him. The seller’s lawsuit was successful.<sup>15</sup> The courts discussed first the competence of the seizing authority and finally came to the conclusion that there was no suspicion of dealing in stolen goods (*Hehlerei*, according to § 259 of the Criminal Code), that no owner has been discovered, asking for the return of the objects, and that the objects can also be held by the potential seller but with a prohibition on selling the objects.

#### **c) Stolen in a Member State of the European Union**

##### *ca)* Bronze helmet

An ancient bronze helmet (about 8<sup>th</sup>/7<sup>th</sup> century B.C.) was part of a German art collection. According to Italian authorities, including the special Italian police for cultural property (*Comando Carabinieri per la Tutela del Patrimonio Culturale*) and the Italian Ministry (*Ministero per i Beni e le Attività Culturali*), the helmet was illegally excavated in July/August 1993 in Southern Italy (Regione di Puglia, Provincia di Foggia, comune di Ortona), smuggled to Germany and sold to a German collector for more than a million German marks. After having asked Germany in 2003 for international assistance in criminal matters and after the helmet had been deposited with the *Stiftung Preussischer Kulturbesitz* (Prussian Cultural Heritage Foundation) in

<sup>13</sup> OLG Frankfurt/Main 4.2.2013, file 16 U 16/11, unpublished.

<sup>14</sup> Kind information by Dr. Michael Müller-Karpe, Römisch-Germanisches Zentralmuseum Mainz, of 27 February 2013.

<sup>15</sup> Verwaltungsgericht Gießen 6.5.2010, [2011] Kunst und Recht, 125, confirmed by Hessischer Verwaltungsgerichtshof 4.7.2011, [2011] Kunst und Recht, 124.

Berlin, the Republic of Italy initiated a law suit against the Stiftung, the state of Berlin and the heirs of the deceased collector in 2008, asking for the recovery of the helmet according to the German statute implementing the European Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State [1993] OJ L74 of 27.3.1993.<sup>16</sup> The claim failed because the plaintiff did not meet the intricate requirements of the German statute with respect to registration of cultural objects and to time limitations.<sup>17</sup> Why did the plaintiff not rely on his title and start a recovery law suit based on replevin? This had also struck the *Verwaltungsgericht Berlin*, and the administrative court mentioned at the end of the judgment that the implementing statute does not exclude a replevin claim in civil law courts.<sup>18</sup>

*c b)* Golden coin

Another case also concerns a coin of allegedly French origin. The golden coin, 'Claudius II Gothicus', was, supposedly, part of a treasure transported in an ancient ship which was discovered and looted by coral fishers in the 19<sup>th</sup> century off the coast of Corsica.<sup>19</sup> In numismatic circles the treasure trove is known as the 'treasure of Lava'. The bay of Lava is north of the Corsican capital Ajaccio. In 1958 the coins were described for the first time and in 1986 the French police seized some of them (63 coins), knowing that many more coins had been discovered and must have been sold illegally, because the treasure trove of Lava is a national monument, state property and as such unmerchantable (*domaine publique*). On 10 January 2007 the golden coin 'Claudius II Gothicus' was sold at a public auction in New York to a Swiss collector and, on 12 March 2010, the coin was to be sold at auction by the plaintiff (auction house) in Osnabrück in Germany for the Swiss collector as the commissioning owner. Before this happened, the *Tribunal de Grande Instance de Marseille* asked Germany for international assistance in criminal matters and for attachment of the coin to be returned to France as part of the national patrimony which should not be exported or removed from France. The coin was attached and deposited with the competent Central Authority in charge of the administration of European cultural objects, the Ministry for Science and Culture in Hannover Lower Saxony. On 12 March 2010 the plaintiff sold the coin for € 54,000 under the condition that the French claim would be turned down. After the attachment had been discharged, the plaintiff (coin dealer) brought a lawsuit against the Central Authority in Hannover asking for damages because of wrongful attachment. This claim was successful because the French claim for recovery of the coin could not be based on the German implementation statute.<sup>20</sup>

This case is interesting because a French claim based on ownership of a stolen object might have been successful. In France no bona fide purchase is possible because of the unmerchantable quality of the coin; in New York there is no bona fide purchase under New York law at all; in

<sup>16</sup> Kulturgüterrückgabegesetz (KultGüRückG) of 18 May 2007, Bundesgesetzblatt 2007 I, pp. 757, 2547.

<sup>17</sup> Verwaltungsgericht Berlin 9.12.2010, [2011] Kunst und Recht, 155.

<sup>18</sup> Verwaltungsgericht Berlin (n 17) 159.

<sup>19</sup> Claudius II Gothicus was Roman Emperor from 268-270 A.D. He was the first of the 'soldier-emperors'.

<sup>20</sup> Verwaltungsgericht Osnabrück 17.5.2011, file I A 187/10, unpublished.

Switzerland the time of prescription (Ersitzung) had been extended in 2005 to thirty years (Article 728 1<sup>ter</sup> ZGB) and in Germany time of prescription is ten years (§ 937 I BGB).

## 2 Privately Owned Cultural Objects Illegally Exported

One case may be mentioned; that of a painting by Tiepolo in the Niedersächsisches Landesmuseum in Hannover. A curator of the museum acquired the bozzetto 'Il miracolo di Sant'Antonio' under very dubious circumstances and finally the museum had to return the bozzetto to its French owner. The German court dismissed the defence of purchase in good faith.<sup>21</sup>

## III Solutions

Most of the examples just mentioned deal with archaeological discoveries and archaeological objects. They were excavated by laymen or found by metal detector enthusiasts and never reported to the competent antiquities authority. Professional or amateur tomb robbers never excavate carefully or pay attention to the context and thereby lose the important data which this context and the provenance of the object can give us.<sup>22</sup> The context is lost for ever. Archaeological objects are thus unique; tomb robbery should be fought and the trade in antiquities carefully supervised and regulated. Private parties, the dealer themselves and the state can also help to stop this very serious misbehaviour.

### 1 Criminal Proceedings

In many cases legal proceedings started with an attachment of the object and criminal investigations against the person in possession of the stolen or illegally excavated or obtained object.

#### a) Indictment of the person in possession

##### aa) Charge of handling stolen property

Lawyers generally try to press charges against the person in possession of the object of handling stolen goods (*Hehlerei*: § 259 of the German Criminal Code). So far no German art dealer has ever been accused of this crime because there was no evidence of anyone knowingly 'enriching

<sup>21</sup> Oberlandesgericht Celle 17.9.2010, GRUR-RR 2011, 24, reversing LG Hannover 11.1.2008, Kunstrechtsspiegel 03/2010, 128. See also Kurt Siehr, 'Zur Rückgabe gestohlener Kunstwerke. Zur Entscheidung des OLG Celle vom 17.9.2010 und zum Grazer/Salzburger Vorentwurf für ein Europäisches Zivilgesetzbuch Buch VIII' [2012] 1 Bulletin Kunst & Recht, 6-15.

<sup>22</sup> Wolf-Dieter Heilmeyer, 'Schutz archäologischer Kulturgüter aus der Sicht der Archäologie' [1996] 95 Zeitschrift für Vergleichende Rechtswissenschaft 117-126, 117-120. Berliner Erklärung zu Leihgaben und Neuerwerbungen von archäologischen Objekten durch Museen (1988) Präambel Nr. 2, in Wolf-Dieter Heilmeyer, J. Cordelia Eule (Hrsg.), *Illegale Archäologie?* (Weißensee Verlag 2004, Berlin) 227.

himself or anybody else' by handling stolen objects. In the United States it is easier to be convicted of handling stolen property<sup>23</sup> because the National Stolen Property Act is violated by possessing stolen goods 'knowing the same to have been stolen'.<sup>24</sup>

*ab)* Confiscation of stolen object/safe haven

If a person in possession of stolen goods cannot be convicted because of absence of guilt, the stolen goods might be seized and taken according to § 73 of the German Criminal Code. This paragraph provides that 'anything obtained in order to commit' the crime can be seized and confiscated.<sup>25</sup> Can the stolen object also be seized if the person in possession of it has been acquitted? Two questions have to be answered: is the confiscation a sort of punishment, which presupposes guilt of the person acquitted; and does the owner of the stolen objects, even if still unknown, take priority under § 73 (1) sentence 2 of the German Criminal Code?

(1) Without going into details, the confiscation of the stolen object is not part of a punishment and therefore does not need any guilt. It is a preventive measure and can be ordered without the person in possession being found guilty.<sup>26</sup>

(2) The other problem pertains to the third party who may have a private claim against the person in possession for restitution of the stolen object. If it is clear that the object has been illegally acquired and neither any state nor private person raises a claim for restitution, the object should be seized and confiscated<sup>27</sup> and deposited with a museum classified as a safe haven. The confiscation, according to § 73e (1) sentence 2 of the German Criminal Code, does not affect 'the rights of third parties'.

(3) Such procedure is only possible if 'safe havens' for cultural property of unknown or endangered property are established in Germany. A scheme for such institutions has been drawn up by the International Law Association Committee on Cultural Property<sup>28</sup> and may be copied or varied by national institutions. I am sure that many German museums will be happy to hold such items in trust for the unknown owner and preserve them under optimal conditions.

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<sup>23</sup> *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003), cert. denied 540 U.S. 1106 (2003).

<sup>24</sup> National Stolen Property Act, 18 United States Code Annotated § 2315 (1) (2000 with Cumulative Annual Pocket Part 2012).

<sup>25</sup> § 73 (1) German Criminal Code reads in English translation: 'If an unlawful act has been committed and the principal or a secondary participant has acquired proceeds from it or obtained anything in order to commit it, the court shall order the confiscation of what was obtained. This shall not apply to the extent that the act has given rise to a claim of the victim the satisfaction of which would deprive the principal or secondary participant of the value of what has been obtained.' Translation of Michael Bohlander, *The German Criminal Code. A Modern English Translation* (n 8) 75-76.

<sup>26</sup> See case law mentioned by Thomas Fischer, *Strafgesetzbuch und Nebengesetze*, (57th edn, CH Beck 2010, Munich) § 73 StGB, marginal note 4.

<sup>27</sup> Fischer (n 26) § 73 StGB, marginal note 19.

<sup>28</sup> Guidelines for the Establishment and Conduct of Safe Havens for Cultural Material, in *The International Law Association (ed), Report of the Seventy-Third Conference held in Rio de Janeiro 17-21 August 2008*, (International Law Association 2010, London) 380-388.

## b) Request for international assistance

In some of the cases mentioned above, international assistance in criminal matters has been requested by the state in which the objects had been stolen. This assistance is granted by application of international conventions such as the European Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime,<sup>29</sup> and of national law on international legal assistance. In such proceedings, based on theft, the person in possession of the stolen object has to prove his bona fide purchase and if he does not succeed, the object is returned to the person, victim of theft or illegal excavation.<sup>30</sup> If the request is based on the crime of illegal export only, the same may happen in these assistance proceedings as in the administrative law proceedings (infra C II).

## 2 Proceedings for Return of Illegally Removed Objects

### a) Administrative proceedings

In German law the claim for return of illegally removed or exported cultural property has to be brought in administrative law courts [§ 13 (1) KultGüRückG]. The proceedings are limited to these claims and the administrative law courts have no jurisdiction to decide matters of private law claims based on the restitution of stolen objects based on ownership. There are several other disadvantages often not appreciated by attorneys engaged in return proceedings. A return claim because of illegal export and import has to fulfil several strictly interpreted preconditions of registration as cultural objects at home and in Germany and rigid time limitations. It is often better to rely on lawsuits in courts of civil jurisdiction and to rely on them for claims of restitution based on replevin and similar remedies.

### b) Summoned persons

Even in administrative law proceedings, third parties with an interest in the proceedings may be summoned and take part as *'Beigeladener'* in the proceedings.<sup>31</sup> In the proceedings concerning the three bowls of allegedly Turkish origin, the defendant could have asked the court to summon the Turkish government to join him in his defence.

<sup>29</sup> *European Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* opened for signature 8 November 1990, ETS No 141 (entered into force 1 September 1993) German BGBl. 1998 II 520; Austrian BGBl. 1997 III Nr. 153; Swiss SR 0.311.53.

<sup>30</sup> OLG Schleswig 10.2.1989, NJW 1989, 3105 = IPRspr. 1989 Nr. 75 (Greek coins illegally excavated in Greece and smuggled to Germany); Swiss Federal Court 1.4.1997, BGE 123 II 134 = Praxis 1997, 899 (theft of a painting in France and sold to a Swiss collector of Geneva who was held mala fide).

<sup>31</sup> See § 65 of the German Code of Administrative Law Proceedings (Verwaltungsgerichtsordnung). See also Konrad Redeker, Hans-Joachim von Oertzen (Hrsg.), *Verwaltungsgerichtsordnung* (15th edn, Kohlhammer 2010, Stuttgart) § 64 VwGO marginal note 11.

### 3 Proceedings for Restitution of the Object

On very many occasions, a civil law procedure is the best remedy to be pursued by the owner of a cultural object. This remedy is neither excluded by the request of international legal assistance nor by the European Directive 93/7/EEC and the national implementation statutes [see, e.g. § 13 (6) German KultGüRückG], nor by the Unidroit Convention [Article 9 (1) Unidroit Convention].

#### a) Bases of claim

In civil law countries, the basis of the claim is the so-called *rei vindicatio*, i.e. the claim in rem of the owner of an object against a person in possession without title for restitution of the object. In cultural property trials, the plaintiff has to prove and give evidence that:

- (1) the object originates in the county of the plaintiff,
- (2) it has been stolen or – what is the same – illegally excavated without government approval,
- (3) the excavation took place after entry into force of the patrimony law of the county where the object originates.

In common law countries the basis of the claim for restitution is the tort claim of *replevin*.

#### b) Illegal excavated objects are stolen objects or objects which 'became missing'

According to German property law, a person not entitled to transfer property may however transfer ownership of certain goods. Two kinds of movable objects have to be distinguished: entrusted goods (*anvertraute Sachen*) and objects which became missing ('...*Sache, die [dem Eigentümer] gestohlen worden, verlorengegangen oder sonst abhanden gekommen war*' § 935 I BGB). As in Switzerland, which basically follows the same system, there is no third possibility or category.<sup>32</sup> Illegally excavated objects in a country where all archaeological objects are state property, are to be qualified as missing (*abhanden gekommen*) because they have not been 'entrusted' to the looters by the state as owner, but the state is going to punish the looters because of unlawful appropriation (*Unterschlagung* according to § 246 of the German Criminal Code).<sup>33</sup> In order to be covered by the prohibition of § 935 I BGB, objects need not be 'stolen' and, as can

<sup>32</sup> *Berner Kommentar zum Schweizerischen Privatrecht* (- Emil Stark), Sachenrecht IV/3, Teilband 1: Der Besitz Artikel 919-941 ZGB (3rd edn, Stämpfli 2001, Bern) Artikel 934 ZGB, marginal note 2: 'es gibt keine dritte Möglichkeit'; *Basler Kommentar Zivilgesetzbuch II* (- Wolfgang Ernst), (4th edn, Helbing Lichtenhahn Verlag 2011 Basel) Artikel 934 ZGB, marginal note 4: 'Eine dritte Möglichkeit besteht nicht'

<sup>33</sup> Kurt Siehr bei: Klaus Ebling, Marcel Schulze (Hrsg.), *Kunstrecht* (2nd edn, CH Beck 2012, Munich), 226 marginal note 136; id, *Rechtliche Probleme der Archäologie: Archäologisches Nachrichtenblatt* 12 (2007) 326-341 (329). The comprehensive commentaries of the BGB and the treatises of German Sachenrecht do not mention this case expressly: *Münchener Kommentar zum BGB* (- Oechsler), (5th edn, CH Beck 2009, Munich) § 935 BGB, marginal notes 3 – 8, *Staudinger* (- *Wiegand*), *Kommentar zum BGB mit Einführungsgesetz und Nebengesetzen, Neubearbeitung* (CH Beck 2004, Munich) § 932 BGB, marginal notes 132-133; § 935 BGB, marginal note 18; Baur, *Stürner, Sachenrecht* (18th edn, CH Beck 2009 Munich) § 52 E; Westermann, Gursky, Eickmann, *Sachenrecht*, (8th edn, C. F. Müller 2011 Heidelberg) § 49; Wieling

be seen with 'lost' objects, possession of the owner at the time of 'Abhandenkommen' is unnecessary. As soon as it has been shown that the objects have become missing, the presumption of title provided by § 1006 I 2 BGB no longer works in favour of the person in possession of the object.

### c) Longer time limitations

In claims based on ownership there are fewer strict time limitations than in claims for return of unlawfully removed objects. Claims of restitution expire rather late if at all,<sup>34</sup> and the period for bona fide *usucapio* (*Ersitzung*) is also quite long.<sup>35</sup>

### d) No listing in registers

Ownership is protected in all countries without the necessity of being registered in the country of origin or elsewhere. The strict rule on documentation of national objects which need an export licence in their home country is not necessary if the claim is brought in civil law courts based on ownership of the removed object.

### e) Interpleader (§§ 75, 76 ZPO)

In civil proceedings brought by the art dealer against the person in possession of the cultural object, the defendant may interplead the owner of the object to join the proceedings and take over the position as defendant.<sup>36</sup> In this way the interested country may join the fight for illegally taken cultural property rather early.

## 4 Where there is no complaint there can be no plaintiff

The result is that, in all proceedings, there has to be a plaintiff asking for the protection of cultural objects. If the country of origin is unknown and no steps were taken by criminal courts to attach

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(Springer 1990, Berlin) § 10 V; Jan Wilhelm, *Sachenrecht*, (4th edn, De Gruyter Rechtswissenschaften Verlags 2010, Berlin) marginal note 960 et seq. - Also, in the United States, objects illegally excavated in a country with patrimony laws have been qualified as 'stolen' within the National Stolen Property Act: *United States v. Schultz* (n 6).

<sup>34</sup> They expire according to the German Statute of limitations in 30 years (§ 197 I No. 1 BGB) and in Swiss law they do not expire at all: Federal Court 15 2.1922, BGE 48 II 38 (Quadri c. Hôtel Brissago).

<sup>35</sup> In Germany ten years (§ 937 I BGB) and in Switzerland thirty years (Article 728 § 1<sup>ter</sup> ZGB).

<sup>36</sup> § 76 I German Code of Civil Procedure (ZPO) reads in English translation: 'A person sued as possessor of property, the possession of which such person asserts on the basis of a legal relationship of the nature designated in § 868 of the Civil Code, may, prior to the hearing in the principal proceedings, move, by filing a pleading in which he or she names the mesne possessor and by joining such mesne possessor, move for the subpoena of such mesne possessor for the purpose of a declaration. Until such declaration is made or until the expiration of the session at which the person named is to make such declaration, the defendant may refuse to participate in the principal proceedings.' Translation by Charles E. Stewart, *German Commercial Code & Code of Civil Procedure* (Dobbs Ferry 2001, New York) 206-207.

and store the objects in a safe haven, the objects will be left with the dealer and enter into the market of stolen, looted and illegally exported cultural treasures.<sup>37</sup>

## IV Summary

1. In former times, foreign public law (including foreign export prohibitions), were not enforced in local courts of private law jurisdiction. This has been changed by several international instruments: the 1970 UNESCO Convention, the EU Directive of 1993 and chapter 3 of the Unidroit Convention. The state parties to these instruments have to enforce the export/removal prohibitions of other state parties.

2. International instruments are often compromises between state parties with very different interests, and provide obstacles and conditions for return proceedings, such as listing requirements and time limitations. Even so, plaintiffs rely on these instruments and pursue their return claims by invoking these instruments and their national implementations.

3. As these return claims of states are of public law nature, the return claims have to be lodged with administrative courts in some countries (e.g. in Germany), but the jurisdiction of these courts is limited and does not extend to claims of restitution of stolen property.

4. As many illegally exported/removed cultural objects are also stolen objects, plaintiffs are better off by filing their claim for restitution in civil law courts and ask for the restitution of their property. With respect to property there are no listing requirements and suits may be brought within much longer time periods, sometimes with no time limitation at all. These normal claims based on *rei vindicatio* of ownership are not excluded by international instruments for the return of illegally exported/removed cultural objects. This remedy seems to be the best in many cases.

5. The interested country has to be active and should not rely on any proceedings by the requested state. In civil proceedings this state may be impleaded if not a party to the proceedings.

6. Criminal law remedies, either requests for international assistance or criminal law proceedings, should only be instituted if the objects can still be seized in the possession of the thief or the prosecuted person.

7. With regard to cultural objects of unknown provenance, there is no country of origin which could ask for restitution or the return of the object. States should provide a 'safe haven' for these cases, where the objects may be held in trust for the still unknown owner.

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<sup>37</sup> This happened with the SEVSO treasure: *Republic of Croatia v. Trustees of Marquess of Northampton 1987 Settlement*, 648 N.Y.S.2d 25 (Sup. Ct. 1996).

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Kinga Timár\*

## The Legal Relationship between the Parties and the Arbitral Institution

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### I Introduction

Arbitration is generally defined as ‘a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudication procedures affording the parties an opportunity to be heard.’<sup>1</sup> Based on this definition, arbitration appears to be a triangular construction, involving at least two opposing parties (claimant and respondent) and a decision-maker (the arbitral tribunal). However, in many – if not most – of the cases, there is a further entity which plays a decisive role in the conduct of arbitration: the arbitral institution, the basic function of which is the administration of arbitral proceedings. In addition to its administrative functions, arbitral institutions sometimes act as adjudicators (decision-makers). This is especially the case if there is a dispute between the parties concerning certain procedural or organisational issues (e.g. whether an arbitrator should or should not be removed for lack of independence or impartiality).

The legal nature of arbitration is a controversial issue. Whereas some authors state that – with regard to its very basis, the parties’ mutual consent – arbitration is clearly of a contractual nature, others put the emphasis on the procedural characteristics, given that, as shown by the above definition, arbitration is a process – a substitute for state court litigation – aimed at the resolution of the parties’ dispute.<sup>2</sup> The same controversy exists in the context of the arbitration agreement. The legal nature of the relationship between the parties and the arbitral institution is less controversial: it is generally regarded as a contract. However, in other respects, the relationship between the parties and the arbitral institution has not been given much attention either in the

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<sup>1</sup> See Gary B. Born, *International Commercial Arbitration* (Kluwer Law International 2009) 217.

<sup>2</sup> See Peter Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (2nd edn, Mohr Siebeck 1989, Tübingen) 28ff.

literature or in case law. This is somewhat surprising, since the interactions between the parties and the arbitral institution may necessarily produce situations that can only be resolved on the basis of a clear understanding of the features of the relationship between the parties and the institution (e.g. disputes on liability issues or on overcharged administration fees).

In this article, I undertake to provide an in-depth analysis of the legal relationship between the parties and the arbitral institution. As an introductory note, I will first summarise the basic characteristics and the most fundamental differences between ad hoc and institutional arbitration (I). I will then turn to the legal nature and the qualification of the relationship (II, III). After identifying the contracting parties, I will look into the formation of the contract between the parties and the arbitral institution (IV). This is a very intricate issue, which has raised some attention in the literature but remained to a large extent unsettled. I will conclude my analysis with the role of the institution's pre-fabricated arbitration rules (VII), followed by a brief summary of the contents of the contract between the parties and the institution (VIII). The ultimate purpose of the analysis is to find an answer to the question of whether the arbitral institution has a duty to accept the parties' case if the parties agreed to arbitrate under the institution's rules and, if so, on what basis.

For the purposes of this article, I have reviewed a number of arbitration laws and rules. My findings are based, amongst others, on the UNCITRAL Model Law,<sup>3</sup> the English Arbitration Act,<sup>4</sup> the German Code of Civil Procedure<sup>5</sup> and the Hungarian Arbitration Act.<sup>6</sup> In addition to these arbitration laws, I have examined the arbitration rules of the following institutions: the Court of International Arbitration of the International Chamber of Commerce (hereinafter: ICC Court or ICC, respectively),<sup>7</sup> the London Court of International Arbitration (hereinafter: LCIA), the German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit*; hereinafter: DIS), the Vienna International Arbitration Centre (hereinafter: VIAC), and the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry (hereinafter: the HCCI Arbitration Court and the HCCI, respectively).<sup>8</sup>

<sup>3</sup> UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

<sup>4</sup> English Arbitration Act 1996, 1996 CHAPTER 23 (hereinafter: EAA).

<sup>5</sup> Code of Civil Procedure (*Zivilprozessordnung*; ZPO) as promulgated on 5 December 2005 [BGBl. (*Bundesgesetzblatt*, Federal Law Gazette) I p. 3202; 2006 I 431; 2007 I 1781], last amended by art 3 of the Act dated 24 September 2009 (BGBl. I 3145) (hereinafter: GCCP).

<sup>6</sup> 1994. évi LXXI. törvény a választottbíráskodásról (Act LXXI of 1994 on Arbitration; hereinafter: HAA).

<sup>7</sup> All references made in this article to the ICC Rules are references to the new ICC Rules, effective as of 1 January 2012. Accordingly, the ICC Rules are hereinafter referred to as the ICC Rules 2012.

<sup>8</sup> The rules of these institutions are accordingly referred to as the ICC Rules 2012, the LCIA Rules, the DIS Rules, the Vienna Rules, and the HCCI Rules.

## II Ad hoc versus Institutional Arbitration

Arbitration, whether domestic or international, has two basic forms: ad hoc and institutional arbitration. Under the principle of party autonomy, which is the guiding principle of arbitration,<sup>9</sup> the parties are free to refer disputes to arbitration rather than litigation (i.e. state courts), and, once they have opted for arbitration, they can freely decide between ad hoc and institutional arbitration. Why do parties decide for the one rather than the other? This is a question of preferences. In comparison to state court litigation, the parties' broad control over the proceedings is held to be one of the greatest advantages of arbitration.<sup>10</sup> However, the extent and the scope of this control might significantly differ depending on whether the parties submit their dispute to ad hoc or institutional arbitration.

Ad hoc arbitration is where the arbitration mechanism is established specifically for the particular agreement or dispute.<sup>11</sup> This sort of arbitration offers the parties a great deal of flexibility and 'complete control of every aspect of the procedure to be followed'.<sup>12</sup> However, as a result of the enhanced role of party control, ad hoc arbitration strongly depends on the parties' willingness to co-operate.<sup>13</sup> If one party is trying to obstruct the proceedings (e.g. fails to appoint an arbitrator or challenges the independence or impartiality of an arbitrator), the solution of the deadlock situation usually requires the intervention of a state court. Accordingly, the effectiveness of ad hoc arbitration is strongly dependent on 'an adequate judicial system at the place of arbitration', which provides proper and prompt assistance, if needed.<sup>14</sup> Furthermore, in ad hoc arbitration, it might be difficult to establish the procedural rules. If the parties do not want, or are not able, to agree upon the procedures, the default rules of the law of the arbitral seat are always available. However, those rules are usually very general in their terms and need to be supplemented by more detailed rules. As a result, the arbitral tribunal will have a decisive role in the determination of procedural matters, which makes the arbitration somewhat unpredictable.<sup>15</sup>

In comparison, [i]nstitutional arbitration is where parties submit their disputes to an arbitration procedure, which is conducted under the auspices of or administered or directed by an existing

<sup>9</sup> See Nigel Blackaby, Constantine Partasides, Alan Redfern, J. Martin H. Hunter, *Redfern and Hunter on International Arbitration* (5th edn, Oxford University Press 2009, Oxford) 365, para 6.08.

<sup>10</sup> Varga István, *Beweiserhebung in transatlantischen Schiedsverfahren. Eine Suche nach Kompromissen zwischen deutscher und US-amerikanischer Beweisrechtstradition* (Nomos, Baden-Baden / CH Beck, München 2006) 35.

<sup>11</sup> Julian M. Lew, Loukas A. Mistelis, Stefan Michael Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 32, para 3-5.

<sup>12</sup> Julian D.M. Lew, *Applicable Law in International Commercial Arbitration. a Study in Commercial Arbitration Awards* (Oceana Publications 1978, New York) 33, para 62.

<sup>13</sup> See Blackaby, Partasides and others (n 9) 53-54, paras 1.155-1.157.

<sup>14</sup> See Frank-Bernd Weigand, *Practitioner's Handbook on International Commercial Arbitration* (2nd edn, Oxford University Press 2009, Oxford) 65-66, para 1.178.

<sup>15</sup> See Michael W. Bühler, Thomas H. Webster, *Handbook of ICC Arbitration. Commentary, Precedents, Materials* (5th edn, Sweet & Maxwell 2005, London) 198, para 15-6.

institution'.<sup>16</sup> One of the biggest advantages of institutional arbitration is that, by opting for an arbitral institution, a whole set of pre-fabricated rules is automatically incorporated into the parties' arbitration agreement.<sup>17</sup> This means that the parties do not need to agree upon each and every procedural detail. In addition, arbitral institutions, being themselves business organisations and determined to further the resolution of disputes between business organisations, attach great importance to efficiency. Accordingly, institutional rules are designed to provide for a solution of all situations that might jeopardise the efficiency of the arbitral proceedings. This means situations where the intervention of a third party is necessary to break a deadlock in the procedure: if one party fails to appoint an arbitrator, the institution will appoint the arbitrator for that party; if one party files a challenge to an arbitrator, the institution will decide whether or not to grant that challenge, etc.<sup>18</sup> Thanks to these institutional mechanisms, parties do not necessarily need to resort to a state court for assistance. Besides the pre-fabricated arbitration rules, established and regularly revised by experienced practitioners, arbitral institutions offer the administrative services of a well-trained staff. This staff 'helps to run the proceedings as smoothly as possible'<sup>19</sup> and, through a wide range of services (e.g. appointment and removal of arbitrators, scrutiny of the award), assures the quality of the arbitration and the enforceability of the award. Hence, institutional arbitration is more predictable and usually more efficient than ad hoc arbitration.<sup>20</sup>

Efficiency, predictability and quality have their price, though, both in a literal and in a metaphorical sense. Even though there are significant differences between the pricing policies of arbitral institutions,<sup>21</sup> institutional arbitration is necessarily more expensive than *ad hoc* arbitration. An institution will always charge a fee for its administrative services in addition to the remuneration of arbitrators. Furthermore, efficiency and predictability require fixed rules and significant powers of the institution which may be applied against the parties' common intentions, if necessary. Institutional arbitration is therefore less flexible and more exposed to the danger of turning into 'bureaucratic machinery'.<sup>22</sup> In extreme cases, institutional arbitration may resemble state court litigation rather than the prototype of arbitration (ad hoc arbitration with one arbitrator, designed for one single dispute).<sup>23</sup> If one takes a look at the Rules of Proceedings of the HCCI Arbitration Court, he will find a rather detailed set of regulations, which has not only been inspired by the

<sup>16</sup> Lew, Mistelis, Kröll (n 11) 32, para 3-6.

<sup>17</sup> See Blackaby, Partasides and others (n 9) 55-56, paras 1.161-1.162.

<sup>18</sup> See Jens-Peter Lachmann, *Handbuch für die Schiedsgerichtspraxis* (3rd edn, Verlag Dr. Otto Schmidt 2008, Köln) 120, para 419.

<sup>19</sup> Weigand (n 14) 67, para 1.180.

<sup>20</sup> See Born (n 1) 151.

<sup>21</sup> E.g. the LCIA applies hourly rates (see the actual Schedule of Arbitration Costs of the LCIA, effective as of 8 July 2011, available at: <[http://www.lcia.org/Dispute\\_Resolution\\_Services/LCIA\\_Arbitration\\_Costs.aspx](http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Costs.aspx)> accessed 10 December 2012) while the ICC calculates the administrative expenses and the arbitrators' fee on the basis of the value in dispute (see Appendix III – Arbitration Costs and Fees of the ICC Rules 2012).

<sup>22</sup> Weigand (n 14) 67, para 1.181.

<sup>23</sup> See Ujlaki László, 'Az állandó választottbíróóság rendhagyó jegyei' [1997] 52 (2) *Jogtudományi Közlöny*, 79-83, 79.

UNCITRAL Arbitration Rules<sup>24</sup> but, at several points, also by the Hungarian Code of Civil Procedure.<sup>25</sup> At first sight, the ICC Rules are less detailed and generally held to 'provide little more than a framework for the conduct of the proceedings.'<sup>26</sup> Nevertheless, how the ICC Court administers arbitral proceedings is, in comparison to other institutional arbitrations (e.g. LCIA or DIS arbitration), more bureaucratic and formalised. This follows from the fact that ICC arbitration is not merely administered but even supervised by the institution.<sup>27</sup>

All in all, both ad hoc and institutional arbitration have their benefits and drawbacks, and the features of institutional arbitration strongly depend on which institution the parties have selected. It is, therefore, a matter of taste which type of arbitration and which institution the parties find the most attractive. While ad hoc arbitration is more flexible and gives more room for party autonomy, institutional arbitration is more predictable, convenient and efficient. It is up to the parties to make their choice. However, once they have made their choice, they will have to live with the consequences of their decision.

### III The Contractual Nature of the Relationship between the Parties and the Arbitral Institution

The question of the legal nature of the relationship between the parties and the institution is often raised in the context of liability issues.<sup>28</sup> Indeed, one of the most important implications of the

<sup>24</sup> See Komáromi Péter, 'A választottbíróóság Eljárási Szabályzata és az UNCITRAL Arbitration Rules kapcsolata' in *A Választottbíróóság hatvan éve 1949-2009. a Magyar Kereskedelmi és Iparkamara mellett szervezett Állandó Választottbíróóság fennállásának 60. évfordulója alkalmából 2009. november 19-20-án megtartott konferencia előadásai* (Magyar Kereskedelmi és Iparkamara 2009, Budapest) 29-35, 32ff and Szász Iván, 'A kamarai választottbíróóság a nemzetközi választottbíróóságok rendszerében' in *A Választottbíróóság hatvan éve 1949-2009. a Magyar Kereskedelmi és Iparkamara mellett szervezett Állandó Választottbíróóság fennállásának 60. évfordulója alkalmából 2009. november 19-20-án megtartott konferencia előadásai* (Magyar Kereskedelmi és Iparkamara 2009, Budapest) 65-74, 69.

<sup>25</sup> See, for instance, art 30 of the HCCI Rules ['Change in the Person of the Parties, Interpleading in the Proceedings'] versus s 61-62 of Act III of 1952 on the Code of Civil Procedure (hereinafter: HCCP). See also Csehi referring to the procedural provisions of the HCCI Rules as 'appearing in international comparison overly detailed and building on the principles of the procedural law of the continental, Germanic legal system'; Csehi Zoltán, 'A nemzetközi kereskedelmi választottbíróóság eljárására alkalmazandó szabályok meghatározása, [1995] 42 (7) Magyar Jog, 431-448, 442.

<sup>26</sup> Yves Derains, Eric A. Schwartz, *Guide to the ICC Rules of Arbitration* (2nd edn, Kluwer Law International 2005) 224. See also Born (n 1) 156.

<sup>27</sup> See W. Laurence Craig, William W. Park, Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications 2000, New York) 41-42; Bühler, Webster (n 15) 3-4, paras 0-8-0-12 and 11, para 1-1.

<sup>28</sup> See Christian Hausmaninger, 'ZPO § 594' in Hans W. Fasching (ed), *Kommentar zu den Zivilprozessgesetzen, §§ 577 bis 618 ZPO* (2nd edn, Manz 2007, Vienna) 459, para 129. Most institutional rules contain disclaimer clauses granting (partial) immunity to the institution. See s 44.2 DIS Rules; art 56 HCCI Rules; art 40 ICC Rules; art 31.1 LCIA Rules; art 8 Vienna Rules.

qualification of the relationship as a contract is the application of the general rules of contractual liability to any misconduct by the institution.<sup>29</sup>

For the existence of a legally binding contract, civil law systems require the parties' mutual consent.<sup>30</sup> Under the common law doctrine, the essential elements of a contract are mutual consent and consideration.<sup>31</sup> Mutual consent means the concurrence of the parties' wills, reached through the express or implied declaration of an offer and of a corresponding acceptance. 'A valuable consideration, in the sense of the law, may consist either of some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other'.<sup>32</sup>

Even though there is some ambiguity as to what constitutes an offer and an acceptance between the parties and the institution, the legal relationship between them is generally considered to be of a contractual nature.<sup>33</sup> It is hardly deniable that there is some kind of consensus (mutual consent) between the parties and the institution, which is directed at the provision of administrative services in aid of the arbitral proceedings. Even the common law requirement for consideration is met: the institution undertakes to administer the arbitration between the parties, and the parties enter into the obligation to pay an administration fee to the institution.<sup>34</sup> Put differently, each side promises to give the other side something of value, that is, a 'valuable consideration'.

Nevertheless, the qualification of the legal relationship between the parties and the institution is, even at this very general level (contract or not?), not without any controversy. In the Hungarian literature, there is a view according to which the relationship between the arbitral institution and

<sup>29</sup> See Blackaby, Partasides and others (n 9) 332-333, paras 5.61-5.64; Pierre A. Karrer, 'Responsibility of Arbitrators and Arbitral Institutions' in Laurence W. Newman, Richard D. Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (Juris Publishing 2004, New York, 479-493), 492-493; Franz T. Schwarz, Christian W. Konrad, *The Vienna Rules: a Commentary on International Arbitration in Austria* (Kluwer Law International 2009) 189-192, paras 8-028-8-036; Emmanuel Gaillard, John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 602-604, paras 1109-1110.

<sup>30</sup> See Jürgen Ellenberger, 'Introduction to § 145' in Palandt, *Bürgerliches Gesetzbuch, Beck'sche Kurz-Kommentare*, Vol. 7 (70th edn, CH Beck 2011, München) 157, para 1; Ernst A. Kramer, 'Introduction to § 145', in Franz J. Säcker (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Vol. 1 (5th edn, CH Beck 2006, München) (beck-online).

<sup>31</sup> See Rainer Wörlen, *Introduction to English Civil Law for German-Speaking Lawyers and Law Students*, Vol. 1 (4th edn, Alpmann und Schmidt Juristische Lehrgänge 2007, Münster) 125; Alexander Dörrbecker, Oliver Rothe, *Introduction to the US-American Legal System for German-Speaking Lawyers and Law Students*, Vol. 1 (2nd edn, Alpmann und Schmidt Juristische Lehrgänge 2005, Münster) 143.

<sup>32</sup> *Currie v. Misa* (1875) LR 10 Ex 153 (Exchequer Chamber); (1875-76) LR 1 App Cas 554 (House of Lords).

<sup>33</sup> See Schlosser (n 2) 382, para 498; Blackaby, Partasides and others (n 9) 332, para 5.61. See also, in respect of the ICC, Joachim Kuckenburg, 'Vertragliche Beziehungen zwischen ICC, Parteien und Schiedsrichter' in *DIS-Materialien Band 1*, 1997, 78-102, 80ff; Jesús Remón Peñalver, Virginia Allan, 'International Arbitration as an Analogue to the International Civil Society' in M. Á. Fernández-Ballesteros, David Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010) 1013-1024, 1019; and, in respect of the VIAC, Schwarz, Konrad (n 29) 9, para 1-021.

<sup>34</sup> See Jörg Risse, 'Schiedsklausel (institutionengebunden), Anmerkungen' in Michael Hoffmann-Becking, Peter Rawert (eds), *Beck'sches Formularbuch. Bürgerliches, Handels- und Wirtschaftsrecht* (10th edn, Verlag CH Beck 2010, München) (beck-online).

the parties is not a contract.<sup>35</sup> The author, László Ujlaki, points out that the relationship between adjudicative bodies (courts and other similar entities, including arbitral institutions) and parties is not regarded as a contract governed by private (civil) law anywhere in the world but as a legal relationship governed by (civil) procedural law and is, therefore, of public law nature.<sup>36</sup> Although his statement seems to have a universal character, claiming to apply to the whole world, Ujlaki bases his view on the legal background of the HCCI Arbitration Court. This must be kept in mind, since the HCCI Arbitration Court and its legal background (the Hungarian legislation on arbitral institutions) have some features not found in other institutions and jurisdictions.

The HCCI, being an economic chamber (*gazdasági kamara*) under Hungarian law, is a public corporation (*köztestület*): a self-governing, autonomous organisation with registered membership, similar to an association, the establishment of which is ordered by law.<sup>37</sup> Public corporations, hence economic chambers and the HCCI, are entrusted with public tasks and operate for public purposes. Pursuant to section 2 para 1 of the Hungarian Arbitration Act (HAA), economic chambers have exclusive right to establish arbitral institutions within the territory of Hungary, unless otherwise provided for by law. This means that, in Hungary, arbitral institutions may be established only if there is an explicit authorisation by law to that effect. From these legal provisions, it follows that the Hungarian State regards the operation of arbitral institutions as a public task that would otherwise be incumbent on the State.<sup>38</sup> For this reason Ujlaki emphasises that the arbitration-related activity of the HCCI and, accordingly, the adoption and modification of the HCCI Rules are based on an authorisation by law and carried out by the HCCI within the autonomy it enjoys as a public corporation. Against this background, it is not surprising that he arrives at the conclusion that the HCCI's activity and its relationship with the parties are not of a private (contractual) but of a public law nature.<sup>39</sup>

In my view, supported by the following considerations, these circumstances do not alter the fact that there is a contract between the parties and the arbitral institution, including the HCCI Arbitration Court.

First of all, the contract as a legal concept does not only exist in private law but also in public law. Therefore, even if the relationship had a public law nature, this would not exclude its qualification as a contract. There are also mixed contracts consisting of elements governed by different fields of law. One of the best examples is the arbitration agreement, which is composed of procedural and substantive (contractual) elements.<sup>40</sup>

<sup>35</sup> See Ujlaki (n 23) 80ff.

<sup>36</sup> See *ibid*, 81.

<sup>37</sup> See *1959. évi IV. törvény a Polgári Törvénykönyvről* [Act IV of 1959 on the Civil Code of Hungary (hereinafter: HCC)] s 65 paras 1-2 and *1999. évi CXXI. törvény a gazdasági kamarákról* [Act CXXI of 1999 on the Economic Chambers (hereinafter: Chambers Act)] s 3 para 1.

<sup>38</sup> This is confirmed by the Preamble of the Chambers Act, which provides that economic chambers shall pursue public tasks related to the economic sector in order to decrease the presence of the State in that sector.

<sup>39</sup> See Ujlaki (n 23) 80-82.

<sup>40</sup> See Lew, Mistelis, Kröll (n 11) 100, para 6-2.

Second, arbitration is a private form of dispute resolution. One of its main features is the equal status of all participants: none of them is in any way superordinate to the others. Not even the arbitral tribunal has coercive powers over the parties, even though the tribunal renders decisions binding upon the parties. Why would and should the arbitral institution, the administrative function of which is definitely subordinate to the adjudicatory function of the tribunal, have such powers and a superordinate ('public law') position over the parties?

Third, from the public law status of the HCCI (a public corporation performing public tasks), it does not follow that the HCCI can only enter into legal relationships governed by public law. The HCCI has legal personality under private law as well. In each case where it does not exercise public authority, the legal relationships triggered by its activity are of a private law and typically contractual nature. The performance of public tasks, hence the administration of arbitral proceedings, is not equal to the exercise of public authority. For instance, in the case of a company operating public utilities, no one would think that the relationship between the consumer and the company is not a contract. Public utility contracts are governed by private law, subject to certain limitations of public law nature that are imposed on the service providers in the public interest. However, these limitations do not alter the private law nature of the relationship.

Finally, as can be seen in other jurisdictions, the operation of arbitral institutions is not necessarily a public task incumbent on the State. Quite the contrary: the only public task incumbent on the State is the maintenance of a state court system and the exercise of a very limited judicial control over the arbitration as such, whether ad hoc or institutional. Arbitration is aimed at providing an alternative to the proceedings of state courts by establishing a system of private adjudication. In order for arbitration to be equivalent to state court proceedings, there is, indeed, a need for action by the State: the arbitral proceedings and the award must be recognised as having the same effect as the proceedings and judgments of state courts. However, the rest (i.e. the organisation of arbitration and its institutionalisation) should be left to the parties and civil society. That is what follows from the spirit and purpose of arbitration as an alternative *and* private dispute resolution method.

## **IV The Qualification of the Contract between the Parties and the Arbitral Institution**

If the legal relationship between the parties and the arbitral institution does qualify as a contract, the first challenge we are faced with is the qualification of the contract for choice-of-law purposes. Once we have found the (national) law governing the contract, which statutory rules of that law are directly applicable to the contract is a further question.

### **1 Qualification to Determine the Law Governing the Contract**

In order to find the law governing the contract between the parties and the institution (hereinafter also referred to as the institution's contract), the contract must be further classified. This is

especially the case under article 4 para 1 Rome I Regulation.<sup>41</sup> Article 4 para 1 determines the law applicable in the absence of the parties' choice of law to particular types of contracts. If a contract does not fit into any of the categories listed in article 4 para 1, or falls within several categories, it is governed by the law of the country where the party required to effect (i.e. fulfil) the characteristic performance of the contract has his habitual residence [see article 4 para 2].

Thanks to the very broad language of article 4 para 1 item b ('a contract for the provision of services'), the law applicable to the institution's contract can easily be determined, without having to analyse the nature of the services rendered by the institution or to resort to article 4 para 2. The contract is clearly 'a contract for the provision of services', with the arbitral institution being the service provider. Accordingly, pursuant to article 4 para 1 item b Rome I Regulation, the institution's contract is governed by the law of the state where the institution is located,<sup>42</sup> unless there is another country to which the contract is manifestly more closely connected.<sup>43</sup>

There is only one question left: is the Rome I Regulation applicable to the institution's contract?<sup>44</sup> Pursuant to article 1 para 2 item e, arbitration agreements and choice-of-court agreements are excluded from the scope of the Regulation. The contract between the parties and the arbitral institution is neither an arbitration agreement nor a choice-of-court agreement. These agreements are excluded from the scope of the Regulation because they are already governed by international conventions and are a matter of international civil procedure rather than a question of the conflict of laws of contracts. Accordingly, the exclusion of these agreements from the scope of the Regulation is warranted by their mixed nature (the close link between procedural and contractual issues).<sup>45</sup>

The above-cited arguments are specifically designed for jurisdiction clauses and are not applicable to the contract between the parties and the arbitral institution. This contract is nothing more than a contract for the provision of services: a contract primarily governed by substantive (contract) law, which has a procedural element only through its indirect implications on the arbitral proceedings.<sup>46</sup> Hence, there is nothing to prevent the application of the Rome I Regulation to the institution's contract.

<sup>41</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6 (hereinafter: Rome I Regulation).

<sup>42</sup> Given that the arbitral institution is required to fulfil the characteristic performance rather than the parties, whose main obligation consists in the payment of a fee, the application of art 4 para 2 Rome I Regulation would lead to the same result.

<sup>43</sup> See art 4 para 3 Rome I Regulation. The seat of arbitration, for instance, could be regarded as such a country.

<sup>44</sup> The same question is raised and left unanswered by Kuckenburg in respect of the 'legal predecessor' of the Rome I Regulation, that is, the Convention on the Law Applicable to Contractual Obligations, made in Rome, on 19 June 1980 (hereinafter: Rome Convention). See Kuckenburg (n 33) 80.

<sup>45</sup> See Section 3.1.4 of the Opinion of 13 September 2006 of the European Economic and Social Committee on the Proposal of the Rome I Regulation [OJ C 318, 23.12.2006, 56 (58)] and Section 4.5.3 of the Opinion of 29 January 2004 of the European Economic and Social Committee on the Green Paper on the conversion of the Rome Convention into the Rome I Regulation [OJ C 108, 30.4.2004, p. 1 (8)]. See also Francisco J. Garcimartín Alférez, 'The Rome I Regulation: Much ado about nothing?' [2009] 2 The European Legal Forum, 1-61-79 (1-64, para 17).

<sup>46</sup> See Joachim Münch, 'Introduction to §§ 1034ff' in Thomas Rauscher, Peter Wax, Joachim Wenzel, *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen*, Vol. III

As a matter of fact, the institution's contract could also be excluded from the scope of the Rome I Regulation by its close connection to the arbitration agreement. This is, however, not the case. Even though the contract is ancillary to the parties' agreement to arbitrate, it is a separate (independent) contract. There is, of course, an interrelationship between the arbitration agreement and the institution's contract: should one of them fail (e.g. become invalid), the other one should normally fail as well.<sup>47</sup> Still, some authorities point out that the invalidity of the arbitration agreement does not necessarily affect the validity of the institution's contract: any dispute about the jurisdiction of the arbitral tribunal is part of the parties' controversy referred to arbitration under the rules of the institution and, as such, falls within the scope of the institution's contractual duty to administer the parties' case.<sup>48</sup> In other words, the arbitration agreement may prove to be invalid but this does not automatically entail the invalidity of the contract between the parties and the institution. The institution's contract is separable from the arbitration agreement and should, therefore, be subject to a choice-of-law analysis separate from that of the arbitration agreement.<sup>49</sup> Accordingly, the contract between the parties and the institution should not be excluded from the scope of the Rome I Regulation by the mere fact that it is (inter)related or ancillary to the arbitration agreement.

Outside the temporal scope of application of the Rome I Regulation,<sup>50</sup> it will depend on the applicable choice-of-law rules whether the determination of the applicable law requires a qualification going beyond the conclusion that the relationship between the parties and the institution is a contract for the provision of services.<sup>51</sup> The few authorities addressing the issue of the law governing the institution's contract agree that the law of the seat of the institution should apply, irrespective of whether the choice-of-law rules of the Rome I Regulation (or its predecessor, the Rome Convention) or the choice-of-law rules of a domestic law are applicable.<sup>52</sup>

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(3rd edn, CH Beck 2008, München) (beck-online). See also Christian Hausmaninger, 'ZPO § 587' in Hans W. Fasching, *Kommentar zu den Zivilprozessgesetzen, §§ 577 bis 618 ZPO* (2nd edn, Manz 2007, Vienna) 289-290, paras 267 and 270.

<sup>47</sup> See Hausmaninger, ZPO § 587 (n 46) 290-291, para 272.

<sup>48</sup> See Schlosser (n 2), 382, para 498, citing the case *Cekobanka v. CCI* (Tribunal de grande instance de Paris, 8 October 1986) [1987] 3 Rev. Arb. 367-368. See also Kuckenburg (n 33) 81.

<sup>49</sup> See Hausmaninger, ZPO § 587 (n 46) 297-298, para 299.

<sup>50</sup> The Regulation is applicable in the Member States, except Denmark, to contracts concluded after the entry into force of the Regulation (17 December 2009) [see art 1 para 4 and Recitals 44 to 46 of the Regulation and Commission Decision of 22 December 2008 on the request from the United Kingdom to accept Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (OJ L 10, 15.1.2009, 22).

<sup>51</sup> See, for instance, prior to the entry into force of the Rome I Regulation, s 25 item f and s 26 para 2 of the *1979. évi 13. törvényerejű rendelet a nemzetközi magánjogról* [Hungarian Private International Law Act (Law-Decree No. 13 of 1979 on Private International Law)] contained different regulations as to the two basic types of contracts for services (*megbízási szerződés* and *vállalkozási szerződés*, which have more or less the same characteristics as the *Dienstvertrag* and the *Werkvertrag* under German law). These old provisions are still applicable to contracts concluded before 17 December 2009, insofar as the 1980 Rome Convention does not apply.

<sup>52</sup> See Kuckenburg (n 33) 80; Schlosser (n 2) 383, para 498; Klaus Lionnet, Annette Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit* (3rd edn, BOORBERG 2005, Stuttgart–München–Hannover–Berlin/Weimar–Dresden) 196. See also *SNF v. CCI*, (Cour d'appel de Paris, 22 January 2009) [2009] XXXIV Y.B. Comm. Arb. 263-268, 265.

## 2 Qualification to Find the Directly Applicable Rules of the Governing Law

There is no legal system on earth that would contain specific rules for the institution's contract.<sup>53</sup> Hence, there is a need for further qualification in order to find the rules of the applicable law directly governing the issues not settled by the parties (default rules). Similarly, there might be mandatory provisions of the governing law, applicable only to certain but not all types of contracts, which must also be identified to make sure that the institution's contract, or a certain provision thereof, is valid.

Under German law, the contract between the parties and the institution (*Administrierungsvertrag* or *Schiedsorganisationsvertrag*) is regarded either as a *Geschäftsbesorgungsvertrag* ('a contract for the management of the affairs of another'),<sup>54</sup> that is, a subcategory of *Dienstvertrag* ('service contract') or *Werkvertrag* ('contract to produce a work'),<sup>55</sup> or as a mixed or *sui generis* type of contract.<sup>56</sup> Under French law, the contract between the parties and the institution is a mixed contract, uniting the characteristics of a *mandat* and of a *contrat d'entreprise* (i.e. of an agency contract and of a contract for the provision of services).<sup>57</sup> Under Hungarian law, it would be a *megbízási szerződés* ('agency contract') or a *vállalkozási szerződés* ('contract for professional services').<sup>58</sup> Even though the issue has not yet been specifically addressed in the Hungarian case law and literature, it can be predicted that a Hungarian court would regard the contract as an atypical (*sui generis*) contract or a subcategory of *megbízási szerződés*. Similarly, under Austrian law, the institution's contract (*Schiedsorganisationsvertrag* or *Administrierungsvertrag*) is considered to be either a contract for the provision of services (*Werkvertrag mit Geschäftsbesorgungselementen*)<sup>59</sup> or 'a contractual relationship *sui generis*, as it embraces elements of various types of contracts, which can be differentiated by the different services performed.'<sup>60</sup>

<sup>53</sup> See Hausmaninger, ZPO § 587 (n 46) 288, para 264.

<sup>54</sup> See Schlosser (n 2) 382, para 498.

<sup>55</sup> See s 675 para 1 of the German Civil Code (hereinafter: GCC). The *Dienstvertrag* and the *Werkvertrag* are regulated in s 611ff and a 631ff GCC, respectively. The English translation of the terms is based on the official English translation of the GCC available on the homepage of the German Federal Ministry of Justice at <[http://www.gesetze-im-internet.de/englisch\\_bgb/index.html](http://www.gesetze-im-internet.de/englisch_bgb/index.html)> accessed 11 November 2013.

<sup>56</sup> See Mark Wilke, *Prozessführung in administrierten internationalen Handelsschiedsverfahren: eine rechtsvergleichende Untersuchung der internationalen Schiedsordnung der AAA sowie der Schiedsordnungen der DIS und der ICC* (Univ., Diss. 2005, Augsburg) 18. See also Münch, Introduction to §§ 1034ff (n 46) para 68.

<sup>57</sup> See Kuckenburg (n 33) 86. The *mandat* and the *contrat d'entreprise* are regulated in Arts. 1984ff and 1779ff of the French Civil Code (*Code Civil*), respectively. See also Gaillard, Savage (n 29) 603, para 1110.

<sup>58</sup> The *megbízási szerződés* and the *vállalkozási szerződés* are regulated in s 474ff and s 389ff HCC, respectively. These types of contracts are very similar to those covered by the German legal terms *Dienstvertrag* and *Werkvertrag*, respectively. The English translation of the Hungarian terms is based on the English text of the HCC published in the electronic legal database *Complex* (Complex Kiadó 2012, Budapest).

<sup>59</sup> See, in reference to §§ 1002ff. and 1165ff of the Austrian Civil Code, Hausmaninger, ZPO § 587 (n 46) 288-289, paras 264 and 267.

<sup>60</sup> Schwarz, Konrad (n 29) 9, para 1-021 and 233, para 9-100. See also Hans Walter Fasching, 'Kostenvorschüsse zur Einleitung schiedsgerichtlicher Verfahren' [1993] *Juristische Blätter* (JBl) 545 (550); Kurt Heller, 'Die Rechtsstellung des internationalen Schiedsgerichts der Wirtschaftskammer Österreich', *Wirtschaftsrechtliche Blätter* (WBL), 1994, 105 (105).

If the rules governing the above-mentioned specific types of contracts do not provide otherwise, the general mandatory and default rules of contract law are applicable to the institution's contract.

## V Contracting Parties

In the foregoing, I have referred to the institution's contract mostly by denominating the two contracting sides: the parties and the arbitral institution.<sup>61</sup> Apart from the cases of extension of the contract to non-signatory third parties (i.e. to legal successors or assignees), it is very easy to identify who is bound by the institution's contract on the parties' side. It is always the parties to the arbitration agreement who enter into a contract with the institution.

Even though arbitral institutions are typically separate legal persons (entities), some of the institutions lack legal personality. If the arbitral institution is not a separate legal entity but a subdivision of the sponsoring organisation, the contract is not entered into by the parties and the subdivision directly responsible for the administration of arbitral proceedings but by the parties and the sponsoring organisation. For example, while the LCIA and the DIS are separate legal entities having full legal personality,<sup>62</sup> the ICC Court and the HCCI Arbitration Court are subdivisions of the ICC and the HCCI, respectively.<sup>63</sup> Therefore, with regard to LCIA or DIS arbitration, the LCIA or the DIS will be the contracting party, whereas in the case of ICC or HCCI arbitration, the parties will not enter into a contract with the ICC Court or the HCCI Arbitration Court but with the ICC or the HCCI itself.

## VI The Formation of the Contract between the Parties and the Arbitral Institution

The contract between the parties and the arbitral institution, like any other contract, is created by an offer and a corresponding acceptance. Beyond the qualification of the contract, the other big question mark hangs over the formation of the institution's contract. In the process leading

<sup>61</sup> See Hausmaninger, ZPO § 587 (n 46) 288, para 264.

<sup>62</sup> The LCIA is a not-for-profit company limited by guarantee and governed by English law (see 'Organisation' at <<http://www.lcia.org/LCIA/Organisation.aspx>> accessed 11 November 2013); see also Simon Nesbitt, 'LCIA Arbitration Rules 1998' in Loukas A. Mistelis (ed), *Concise International Arbitration* (Kluwer Law International 2010, 401-465) 401. The DIS is a registered association (*eingetragener Verein*) established under German law (see 'About the DIS' at <<http://www.dis-arb.de/en/57/content/ueber-die-dis-id46>> accessed 11 November 2013).

<sup>63</sup> In respect of the ICC, see *Cubic Defense Systems v. ICC* (Cour d'Appel de Paris, 15 September 1998), [1999] XXIV Y.B. Comm. Arb., 287-293, 290. See also Laurence Kiffer, 'Comments on the Paris Court of Appeal Decision in SNF v. International Chamber of Commerce' [2009] 26 (4) J Int'l Arb, 579-589, 581.

to arbitration under the auspices of an institution, and especially at the outset of the arbitral proceedings, there are several events that could possibly constitute an offer or an acceptance:<sup>64</sup>

- (i) the release (publication) of the arbitration rules by the institution;
- (ii) the conclusion by the parties of the arbitration agreement containing a reference to the arbitration rules of the institution;
- (iii) 8th submission of the request for arbitration;
- (iv) the service of the request for arbitration upon the respondent by the institution (typically by the secretariat);
- (v) the decision by the institution to set the proceedings in motion.

There are a number of authors holding that the release of the institutional rules is a binding offer, which is accepted by the parties' agreement to arbitrate under the rules of the institution.<sup>65</sup> Other authors are of the opinion that the release of the rules is only an invitation to make an offer (*invitatio ad offerendum*). Accordingly, the filing of the request for arbitration is the offer, and setting the proceedings in motion by the institution is an (implied) acceptance.<sup>66</sup> Interestingly, the idea that the service of the request for arbitration upon the respondent could serve as an acceptance is not very popular, even though there is case law stating that the institution's contract is formed upon the filing of the request for arbitration as an offer and the service of the request for arbitration as an acceptance.<sup>67</sup>

The essential elements of an offer to contract are defined by the law governing the contract. This is, in our case, the law of the seat of the arbitral institution. Generally speaking, the offer is a proposal for concluding a contract, which is sufficiently definite and indicates the intention of the offering party to be bound in the event of acceptance.<sup>68</sup> Even though the offer is usually addressed to one or more specific persons, in most jurisdictions an offer can be directed at an indefinite group of persons (at the public) as well (*invitatio ad incertas personas*).<sup>69</sup> When

<sup>64</sup> See Kuckenburg (n 33), 80.

<sup>65</sup> See Lionnet, Lionnet (n 52), 196-197; Peter Schlosser, 'Introduction to § 1025' in Martin Jonas, Friedrich Stein, *Kommentar zur Zivilprozessordnung*, Vol. 9 (22nd edn, Mohr Siebeck 2002, Tübingen) (beck-online); Andreas Reiner, *Handbuch der ICC Schiedsgerichtsbarkeit: die Verfahrensordnung des Schiedsgerichtshofes der Internationalen Handelskammer unter Berücksichtigung der am 1.1.1988 in Kraft getretenen Änderungen* (Manz 1989, Vienna) 20; Gaillard, Savage (n 29) 602, para 1110.

<sup>66</sup> See Münch, Introduction to §§ 1034ff (n 46) para 69; Lachmann (n 18) 793, para 3509; Schlosser (n 2) 382, para 498; Hausmaninger, ZPO § 587 (n 46) 293, para 280.

<sup>67</sup> See the case *Cekobanka v. CCI* (Tribunal de grande instance de Paris, 8 October 1986), [1987] 3 Rev. Arb., 367-368, cited in Kuckenburg (n 33) 82. See also Heller (n 60) 105ff.

<sup>68</sup> See art 2.1.2 ['Definition of Offer'] UNIDROIT Principles of International Commercial Contracts 2010 (hereinafter: UNIDROIT Principles), art 14 para 1. *United Nations Convention on Contracts for the International Sale of Goods, done at Vienna*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) (hereinafter: CISG); Jan Busche, '§ 154' in Franz Jürgen Säcker (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. I* (6th edn, CH Beck, 2012 München) (beck-online); Eörsi Gyula, *Kötelmi jog. Általános rész* (25th edn, Nemzeti Tankönyvkiadó 2010, Budapest) 80-81.

<sup>69</sup> See Busche, BGB § 145 (n 68), para 17; Hans-Werner Eckert, BGB § 145, in Heinz Georg Bamberger, Herbert Roth, *Beck'scher Online-Kommentar zum BGB* (24th edn, CH Beck 2012, München) (updated on August 1, 2012) ☞

releasing its rules of proceedings, the arbitral institution does not address one or more specific persons but an indefinite group of persons, that is, everyone who wants to have disputes arbitrated under the auspices of the institution. Whether this action of the institution is an offer or an invitation to make an offer is a matter of interpretation.<sup>70</sup> However, both qualifications have their weaknesses.

The first theory, holding that the release of the arbitration rules is an offer and the conclusion of the arbitration agreement constitutes the acceptance, is only workable if the release of the rules can be regarded as an offer made for an indefinite period of time. Normally, if the offeror does not fix a deadline for acceptance, the offer must be accepted within a reasonable time,<sup>71</sup> and a late acceptance is only effective as an acceptance if the offeror is willing to accept it.<sup>72</sup> In other words, a late acceptance will not in itself result in the conclusion of the contract. This means that, eventually, it depends on the offeror whether the contract comes into existence or not.

Rules of arbitral institutions never contain a time for acceptance, that is, a deadline within which parties can agree to arbitrate under the respective rules. There are three ways to ‘convert’ the release of the rules into an offer made for an indefinite period of time:

- (i) re-interpreting the indefinite period into a fixed period of time (i.e. assuming that the institution has set an indefinite time for acceptance);
- (ii) qualifying the release of the rules and their constant availability to the public as a permanent(ly) (renewed) offer; or
- (iii) with regard to the circumstances, defining a reasonable time as an indefinite period of time.

All of these solutions are somewhat weird and artificial. A further problem is that the parties’ agreement to arbitrate under the rules of an institution can only be regarded as an acceptance if there is no need for the acceptance to reach the offeror. This is possible under German law, the CISG and the UNIDROIT Principles, if so required by applicable trade usages or if the notification

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(beck-online). See also art 14 para 2 CISG and Peter Schlechtriem, Ulrich G. Schroeter, ‘CISG art 14 Begriff des Angebots’ in Peter Schlechtriem, Ingeborg Schwenzer, *Kommentar zum Einheitlichen UN-Kaufrecht* (5th edn, CH Beck 2008, München / Helbing Lichtenhahn Verlag 2008, Basel) (beck-online); Hester Wattendorf, 2. Formation. Section 1: ‘Offer and Acceptance’ in Hugh Beale and others, *Casebooks on the Common Law of Europe. Contract Law* [Hart Publishing 2002, Oxford/Portland (Oregon)] 185-189.

<sup>70</sup> See Volker Kitz, ‘Teil 13.1 Vertragsschluss im Internet’ in Thomas Hoeren, Ulrich Sieber (eds), *Multimedia-Recht. Rechtsfragen des elektronischen Geschäftsverkehrs* (29th edn, CH Beck 2011, München) (beck-online); Othmar Jauernig, ‘BGB § 145’ in Othmar Jauernig, *Bürgerliches Gesetzbuch. Kommentar* (14th edn, CH Beck 2011, München) (beck-online).

<sup>71</sup> See, for example, s 147 para 2 GCC; s 211 para 2 HCC. See also Wattendorf (n 69) 208-211.

<sup>72</sup> Under the different laws, the exact consequences of a late acceptance are determined in different ways. For instance, under the CISG (art 21 para 2) and the UNIDROIT Principles (art 21 para 2), the offeror must explicitly accept the late acceptance for the contract to be concluded. Under German law, the offer expires and the late acceptance is a new offer (s 146 and s 150 para 1 GCC). Under Hungarian law, the offeror is no more bound by the offer (s 211 para 2 HCC). However, these differences do not alter the fact that a late acceptance is ineffective and thus in itself incapable of bringing the contract into existence.

of the acceptance has been waived by the offeror.<sup>73</sup> However, other laws<sup>74</sup> do not provide such an exception from the rule that the acceptance becomes effective upon receipt by the offeror.<sup>75</sup> Some authors have therefore taken a modified version of the first approach: while upholding that the release of the rules by the institution is the offer, they regard the filing of the request for arbitration as the acceptance.<sup>76</sup> Under this modified view, the parties, when entering into the arbitration agreement, undertake to submit disputes to the selected institution *vis-à-vis* one another (i.e. not yet towards the institution) and mutually authorise each other to accept the institution's offer by filing a request for arbitration on behalf of both of them.<sup>77</sup>

The second theory, which qualifies the release of the arbitration rules as an invitation to make an offer, has some drawbacks, too. Under this approach, the filing of the request for arbitration is an offer and the setting into motion of the proceedings by the institution is the acceptance. The biggest issue with this solution is that the acceptance is postponed until after the commencement of the arbitration and is left to the institution. As such, when entering into an arbitration agreement, the parties cannot be sure that the institution will accept their offer. Without having an obligation to do so, the institution would be basically free to accept or reject the parties' case.

## VII The Role of the Arbitration Rules

When entering into an agreement to arbitrate under the rules of an institution, the parties incorporate those rules into their arbitration agreement.<sup>78</sup> Accordingly, the arbitration rules become part of the arbitration agreement and substitute the parties' individual agreements on a range of different – mainly procedural – issues.<sup>79</sup> As article 2 item e UNCITRAL Model Law states, 'where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement.'<sup>80</sup> Hence, arbitration rules have a double function: on the one hand, they are contractual terms between the parties; on the other hand, they are procedural agreements of the parties, defining the procedures to be followed not only by the parties but also by the arbitrators.

<sup>73</sup> See s 151 para 1 GCC; art 18 para 3 CISG; art 2.1.6 para 3 UNIDROIT Principles. See also Lionnet, Lionnet (n 52) 197.

<sup>74</sup> See, for example, Hungarian law and French law. For the latter, see Kuckenburg (n 33) 83.

<sup>75</sup> For further critics to this first approach see Hausmaninger, ZPO § 587 (n 46) 291-292, paras 275-279.

<sup>76</sup> See Kuckenburg (n 33) 82-84; Born (n 1) 1614.

<sup>77</sup> See Born (n 1) 1614, note 120; Schlosser (n 2) 382, para 498.

<sup>78</sup> See Born (n 1) 1122. See also Alexander Jolles, Maria Canals de Cediell, 'Chapter 6 – Confidentiality' in Gabrielle Kaufmann-Kohler, Blaise Stucki, *International Arbitration in Switzerland: a Handbook for Practitioners* (Kluwer Law International 2004, 89-114) 95; Bommel van der Bend, Marnix Leijten, Marc Ynzonides, a *Guide to the NAI Arbitration Rules: Including a Commentary on Dutch Arbitration Law* (Kluwer Law International 2009) 9, 38.

<sup>79</sup> See Lionnet, Lionnet (n 52) 92, 159.

<sup>80</sup> See also s 9 para (2) HAA; s 4 para (3) EAA; s 1042 para 3 GCCP.

The role of the arbitration rules in relation between the parties and the institution is a more complicated issue. According to some authors, the rules of proceedings of arbitral institutions are in fact standard business terms.<sup>81</sup> Pursuant to article 2.1.19 para 2 UNIDROIT Principles, '[s]tandard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party'. Other laws provide for a similar definition.<sup>82</sup> Indeed, arbitration rules are formulated unilaterally by the institution in advance for general and repeated use in a number of contracts, and in most cases they become part of the institution's contract without prior negotiation with the parties. However, an essential feature of the arbitration rules is that the parties can modify the rules to a large extent and the modifications are binding upon the institution.<sup>83</sup> For standard business terms, it is very unusual to grant the other party the power to unilaterally determine the terms of the contract by modifying the standard business terms.

Insofar as the arbitration rules allow the parties to deviate from, or supplement, the pre-established rules (e.g. by such explicit terms as 'unless otherwise agreed by the parties [...]'; '[...] as has been agreed in writing by the parties [...]' or 'the parties may agree on [...]'<sup>84</sup>), the parties' power to determine the terms of their contract with the institution derives from the arbitration rules themselves. Hence, the parties' power to adopt rules binding upon the institution is ultimately not unilateral but based on the prior consent of the institution. This means that, by exercising this power in the arbitration agreement or later, the parties do not deviate from the institutional rules but, in fact, follow them.

In other cases where the arbitration rules do not allow the parties to agree otherwise, the procedural rules established by the parties in deviation from the pre-fabricated rules can be subject to individual agreements between the parties and the institution and become part of the contract only in this way. As is well known from the law of standard business terms, individual agreements between the user and the other contracting party prevail over the standard terms.<sup>85</sup> In this case, the procedural rules agreed upon by the parties become part of the contract and binding upon the institution only if subsequently accepted by the institution.

Consequently, the parties' ample opportunities to determine the actual terms of their contract with the institution do not undermine the qualification of the institutional rules as standard business terms.

<sup>81</sup> See, implicitly, Schlosser (n 2) 474, para 631 and 404, para 526; explicitly, Lachmann (n 18) 343, para 1377. See also judgment of the BGH (*Bundesgerichtshof*; German Federal Supreme Court) of 14 April 1988, Case No. III ZR 12/87 (Stuttgart), *BGHZ* 104, 178, 181 (juris, para 31).

<sup>82</sup> See, for example, s 305 para 1 GCC; s 205/A para 1 HCC.

<sup>83</sup> See Jean-François Poudret, Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, Thomson Sweet & Maxwell 2007 / Schultess 2002) 70, para 96.

<sup>84</sup> See, for example, Arts. 5.4, 14.1-14.2, 15.1, 15.7, 16.1, 17.1 and 17.3, 19.1 and 19.4, 21.1-21.2, 22.1, 25.1, 28.2-28.5 and 30.1 LCIA Rules. All other institutional rules (ICC, DIS, HCCL, Vienna Rules) contain similar provisions.

<sup>85</sup> See, for example, art 2.1.21 ['Conflict between Standard Terms and Non-standard Terms'] UNIDROIT Principles; s 205/C HCC; s 305b GCC.

## VIII The Contents of the Contract between the Parties and the Arbitral Institution

Once it has been formed, the contents (i.e. the terms) of the institution's contract are determined by the institutional rules, the parties' arbitration agreement, the law applicable to the contract (i.e. the law of the seat of the institution) and, regarding the institution's procedural competences, by the *lex arbitri* (in general, the law of the seat of arbitration).<sup>86</sup> The characteristic obligation arising out of the contract is imposed on the institution: the institution is obliged to provide administrative services in support of a dispute resolution process between the parties. From another point of view, upon entering into a contract with the institution, the parties transfer or grant powers to the institution. The purpose of the transfer of powers is to relieve the parties and the arbitrator(s) from the administrative burdens associated with the arbitral proceedings, to entrust a professional organisation with the administrative tasks and to make the dispute resolution more efficient and predictable. In the following, I will only focus on the services and powers of the institution (i.e. on the characteristic performance) and will not go into the duties of the parties.

The most typical services and powers undertaken by or transferred (granted) to the arbitral institution are the following:<sup>87</sup>

- (i) selecting (appointing) and confirming arbitrators, including the power to determine the number of arbitrators (serving as an appointing authority);<sup>88</sup>
- (ii) resolving challenges to arbitrators and removing arbitrators (upon challenge/request or *ex officio*);<sup>89</sup>
- (ii) designating the place of arbitration;<sup>90</sup>
- (iv) fixing the initial language of the proceedings (until the arbitral tribunal finally determines the language of the arbitration);<sup>91</sup>

<sup>86</sup> See Hausmaninger, ZPO § 587 (n 46) 298, para 299.

<sup>87</sup> See Born (n 1) 149. See also Lionnet, Lionnet (n 52) 196; Schlosser (n 2) 460, para 600; Hausmaninger, ZPO § 587 (n 46) 294, para 286.

<sup>88</sup> See Arts. 11-13 ICC Rules 2012; art 18 HCCI Rules; s 12, 14 and 17 DIS Rules; art 14 paras 2-5 Vienna Rules. As opposed to arbitration under the rules of other institutions, in LCIA arbitration it is always the institution that appoints the arbitrator(s) (see Arts. 5.5-5.6 LCIA Rules).

<sup>89</sup> See Arts. 10-11 LCIA Rules; Arts. 14-15 ICC Rules 2012; Arts. 19-20 HCCI Rules; s 18 DIS Rules; Arts. 16-18 Vienna Rules.

<sup>90</sup> See art 16.1 LCIA Rules; art 18 ICC Rules 2012. Under the HCCI Rules, the seat of arbitration is always Budapest (Hungary) (see art 7 para 1). Under the DIS Rules, failing any agreement by the parties, the arbitral tribunal determines the place of arbitration (see s 21.1). Under the Vienna Rules, unless otherwise provided for by the parties, the place of arbitration is Vienna (see art 2 item a).

<sup>91</sup> See art 17.2 LCIA Rules; art 8 para 3 HCCI Rules. Pursuant to art 6 Vienna Rules, the languages of the correspondence with the institution are German or English and the institution has no discretion to decide between the two. The ICC Rules 2012 and the DIS Rules do not contain any special provisions on the determination of the initial language of the arbitration (see art 20 ICC Rules 2012; s 22 DIS Rules).

- (v) fixing the cost (fee) (advance), including the fees payable to the arbitrators, and ordering advance (interim) or final payments;<sup>92</sup>
- (vi) fixing or modifying time limits.<sup>93</sup>

Some arbitration rules, for example, the ICC Rules, grant the institution such unique powers as the determination of the *prima facie* existence of an arbitration agreement, the consolidation of two or more arbitrations, the approval of the Terms of Reference or the scrutiny of the award.<sup>94</sup> With regard to these specialties, ICC arbitration is often described as ‘supervised arbitration’, in comparison to ‘administered arbitration’ under other rules which do not grant the institution such extensive supervisory powers over the parties’ case.<sup>95</sup> Indeed, all institutions have some kind of peculiarity. The LCIA, for example, reserves the exclusive right to appoint the arbitrators for the parties ‘with due regard for any particular method or criteria of selection agreed in writing by the parties.’<sup>96</sup> In contrast, the HCCI Rules do not even refer to the notion of confirmation of arbitrators.<sup>97</sup> There is a need for approval by the institution only if a party wants to appoint an arbitrator who is not included in the roll of arbitrators of the HCCI Arbitration Court.<sup>98</sup>

Most of the above-listed powers are of a subsidiary nature: the institution comes into play only if one or both of the parties have failed to arrange for a particular issue (e.g. to determine the place of arbitration) or to perform a procedural act (e.g. to appoint an arbitrator).

In *ad hoc* arbitration, under the statutory rules of the *lex arbitri*, the overwhelming majority of these powers are specifically granted to the parties: it is the parties who may select and remove the arbitrators, designate the place and the language of arbitration, etc. Other powers emerge from the parties’ general power to establish the procedures to be followed by the tribunal (e.g. the setting of procedural time limits or the establishment of procedures for the constitution of the tribunal, the challenge to arbitrators, the handling of advance and final payments or the rendering of an award). If the parties do not exercise these powers, it is either the tribunal or a state court that has to resolve the situation (e.g. by designating the place of arbitration or appointing an arbitrator). Finally, the parties may also decide to transfer or grant the above-mentioned powers to a third party, for instance to an arbitral institution, instead of exercising those powers

<sup>92</sup> See Arts. 24 and 28 and the Schedule of Arbitration Costs of the LCIA Rules; Arts. 36-37 and Appendix III ICC Rules 2012; art 12 and Regulation on Fees of the HCCI Rules; s 7, 11 and 40 and Appendix to s 40.5 of the DIS Rules; Arts. 31-36 and Annex I [‘Schedule of Arbitration Costs’] of the Vienna Rules.

<sup>93</sup> See art 9.3 LCIA Rules; Arts. 23(2), 30, 38(2) and art 6 para 4 of Appendix V of the ICC Rules 2012; Arts. 18(5), 25(2), 41(3) and 45(3) HCCI Rules; s 7.2, 11.2, 12.1 and 13.2 DIS Rules; art 13 para 1 Vienna Rules.

<sup>94</sup> See Arts. 6(3)-(6), 10, 23(3) and 33 ICC Rules 2012. In the Vienna Rules, such *prima facie* powers are not expressly specified but, according to Schwarz and Konrad, they appear to be implied. See Schwarz, Konrad (n 29) 223-225, paras 9-074–9-079.

<sup>95</sup> See Craig, Park, Paulsson (n 27) 40-42; Bühler, Webster (n 15) 2, para 0-7, 3-4, paras 0-8–0-12 and 11, para 1-1.

<sup>96</sup> See art 5.5 LCIA Rules.

<sup>97</sup> See Arts. 4, 18 and 27 HCCI Rules.

<sup>98</sup> See art 18 para 1 third sentence HCCI Rules.

themselves, or leaving the decision to the arbitral tribunal or a state court.<sup>99</sup> This follows from the principle of party autonomy.

In all of the above-mentioned typical or atypical powers of arbitral institutions, it is common that these powers are basically of an administrative nature<sup>100</sup> and are directly related to the particular arbitration initiated and pending before the institution. Sometimes a distinction is drawn between the procedural acts (powers) (e.g. determination of the number of arbitrators, the place of arbitration or the language of the procedure) and the administrative services of the institution (e.g. service of documents, the handling of cost advances).<sup>101</sup> However justified this distinction may seem, it does not alter the fact that both the procedural powers and the administrative services are of contractual origin. It is another issue that the consequences of a breach by the institution of these duties might differ depending on the procedural or administrative nature of the duty concerned (procedural law or substantive law consequences).<sup>102</sup> In my opinion, the one does not necessarily exclude the other: for the omission of a procedural act by the institution, the liability for damages caused by the institution seems to be appropriate as well. The contractual origin of the procedural duties provides a proper basis for the institution's liability for damages.

## IX Conclusion

The arbitration agreement is often said to be the foundation of arbitration.<sup>103</sup> While this is undoubtedly true for ad hoc arbitration, the parties' agreement to arbitrate is not the only one but one of the foundation stones of institutional arbitration. Institutional arbitration is founded on the contract between the parties and the institution. For that contract, the arbitration agreement is a necessary but not sufficient condition. In order to have institutional arbitration, the institution's consent is essential as well.

Nowadays, it is generally recognised that the legal relationship between the parties and the arbitral institution is of a contractual nature. In general terms, it is a contract for the provision of services: the institution provides administrative services in support of the arbitral proceedings and the parties pay an administration fee for those services. The contract falls within the scope of the Rome I Regulation and is basically governed by the law of the seat of the institution. Since the institution's activities carried out under the contract often have a direct implication on the arbitral proceedings, the provisions of the law governing the arbitration (*lex arbitri*) are also

<sup>99</sup> See Schlosser (n 2) 460, para 600.

<sup>100</sup> See Gaillard, Savage (n 29) 603, para 1110; Karrer (n 29) 492.

<sup>101</sup> See Hausmaninger, ZPO § 587 (n 46) 294, paras 286-287.

<sup>102</sup> A procedural law consequence may be the possibility to resort to court in order to have the 'missing' arbitrator appointed, if the institution fails to make the appointment for a party. A substantive law consequence may be the institution's liability, e.g. for the negligent handling of cost advances.

<sup>103</sup> See Lew, Mistelis, Kröll (note 11) 99, para 6-1.

relevant to the contract. The relationship between the parties and the institution is in all jurisdictions highly under-regulated. As such, there is generally a wide room for self-regulation in this area. One means of self-regulation is the use of pre-fabricated arbitration rules. These rules are multi-functional: they are contractual terms and procedural agreements between the parties but also contractual terms – standard business terms – between the parties and the institution; moreover, they are binding upon the arbitral tribunal as well.

As to the formation of the contract between the parties and the institution, there are different theories. In most cases, it is not relevant which theory is applied. The differences between the various theories become visible if there is a dispute between one or both of the parties and the institution on the exact terms of the contract (e.g. because the arbitration rules have been changed after the parties entered into the arbitration agreement) or the institution denies to accept, or proceed with, the case (e.g. because in the arbitration agreement the parties agreed to deviate from the pre-fabricated institutional rules). In these cases, it can be of utmost importance when exactly the contract was formed, since after contract formation the contract is binding upon both contracting sides (i.e. the parties *and* the institution) and the terms of the contract can only be modified by their mutual consent.

From the contractual nature of the relationship between the parties and the institution and, in a broader context, from the private (law) nature of institutional arbitration, it also follows that the sole basis for the institution's duty to accept the parties' case is the institution's contract and that there is certainly no constitutional right of access to an arbitral institution.





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