Summary

Annamária Csilla Gyüre:
Green Urban Management in the Light of Ecological Challenges 3

Géza Balázs:
The Symbolic Hungarian "Language Act" 13

Csaba Cservák:
On the Dogmatic Aspects of Free Speech in Media Law 23

Boglárka Lilla Schlachta:
Certain Questions of the Judicial Liability
in a Legal Historian Perspective 31

Máté Giovannini:
The a *Semet Ipso Exigere* Obligation of the *Negotiorum Gestor*
Concerning Interest Payment 41

Edina Lajos:
Law and Morality in the Context of the Ombudsman 57

Judit Balassa:
Religious Freedom in the System of Fundamental Rights 67

Balázs Vesszős:
The Language of Law in Intercultural Context
in the Light of British and American English 75

Ferenc Norbert Sipos:
Our New Old Friend:
Can Latin Become the Common Legal Language Again in Europe? 85

Csaba Cservák:
Human Rights and Legitimacy 91

Green Urban Management in the Light of Ecological Challenges

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The number of people moving to cities has been growing steadily over the past decades, with the population of cities set to increase by around 350 million every five years over the next decades, while the absolute number of non-urban people is projected to fall. This also means that rural depopulation will begin in the less developed parts of the world, with the proportion of the urban population likely to exceed 65% by 2050. This process, combined with climate change, will place increasing pressure on cities and make them increasingly challenging to manage. Urban populations will be the ones to suffer. The latest IPCC (Intergovernmental Panel on Climate Change) report published in March 2023 summarises the projected impacts of climate change, with key findings for cities. Climate change is having a detrimental impact on critical infrastructure, and extreme weather events and heat waves are intensifying in cities, which is also worsening air quality. In this paper, I will outline the issue of sustainable urban development and a possible way forward in the context of ecological sustainability, taking into account the limits of scope.
Keywords: *climate change, green cities, sustainability, smart city*

The basics

The number of people moving to cities has been growing steadily over the past decades, with the population of cities set to increase by around 350 million every five years over the next decades, while the absolute number of non-urban people is projected to fall. This also means that rural depopulation will begin in the less developed parts of the world, with the proportion of the urban population likely to exceed 65% by 2050.[1] This process, combined with climate change, will place increasing pressure on cities and make them increasingly challenging to manage. Urban populations will be the ones to suffer.[2]

1 Kovács Kálmán, *Okos városok és az okos közszolgáltatás és városfejlesztés*, Dialóg Campus, 2019. 11–12.
2 Also related: Ádám Boóc, Megjegyzések a COVID-19 vírus hatásairól a magyar szerző-

According to a 2015 survey in Hungary, 72% of respondents feel that summers are getting hotter, 69% experience sudden temperature swings, while 57% experience increasingly violent thunderstorms and windstorms.[3]

The latest IPCC (Intergovernmental Panel on Climate Change) report[4] published in March 2023 summarises the projected impacts of climate change, with key findings for cities. Climate change is having a detrimental impact on critical infrastructure[5], and extreme weather events and heat waves are intensifying in cities, which is also worsening air quality.[6]

The structure of cities increases local warming, leading to urban heat islands, and urbanisation contributes to damaging rainfall and strong wind storms. The result of all this can be observed in the intensity of flash floods.[7]

Climate change impacts particularly affect economically and socially marginalised urban dwellers, such as those living in slums.[8] Research shows that climate change is adversely affecting people's physical and mental health worldwide and contributing to humanitarian crises where climate hazards interact with high levels of vulnerability among populations.[9]

In this paper, I will outline the issue of sustainable urban development and a possible way forward in the context of ecological sustainability, taking into account the limits of scope. The topic under consideration is the subject of further analysis, which this paper will serve as a basis for.

Sustainability and urban development

Sustainability can be understood as a resource management issue based on local conditions and characteristics - resources, opportunities, goals, urbanisation processes[10] etc. - in the service of intergenerational social well-

dési jogban, különös figyelemmel a vis maior fogalmára, *Glossa Iuridica* 7: különszám, 2020. 85–94.

3 Energy Club July 2015 survey of a nationally representative sample of 1600 people.

4 IPCC, Synthesis Report of The IPCC Sixth Assessment Report (hereafter AR6), available at: https://www.ipcc.ch/report/ar6/syr/ (7. 08. 2023).

5 Critical infrastructure is defined in the literature as those infrastructural elements that are essential for the functioning of a country and play a crucial role in maintaining an adequate level of national and international legal and public security, economic viability, environmental condition, health and administration, and other services (such as drinking water, wastewater services). Kovács [2019] 23–24.

6 AR6 15.

7 AR6 16.

8 AR6 16.

9 AR6 16.

10 Enyedi György, A városnövekedés szakaszai – újragondolva, *Tér és Társadalom,* 2011/1, 5–19.

being[11], while one of the keys to achieving it is the implementation of sustainable projects based on local initiatives.[12] Sustainable development requires resilient ecosystems and social and economic systems,[13] whose lack of resilience can easily lead to unsustainable conditions. Ecological resilience improves economic sustainability, but the reverse is rarely true.[14]

Once infrastructure, low-density urban form, institutional and social practices become familiar, accepted or difficult to change, they create lock-in phenomena.[15] The long-term effects of the lock-in process and urban growth are still poorly understood, but infrastructure development in cities continues without a detailed analysis of the interrelationships that may affect the achievement and feasibility of long-term sustainability goals.[16] At the same time, urban planning has the opportunity to develop synergies through careful planning of interventions and complex assessment of direct and indirect impacts.

Urban development policy is a multifaceted concept, with many different forms, from the objectives and strategies formulated, to the programmes and methods used, to the everyday development practices.[17]

Climate adaptation and urban sustainability are complementary concepts. Sustainable urban development separates green, blue and grey infrastructures, the long-term development of which can do much to prepare for ecological and economic challenges. These elements are considered below.

Green Infrastructure (GI) is primarily about the maintenance and use of natural areas and natural, near-natural infrastructure, which is not about repainting and transforming the built environment or covering it with artificial grass, but about sustainable, ecologically sound development. It also

11 Buzási Attila, Szalmáné Csete Mária, Fenntartható fejlődés és klímaváltozás – globális összefüggések lokális értelmezése, *Magyar Tudomány* 2018/9., 1349–1358.

12 Szlávik János, Lépések a fenntartható gazdálkodás irányába: Gondolatok Láng István és Kerekes Sándor Megalakult a Túlélés Szellemi Kör című vitairatához. *Magyar Tudomány* 2014/1., 99–108.

13 Also relates: Pónusz Mónika, Kolonics Patricia, Megosztásos gazdaság, *Glossa Iuridica*, 2020/1-2. 315–334.

14 Also related: Gyüre, Annamária Csilla, *Az éghajlatváltozás és a fenntarthatóság kapcsolatának jogi szempontú vizsgálata*, In: Csillik, Péter; Andó, Éva; Kovács, Róbert (szerk.) *Egymillió karakter a fenntarthatóságról* I. kötet, Budapest, Magyarország: Károli Gáspár Református Egyetem, Gazdaságtudományi, Egészségtudományi és Szociális Kar (2023) 237–275.

15 Romero-Lankao, Patricia et al, Urban Transformative Potential in a Changing Climate. *Nature Climate Change* 2014/9, 754–756.

16 Chester, Mikhail V. et al, Positioning infrastructure and technologies for low-carbon urbanisation, *Earth's Future* 2014/10, 533–547.

17 Árvai Anett, A városfejlesztési szakpolitikák terjedése: elméleti megközelítések, *Tér és Társadalom*, 2021/2, 7.

promotes multifunctionality, which means that the same piece of land can serve multiple functions and offer multiple benefits if its ecosystem system is in a healthy state.

The GI aims to improve nature's capacity to provide a range of valuable ecosystem goods and services, potentially offering a wide range of environmental, social, climate change adaptation and mitigation[18] and biodiversity benefits.[19]

Green infrastructure uses (or mimics) natural systems to manage stormwater run-off. The most typical elements are rain gardens, infiltration basins, stormwater green streets, blue roofs and green roofs,[20] permeable pavements, subsurface detention systems, and rainwater tanks and cisterns.

The EU's new biodiversity strategy to 2030 includes a plan to *„build a truly coherent trans-European nature network*", with a particular focus on helping to conserve and rebuild biodiversity. It builds in large part on the existing Natura 2000 network[21]. The strategy establishes a framework to prevent biodiversity loss.[22]

While green infrastructure focuses on natural and strategically planned and designed green spaces, *blue infrastructure focuses* on similar aquatic ecosystems.

The systems are interconnected. The design of urban green infrastructure as well as grey infrastructure (i.e. stormwater drainage, water networks and wastewater services) thus includes the design of vegetated and wet vegetated channels as designed aquatic ecosystems as habitats, the regeneration of urban water bodies and vice versa. In addition to helping to improve the ratio of natural areas to green spaces, a naturalised riverbed and grassed bank can also have significant ecological value, increasing the biodiversity of the area concerned.[23]

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18 Also related: Gyüre, Annamária Csilla, *Current Issues in Climate Change Legislation* - /megjelenés előtt/, In: Szabó, Imre (szerk.) *Central European Legal Studies - Vol 1.*- / megjelenés előtt/ : Selected essays on current legal issues from a comparative legal approach, Oradea, România : Partium Press, 2023, 135-146.

19 What is green infrastructure? - European Environment Agency (europa.eu) (16. 08. 2023.)

20 What is an extensive green roof - greenroof.hu (15.08.2023)

21 The Natura 2000 network The European Union's nature conservation programme. For more on this, see Gyüre Annamária Csilla, *Környezetjogi előadások*, Patrocinium Kiadó, Budapest, 2022. 125-127.

22 *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions - EU Biodiversity for Strategy for 2030*, (COM(2020) 380 final, 20.5.2020.)

23 https://masfelfok.hu/2020/12/15/esztetikus-okologikus-gazdasagos-kek-zoldinfrastruktura-uj-szemlelet-a-varosi-csapadekviz-gazdalkodasban-i/ (2023. 08. 16.)

Grey infrastructure also includes transport (i.e. roads, railways) and general sewerage and utilities (electricity, transmission, oil, gas, water and sewerage).

The challenges of grey infrastructure in Hungary there is a significant difference in the proportion of the population connected to the water network and sewerage network, the water and sewerage network is outdated in many places and is not able to handle large amounts of rainwater. Classical urban stormwater management aims to collect the rainfall in the shortest possible time and deliver it to a nearby watercourse. Most urban surfaces are therefore paved and impervious to stormwater. High pavement cover therefore has the greatest impact on the water cycle: it prevents soil absorption and recharge of groundwater, which can increase runoff volumes severalfold. Stormwater runoff is conveyed by combined or separated sewer systems.

The combined system is mostly used in urban areas built until the mid-20th century. Here, rainwater is piped in with the wastewater, so it cannot be discharged into rivers without treatment.

Recognising the value of water, the principle of stormwater management should be used instead of stormwater drainage. The aim should be to restore the original balance of runoff, infiltration and evaporation, mimicking natural processes. A combined system of stormwater management and permeable green spaces forms the urban blue-green infrastructure. Multifunctional, aesthetic and ecological surfaces simultaneously reduce runoff, cool the environment, serve the health of residents and maintain habitats.

Sustainable blue infrastructure solutions include several activities. These include, for example, the use of blue-green infrastructure elements to model the natural hydrological cycle in order to retain rainfall. Their four main functions are the capture, storage, evaporation and treatment of rainwater.

The simplest means of silting up rainwater is a flat permeable surface. Permeable pavements can provide a solution. The role of plants is also crucial, because their roots densely permeate the top layer of soil and the millions of micro-organisms living in this tissue filter and cleanse rainfall before it reaches the groundwater. The easiest way to increase evapotranspiration is to plant green spaces, especially trees with large canopies. A mature oak tree can absorb and evaporate up to 400 litres of water per day, intensively cooling its environment.[24]

24 A toolbox for keeping rainfall in place. A new approach to urban stormwater management II | Másfélfok (masfelfok.hu) (17. 08. 2023.)

The green and blue areas discussed above are particularly beneficial for the health and quality of life of certain socio-economic groups. The benefits of urban green spaces can be observed in relation to the reduction of stress levels and mental health of residents. [25]

According to a 2018 survey of 38 EEA countries (excluding Liechtenstein), on average 42% of the urban area of EEA member states had green infrastructure.[26]

Smart city concept

Smart city planning goes back two decades. The concept of the smart city originated in the technology sector, there are no scientific criteria or standards for what can be called a smart city, nor is there a single definition even today.[27]

Since the 1990s, the main question has been how to reform urban governance systems within a framework of sustainability (sustainable development). Cities had then evolved into dynamic systems in which people increasingly need personalised and time-sensitive services. The concept of the smart city has been developed in response to this and is organised around three aspects: sustainability, efficiency and broad participation.[28]

Sustainability means economically self-sustaining. Efficiency focuses on improving the quality and efficiency of services (e.g. digital infrastructure development), while broad participation means involving citizens in decision-making processes.[29]

According to Government Decree No. 314/2012 (XI. 8.) on the settlement development concept, the integrated settlement development strategy and settlement planning instruments, as well as on certain specific legal measures for settlement planning , and Government Decree No. 419/2021 (VII. 15.) on the content, preparation and adoption of settlement plans, as well as on certain

25 Marselle, Melissa R., Bowler, Diana Er, Watzema Jan, Eichenberg, David, Toralf, Kirsten, Bohn, Aletta, Ubran Street Tree Biodiversity and Antidepressant Prescriptions, *Scientific Reports*, 2020/10, 1-11. Ward Thompson, Catharine, Aspinall, Peter, Roe, Jenny, Robertson, Lynette, Miller David, Mitigating Stress and Supporting Health in Deprived Urban Communities: The Importance of Green Space and The Social Environment. *Int. J. Environ. Res. Public Health* 2016/13, 440.

26 https://www.eea.europa.eu/publications/who-benefits-from-nature-in/who-benefits-from-nature-in (10/08/2023)

27 Gere László, Kocsis János Balázs, Az okosváros-tervezés fejlődéstörténete kritikai megközelítésben*, Tér és Társadalom* 2022/4. 108-129.

28 Egedy Tamás, Városfejlesztési paradigmák az új évezredben – kreatív város és az okos város. *Földrajzi Közlemények,* 2017/3. 256-257.

29 Egedy, [2017] 256-257.

specific legal measures for settlement planning, a smart city is a municipality (or a municipality participating in joint planning of municipalities) that prepares and implements its integrated settlement development strategy (development plan) on the basis of the smart city methodology, which is defined in the Government Decree of 2012 as a methodology for the development of settlements or a group of settlements that develops its natural and built environment, digital infrastructure, quality and economic efficiency of municipal services by applying modern and innovative information technologies in a sustainable manner with increased involvement of the population.

The integrated urban development strategy is a specific tool for achieving medium-term objectives. The smart city prepares its strategy on the basis of the smart city methodology provided by the Lechner Knowledge Centre.

The concept of a smart city can be found in the literature in many ways, but the common denominator is that it includes solutions that use the latest technologies and innovations to improve a particular municipality. A smart city will include IoT technologies[30], augmented and virtual reality and big data technologies[31]. The concept of a smart city includes elements that use „smart" technology[32] to make a municipality more liveable. In this sense, for example, mobile applications that show the attractions of the area, routes or the city itself can be included.

The two main characteristics of a smart city are technology and added value for stakeholders. The aim of city management is to ensure a high quality of life and to increase competitiveness in a given geographical area. The smart city concept is becoming increasingly complex and is defined as a system of six elements (economy, people, governance, mobility, environment and living conditions)[33] based on one of the most commonly used models.[34]

30 Internet of Things

31 The term Big Data refers to the continuous collection of large amounts of data from connected devices through technological means. Chua F, *Big Data: its power and perils - Accountancy Futures Academy,, The Association of Chartered Certified Accountants*, London, 2013. cited in Kalmár Péter, Adattudomány és „Big Data" technológia a controlling szolgálatában, *Contoller Info*, 2017/2. 2-3.

32 See also Boóc Ádám, *Az online szerződéskötés magánjogi problémái*, In: Homicskó Árpád Olivér (ed.), Egyes modern technológiák, etikai, jogi és szabályozási kihívásai, *Acta Caroliensia Conventorum Scientiarum Iuridico-Politicarum,* XXII. Károli Gáspár Református Egyetem, Budapest 2018. 37-48.

33 Giffinger, Rudolf, *Smart cities: ranking of European medium-sized cities*, Vienna University of Technology, University of Ljubljana and Delft University of Technology 2007. 1-26. http://www.smart-cities.eu/download/smart_cities_final_report.pdf (18/08/2023).

34 Sikos T. Tamás, Szendi Dóra, A hazai megyei jogú városok gazdasági és környezeti fenntarthatóságának mérése, 2020-2021, *Területi Statisztika*, 2023/1. 88-124.

The living conditions include the implementation of a liveable city, measures to improve personal safety and health conditions, active cultural and leisure programmes, processes to improve housing conditions and the ICT[35] solutions that support them.

The economy dimension includes services supporting businesses and innovation ecosystems, as well as ICT platforms. The smart environment includes sustainable management of environmental resources (renewable energy, water and waste management), increasing the adaptability of cities to climate change[36], energy efficiency of the built environment and its improvement.

Smart transport includes sustainable and service-oriented transport development, the promotion of non-motorised and public transport modes, the provision of multimodal access (system-level and space-specific connections between transport modes).

The dimensions of smart people are defined by their capacity for lifelong learning, social and ethnic pluralism, flexibility, creativity and participation in public life.

Finally, participation in decision-making, community, social services, transparent governance are the key elements of smart governance.[37]

Nowadays, the literature on smart cities has developed a sustainable smart city approach, which complements the elements of smart cities with indicators of optimal management of limited resources, such as environmental protection, waste and water management, and greener energy.[38]

Concluding thoughts, conclusion

„Perhaps the highest level of sustainable cities is the so-called resilient cities, characterised by adaptation to different socio-economic-environmental shocks."[39]

In practice, urban smart planning is the result of an automatic signalling system that helps business and municipalities to achieve sustainable urban

35 information and communication technology

36 For more on this, see Gyüre, Annamária Csilla, *Az Európai Unió klímapolitikájának elmúlt 15 éve és hatása a magyar jogra,* In: Miskolczi, Bodnár Péter (szerk.) *Az Európai Unióhoz történő csatlakozásunkat követő hazai és európai jogfejlődés*, Budapest, Magyarország: Wolters Kluwer Hungary Kft. 2020. 113-134.

37 Giffinger et. al [2007] 1-26.

38 Sikos, Szendi [2023] 91. cite Ahvenniuemi Hannele et. al, *What are the differences between sustainable and the smart cities*? Cities February 2017 Part A Volume 60 Volume 234-245.

39 Sikos, Szendi [2023] 91.

development goals through smart business solutions. A common platform provides the right opportunity to allocate resources in a sustainable way.[40]

Smart cities are the cities of the future, leading the way towards sustainability by aligning infrastructures and changing societal attitudes.

40 Szalmáné Csete Mária, Buzási Attila, A smart planning szerepe a fenntartható városfejlesztésben, *Területi Statisztika,* 2020/3. 386.

The Symbolic Hungarian „Language Act"

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In my study, I place the Hungarian Language Act, passed in 2001 and discussed again in 2023 on the Day of Hungarian Culture, in the network of French and other Central and Eastern European (Polish, Slovak, Ukrainian) language acts, which serve as a basic model. I present the main features of the language act; its possible positive and probable negative effects. Almost a quarter of a century since its creation has shown that it is in fact a symbolic law, as it has hardly been used. The Hungarian Language Act has met with total rejection in the academic world, especially among linguists. Once it was passed, it did not have a particularly strong social resonance. The question of whether a particular language needs to be protected by law and, if so, in what areas. Or how else can a language be protected.
Keywords: *language act – symbolic law – French, Polish, Slovak, Ukrainian Language Act – advertising language act – sign law*

The Basic Model: French Language Acts

The French language acts of the second half of the 20th century served as a model for the language acts of other countries. The Bas-Lauriol Language Act of 1975 made the use of French compulsory in the public sector, in particular in commercial designations, instructions for use, employment contracts, signs for public institutions, radio and television programmes, and prohibited the use of foreign (mainly English) words where they had an accepted French equivalent. The Bas-Lauriol Language Act was followed in 1994 by the Toubon Language Act, named after the then Minister of Culture. The essence of the French Language Act is as follows. French is the language of education, work, commerce and public service. It is the privileged link between the Francophone States (Article 1).

Its application is compulsory in all signs, business offers, instructions for use, descriptions of the conditions of guarantee of goods or services, and the issue of invoices and receipts (Article 2). Signs and notices intended to inform the public must be written in French (Article 3). If the product or service is foreign, the foreign language text must be accompanied by a French translation which must be as "visible, audible and intelligible" as the original.

Public servants may only write contracts in French, and these texts may not contain foreign expressions that have a French equivalent (Article 5). At events organised in France by French citizens or organisations, everyone has the right to speak French, and the programme and documents of the meeting must be published in French, and if the event is in a foreign language, it must be accompanied by a translation or a French summary. The language of instruction, examinations, theses and dissertations is French (except in the case of foreign or regional language teaching establishments) (Article 11). The law establishes the French Language Council, whose head is directly subordinate to the Prime Minister at ministerial level.

The law lists the supervisory bodies, the penalties (withdrawal of aid and benefits). Vilmos Bárdosi, in his description of the law in Hungarian, points out that "Toubon's Language Act, which was very tolerant in other respects, was a very important step in France: it emphasised the democratic principle that every French citizen has the right to acquire knowledge in his or her own language, and it further strengthened or awakened the French people's consciousness of their mother tongue, their attachment to it".[1] And this language act has served as a model for many countries with very different histories.

Language Acts in Central and Eastern Europe

In the Central and Eastern European region, language acts were passed in several countries in the 1990s, but they were less concerned with language protection and more with the relationship between the official language (state language) and other minority languages.

The Czech and Slovak Republics were the earliest to act with their language acts in 1990. This was followed in 1995 and significantly amended in 2009 by the now separate Slovak Language Act. The Act declares the primacy of Slovak over other languages: Slovak is "an expression of the sovereignty of the Slovak Republic and allows for the imposition of fines on those who use a language other than Slovak in (public) situations as defined by law. In the wake of the Language Act, a war of names and signs broke out in the 1990s (in particular, restrictions on the use of Hungarian names and historical place names in Slovakia provoked opposition from time to time).[2]

1 See: Bárdosi,Vilmos: Globalizáció, Európa és nyelv. A francia példa, 2010, Magyar Nyelvőr 1/1—15. (Translated by Géza Balázs)

2 See: Berényi, József: Nyelvországlás. A szlovákiai nyelvtörvény történelmi és társadalmi okai. Fórum, Pozsony, 1994., Zalabai Zsigmond (compiled) 1995. Mit ér a nyelvünk, ha magyar? A „táblaháború" és a „névháború" szlovákiai magyar sajtódokumentumaiból, 1990-1994. Kalligram, Pozsony, Balázs Géza 1995. Név- és táblaháború. Két

The Romanian Language Act of 2004 is less developed than the Slovak one. István Horváth lists such examples of the uncertainties created by the law: "For example, it would be impossible to organise a conference in English only, a Sunday sermon in Hungarian would have to be simultaneous interpreted, the name of the "Öt Kutya" restaurant in Chiucszereda would have to be translated into Romanian, the owner of the restaurant would have to put "foglalt" (reserved) on the table in Romanian, and even if someone leaves a note on the door of the shop saying "I'll be right back"... (...) there is no need to teach bilingual education in schools (because there is a legislation on the use of Hungarian), but the question remains whether a mayor of Szeklerland can give a speech on 15 March in Hungarian only?"[3]

The Slovak language acts have led to a war of names and signs, while Ukraine's successive language acts have led to a real war. According to Mihály Tóth, these language acts "can be seen as both a cause and a consequence", and the result is that by 2020 Ukraine has moved "from the linguistic freedom guaranteed by the 2012 Language Act to the state monolingualism prescribed by law".[4] The Ukrainian Language Act is not primarily about language protection, but about the forcing of an independent, sovereign, monolingual national existence.

The Polish Language Act, which came into force in 1999, bears many similarities to the French Language Act. The first chapter emphasises 'taking care of the correct use of the language' and 'preventing the vulgarisation of the language', while the second chapter contains details similar to the earlier French and later Hungarian language acts. The Polish language must be used, "in particular for the names of goods, services, advertisements, promotions, instructions for use, descriptions of goods and services, conditions of warranty, fact sheets, invoices, receipts". "Polish is the language of education, examinations and theses..." "Signs and notices used in public offices and institutions, and those intended for public use and on public transport, must be in Polish... Polish names and texts may be accompanied by translations into foreign languages..."[5]

szociolingvisztikai-névtani könyv Szlovákiából. Névtani Értesítő, 17/133–135.

3 See: Horváth, István: Románia: a kisebbségi nyelvi jogok és intézményes érvényesülésük, 2012, pp. 172-198., p. 178., in: Térvesztés és határtalanítás. A magyar nyelvpolitika 21. századi kihívásai. Edited by: Eplényi Kata and Kántor Zoltán. Nemzetpolitikai Kutatóintézet, Lucidus Kiadó, Budapest, download: https://bgazrt.hu/wp-content/uploads/2018/07/Tervesztes-es-hatartalanitas.pdf (translated by Géza Balázs).

4 Tóth, Mihály: Változások a nyelvpolitika területén Ukrajnában (2014-2020), 2021, pp. 187-192., p. 187., in: Balázs Géza (ed.): Jelentés a magyar nyelvről 2016-2020. Petőfi Kulturális Ügynökség, Budapest (translated by Géza Balázs).

5 Banczerowski, Janusz: A lengyel nyelv törvényi védelméről, 2001, Magyar Nyelvőr 2/152-158. (translated by Géza Balázs).

The Hungarian Language Act

In Hungary, the idea of language legislation was raised primarily by lay people and civil language protection and cultural organisations. As a result, the Hungarian Language Committee of the Hungarian Academy of Sciences (MTA) first officially addressed the issue on 3 May 1996 (Is there a need for a language protection law in Hungary?). The Committee's position was succinctly formulated as follows:

"In general, language acts have a monopolistic intent and are exclusionary or at least restrictive. In this respect, it would in no way be desirable to follow them. What is needed, therefore, is not a language act (which would be particularly harmful), but a guideline in principle, enshrined in the constitution, which provides uniformly for the use of all languages in our country and which could possibly be taken as a starting point for subsequent regulation, even in a single area, such as the use of language in the mass media, etc."[6]

However, civil society organisations continued their struggle for the protection of the Hungarian language, especially against linguistic alienation, and despite the academic rejection, they again raised the need for legislation. In November 1997, the World Council of Hungarian Professors in Nyíregyháza proposed a new language act. On 20 May 2000, the Hungarian Language Committee of the Hungarian Academy of Sciences (MTA) again addressed the issue. "The second item on the agenda, which led to a two-hour debate, was the draft of the Ministry of Justice's proposal for the legal regulation of the protection of the Hungarian language, submitted by László Grétsy. László Grétsy said that the draft had been prepared by the Ministry on the recommendation of the World Council of Hungarian Professors and had now been sent to several organisations for comments. The former chairman of the Committee, Pál Fábián, said that the Committee had previously taken the position that there was no need for a language act in Hungary. The debate raised the following questions: Is the draft really a language act, a framework law, or just a set of guidelines? The draft does not cover all areas of language use. Is the Hungarian Language Committee entitled to express an opinion on a draft law? The Committee adopted the following as the majority opinion: The Committee welcomes initiatives on the Hungarian language issue, but maintains its view that there is no need for a language act in Hungary. Language protection must be achieved through lower-level legislation, regulations, education and awareness-raising. The Committee does not consider itself competent to give an opinion on a draft law directly,

6 Keszler, Borbála: Jelentés a Magyar Nyelvi Bizottság 1996. évi munkájáról, 1997, Magyar Nyelvőr 3/365. (translated by Géza Balázs).

bypassing the President of the I. Department and the President of the Academy."[7]

Despite the academic rejection and dissociation, the language act was embraced by the government, and after a public debate in 2000, it was passed on 29 November 2001 with minor amendments by a nearly two-thirds majority in parliament. It should be stressed that the resulting law cannot technically be considered a "language act", and linguists have suggested that it should be called an "advertising language or signage law". The official, full name of the law, reflecting its full scope, is "Act XCVI of 2001 (No 4899/70) on the publication of economic advertisements and business signs and certain public announcements in Hungarian". The law entered into force in 2001 and is still in force at the time of writing with minor technical corrections.[8]

The "Language Act" could be called an "advertising or sign law" because, unlike other European language acts, it covers only three areas: advertising, business signs and public notices. The Hungarian law is virtually unique in being "permissive" and not in any way exclusionary. In fact, it still allows everything in foreign languages, except that it requires that the text of public interest (advertising, notices) must also be published in Hungarian. In the case of advertisements and business descriptions, the name of the company, the so-called keywords, commodity codes, trademarks (brand names), etc. may remain in the original. For example, it would be nonsense to translate the McDonald's brand name. In the case of public interest announcements, only those which fall outside the scope of economic activity should be published in Hungarian too. In practice, such notices have in the past only been published in Hungarian. There is no need to translate "established foreign language terms" (the definition of the latter could be the subject of endless linguistic disputes, as "established" cannot be defined), the law does not apply to areas with minority self-governments (élelmiszerbolt may be Lebensmittel in German minority settlements) and to areas under cultural heritage protection. So - however ironic one of our linguists may have been about the law - there is no need to translate into English the Latin motto of the Basilica: Ego sum via, veritas et vita (Én vagyok az út, az igazság és az élet).

As the scope of the Language Act covers specific commercial advertising, the Hungarian Advertising Association considered it necessary to interpret the Act both in 2001 and in 2013. The 2001 interpretation: the Hungarian Advertising Association's position paper on the interpretation of Act XCVI of 2001 on the publication of economic advertisements and business descrip-

7 Balázs, Géza: Beszámoló az MTA Magyar Nyelvi Bizottságának 2000. évi munkájáról, 2001, Magyar Nyelvőr 1/128–131.

8 Source: https://net.jogtar.hu/jogszabaly?docid=a0100096.tv (04.08.2023.)

tions and certain public announcements in Hungarian.[9] The Guide 2023: The Hungarian Advertising Association's Guide on the Application of the Language Act in Advertising. Prepared 10 February 2023.[10] What triggered the creation of the 2023 Guide is indicated in the introduction: "The Hungarian Advertising Association considers it of the utmost importance that advertisements and promotions are understandable, and one of the important pillars of this is the correct use of the Hungarian language in advertisements. In January 2023, Judit Varga, Minister of Justice, announced that in 2023, the Consumer Protection Office will focus on the protection of the Hungarian language in advertising. The Hungarian Advertising Association has produced a guide to support its members and all players in the advertising industry in producing advertising in accessible Hungarian.[11] The publication of the resolution is justified by the fact that the Consumer Protection Office has included in its 2023 control programme the increased control of television, radio and print media advertising in order to protect the mother tongue. In this document, we have collected the most important information on the regulatory background, and we have tried to help our members and the advertising industry in general to comply with the law and the Language Act by providing a collection of the most frequently asked questions and answers, as well as examples and recommendations."[12]

After the revival of the law, its unchanged symbolic character is shown by the fact that after the announcement of the Hungarian Culture Day on 21 January 2023, the legal protection of the Hungarian language was no longer heard of, and in July 2023 the Minister of Justice left for another post.

Evaluation of the Hungarian Language Act

Relatively few events can be reported on the application of the Hungarian Language Act. However, some cases are available in the legal repository databases (e.g. Decision No 473/B/AB of the Hungarian Constitutional Court).

In 2010, an interview on the Index website showed how the Hungarian Language Act is not working in practice.[13] The Language Advisory Board of

9 Source: https://web.unideb.hu/~tkis/reklsz.htm. (downloaded on: 04.08.2023.)
10 Source: https://mrsz.hu/cmsfiles/32/18/MRSZ_nyelvtorveny_utmutato_20230210_final.pdf. Downloaded on: 04.08.2023.
11 On the concept of intelligibility, see for example: Arató Balázs: Quo vadis, igazságügyi nyelvészet? Magyar Jogi Nyelv; 2020/2.; pp. 8-15. https://joginyelv.hu/quo-vadis-igaszsagugyi-nyelveszet/.
12 Source: https://mrsz.hu/cmsfiles/32/18/MRSZ_nyelvtorveny_utmutato_20230210_final.pdf. Downloaded on: 04.08.2023.
13 Source: Munk, Veronika: Nem jött be a magyar nyelvtörvény. 01.05.2010. https://

the Hungarian Academy of Sciences is responsible for deciding on the language cases in question. The six-member body, chaired by Ferenc Kiefer, will issue a position statement if it is necessary or if it is linguistically possible. For example, the term nonstop was accepted because it has become established in Hungarian, and the term pizzeria was accepted because it was considered unnecessary to call it an Italian flatbread bakery.

Between 2001 and 2008, they were rarely consulted, and when they were, "in all cases, the terms were English terms that were clearly foreign terms not established in Hungarian, which the Office could have established." In 2010, Ferenc Kiefer, who opposed the Act from the outset and thus became chairman of the advisory body, summed up his opinion: "The vast majority of linguists were already against the legislation on language use when it was being prepared. We knew from international experience that such a law would not be successful. And we also know that the degree to which a foreign term has become established cannot always be clearly established. However, if a foreign language term is used a lot, sooner or later it will become established. Many hundreds of elements of the basic vocabulary of the Hungarian language today are of foreign origin!" Another article also lists such linguistic difficulties: "It is therefore difficult to give a practical example, since if a household appliance distributor calls an oil fryer a "fritőz" in an advertisement, which is moreover available in its "outlet", the question is whether the latter terms are "established foreign language terms".[14]

With some distance, it can be said that the Hungarian language law or "advertising language law" would be more lenient than all known language laws, could be conceived as a subchapter of the Advertising Law (1997); and its content could be regulated by lower legislation. The Hungarian Language Act ultimately does not restrict or prohibit anything, but only (with restrictions) provides for bilingualism (Hungarian and another language). The increasing number of signs and instructions in foreign languages is a clear indication of the extent to which it does not work. The latter can also be seen as a consequence of the incredible increase in online trade, which has an international background and therefore cannot be regulated by Hungarian Language Act.

But can the Language Act have any positive effect? A possible positive effect[15] is that the streetscape can be more linguistically colourful and varied

index.hu/belfold/2010/01/05/sikertelen_a_magyar_nyelvtorveny/. Downloaded on: 04.08.2023.

14 Source: Sirbik, Attila: „Fritőzt" hirdetek az „outletemben", megbüntet ezért a nyelvőr Varga Judit?, 2023. január 24., https://kreativ.hu/cikk/jogasz-valaszol-minden-jogszabaly-annyit-er-amennyit-ervenyesitenek-belole. Downloaded on: 04.08.2023.

15 I thought in 2005. See: Balázs, Géza: „A magyar nyelv elé mozdításáról…" Vitairat a

(which foreigners can be happy about, since our Hungarian language with its unique and interesting spelling and look is one of the Hungarian characteristics), and it will encourage Hungarian-language use (advertisers and signmakers will tend to strive for mother tongue). A spontaneous - social - movement for this has also been started, independently of the act on advertising language. There is no evidence of any positive effect of the Hungarian Language Act, but fortunately it has had no harmful effect either. It has become a typical symbolic law and remains so to this day.

The shortcoming of the Language Act is that because it focused on foreign words, it failed to address the even more problematic and proliferating problem of poorly worded (e.g. over-complicated, formal, legal) Hungarian texts, which, in addition to leading to communication breakdowns, also cause a lack of democracy and perhaps even more so, destroy language culture and public taste. In this context, legal experts and linguists have repeatedly advocated clear ("normative"), comprehensible Hungarian wording[16], which has a thousand-year tradition in rhetoric[17], and which aims to avoid misunderstanding.[18]

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nyelvművelésért. Akadémiai Kiadó, Budapest, 2005.

16 Vinnai, Edina: Harc a szavakért – közérthetőség a jogban. Alkalmazott Nyelvészeti Közlemények, Miskolc, 2017b., XII/1: 42–53., Minya, Károly-Vinnai, Edina: Hogyan írjunk érthetően? Kilendülés a jogi szaknyelv komfortzónájából, 2018, Magyar Jogi Nyelv (2. évf.) 1: 13–18., see also: Arató, Balázs: Norm clarity in the light of Hungarian case law, 2022, Magyar Nyelvőr 146 (special issue) pp. 80-90., DOI: 10.38143/Nyr.2022.5.81, see also: Arató, Balázs-Balázs, Géza: The linguistic norm and norm of legal language, 2022, Magyar Nyelvőr 146 (special issue) pp. 91-103., DOI: 10.38143/Nyr.2022.5.91. https://nyelvor.mnyknt.hu/wp-content/uploads/146507.pdf, and see also: Szöllősi-Baráth, Szabolcs: A normavilágosság követelményének vizsgálata a közbeszerzési jogszabályok esetén, 2023, Magyar Nyelvőr 146/1: 93—107. DOI: 10.38143/Nyr.2023.1.93.

17 Pölcz, Ádám: Az emberközpontú nyelvművelés és az antik retorikai hagyomány, 2015, Magyar Nyelvőr 139/4: 409-428., and see also: Pölcz, Ádám: A nyelvművelés retorikai gyökerei. A nyelvhelyesség retorikai alapjainak hagyományáról, 2021, MNYKNT-IKU, Budapest, (IKU-monográfiák, 8.).

18 Vesszős, Balázs: A félreértés pragmatikája, 2022, Magyar Nyelvőr 146: 458-475. Magyar Nyelvőr 146. 2022: 458–475. DOI: 10.38143/Nyr.2022.4.458.; on the role and tasks of forensic linguists, see: Arató, Balázs: Quo vadis, igazságügyi nyelvészet? Magyar Jogi Nyelv; 2020/2.; pp. 8-15. https://joginyelv.hu/quo-vadis-igaszsagugyi-nyelveszet/.; see also: Arató, Balázs: A végrendeletek értelmezésének egyes kérdései; in: Magyar Nyelvőr 147; 2023; pp. 78-92.; DOI: 10.38143/Nyr.2023.1.78. On the constitutional framework for the expert procedure, see: Arató, Balázs: A tisztességes eljáráshoz fűződő jog, különös tekintettel a tisztességes igazságügyi szakértői eljárásra; in: Tóth J. Zoltán (ed.): Az Abtv. 27. §-a szerinti alkotmányjogi panasz. Tanulmányok a „valódi" alkotmányjogi panasz alkotmánybírósági gyakorlatáról; Budapest, KRE-ÁJK; Patrocinium; 2023; p. 216.; pp. 9-30.

In the economic sphere, the key linguistic area from the point of view of Hungarianisation (naturalisation) is brand names[19]; and terminology in general[20].

A possible negative effect of the Language Act is that impossible translation and Hungarianisation ideas are generated. The number of non-Hungarian mirror translations may increase. The biggest negative effect, however, is that the Hungarian language issue has become a party political issue, dividing linguists for a long time and discouraging Hungarian language education and language strategy. This was already evident in the debate on the "language act". According to an extreme opinion at the time: The language act is about how what has always been intertwined - politics and language education - have found each other again. The new law promotes discrimination against people on the basis of language use and its institutionalised promoters, the pseudo-linguistic impostors of the intellectual underworld".[21]

And finally, a telling example of how the Hungarian Language Act has failed to influence the use of foreign words and phrases in advertising in the Hungarian-speaking world. McDonald's worldwide campaign includes an English phrase that has been translated into national languages in almost every part of the world, but not even accidentally into Hungarian:[22]

ich liebe es ~ "I love it" (German)

انأ مبحأ (ana uħibbuhu) or اكيد مبحب (akid behibuhu) ~ "I love it. / Of course I love it" (Arabic)

c'est tout ce que j'aime ~ "It's everything that I love" (French)

c'est ça que j'm (j'm = j'aime) ~ "That's what I love" (Canadian French)

me encanta ~ "I love it" (Spanish)

me encanta todo eso ~ "I love all that" (lit. All that enchants me.) (Chilean Spanish)

amo muito tudo isso ~ "I love all this a lot" (Brazilian Portuguese)

işte bunu seviyorum ~ "This is what I love" (Turkish)

вот что я люблю ~ "That is what I love" (Russian)

я це люблю ~ "I love this" (Ukrainian)

19 Kovács, László: Márkanevek: a márkakutatás és a nyelvtudomány metszéspontjában, 2022, Magyar Nyelvőr 146/1: 60-70. DOI: 10.38143/Nyr.2022.1.60.

20 Compare: Fóris, Ágota: A magyar nyelv a tudományban. A terminológia helye, szerepe és feladatai, 2019, Magyar Tudomány, 180/406-416. DOI: 10.1556/2065.180.2019.3.11.

21 Kis, Tamás: Kinek kell a nyelvtörvény? Heti Világgazdaság, 2001. november 17.

22 Source: https://www.napi.hu/nemzetkozi-vallalatok/uj-mcdonalds-szlogen-im-lovin-it.172203.html Napi.hu 05.09.2003., Downloaded on: 04.08.2023.

man tas patīk ~ “I like it” (Lithuanian)[23]
bax, budur, sevdiyim! (Azeri)
我就喜歡 (“I just love [it]”) (Chinese)

And of course it is translated into Hindi and many other languages. The only language into which the slogan has not been translated is Hungarian (the symbolic Hungarian language law didn’t force it either, since it doesn’t apply to the original slogans used as trademarks). It wouldn’t be difficult. It would be just that, in the most concise language in the world: “Szeretem”.

23 Source: https://languagelog.ldc.upenn.edu/nll/?p=1954. Downloaded on: 04.08.2023.

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On the Dogmatic Aspects of Free Speech in Media Law

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Freedom of the press must be examined with regards to both the owners of press organs and the journalists and editors working for them, who are also covered by certain aspects of press freedom. When is the press completely free? When every person may convey any thought at any time and any place; excluding those strictly interpreted cases that violate human dignity. Plurality is essential for an all-encompassing freedom of the press. Digital media have fundamentally changed media relations. The finite nature of frequencies has disappeared. (Let us add that the combined persuasive power of image and sound effects still exists as a specific regulatory reason.) The evolution of the online environment has also had a significant impact on fundamental rights in other respects.
Keywords: *freedom of expression, freedom of the press, plurality, digital media, online environment*

In the event that we seek to separate freedom of the press from free speech in general, imbuing the media with certain extra rights in comparison to a simple street preacher, it stands to reason to also attach to it a number of additional responsibilities.[1] This would evidently necessitate the intervention of the state, which can steer us to very dangerous waters.

According to a different view, the press must be given additional freedoms without the imposition of such extra responsibilities in exchange. This is clearly problematic, for how exactly would such privileges be justified? Rights and responsibilities constitute an indivisible whole.

This brings us to a synthesis: freedom of speech and freedom of the press are indeed different, and media organs must indeed be granted additional rights and additional responsibilities alike. From this perspective, freedom of the press is not an individual right, but a right wielded by the press as a social institution.[2]

1 András KOLTAY: *A szólásszabadság alapvonalai*, Századvég 2009 Budapest, p. 198.
2 An approach first espoused by U.S. Supreme Court Justice Potter Stewart, later reinforced by William Brennan.

These freedoms being institutional rights, they do not protect the individuals working for the press (who, themselves, are covered by the general rules of free speech), but the institution, which, as a consequence, also bears the extra rights and responsibilities thus allocated. According to this view, freedom of the press is clearly a tool, a means to advance the public interest through the realisation of the exchange of information and ideas, as well as providing avenues for the public expression of such.

Freedom of the press must be examined with regards to both the owners of press organs and the journalists and editors working for them, who are also covered by certain aspects of press freedom. But what happens when these rights conflict with the owner's property rights? Could the editor's independence from the owner's influence even be guaranteed? Interestingly, this seems to be a highly neglected topic in academic literature and – especially – legislation.[3]

It is worth noting that the instrument-like nature of press freedoms is generally embraced even by jurists who otherwise consider the individual aspect and personal autonomy the primary consideration of free speech.[4] Freedom of speech can be justifiably considered a limitless right of the natural person; it cannot be extended to freedom of the press. Because the media is a social institution driven primarily by financial interests, its public presence is expressed in a less personal way, preventing the right of natural persons to free expression from becoming the dominating legal factor in its communications, rendering the individualist approach invalid.

Plurality is essential for an all-encompassing freedom of the press. When is the press completely free? When every person may convey any thought at any time and any place; excluding those strictly interpreted cases that violate human dignity. Naturally, this is but a mirage, because full media freedom does not exist. Regarding plurality, the main object of our scrutiny must be the diversity of the opinions that do actually fluctuate in the press.

In the event that the media falls under the steady influence of a few (or especially *one*) social groups, which are thereby able to exert considerable influence on public thinking and exclude outsiders, the situation is skewed and needs to be remedied.[5]

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3 Once again highlighted by Koltay on p. 216 in the previously quoted publication. Even though many court decisions emphasised the importance of editorial freedom, none lay down any theoretical principles regarding it (unlike the SCOTUS).

4 A reference to the „liberty model" of Edwin Baker, quoted from p. 200 of Koltay's book.

5 A reference to a series of constitutional court decisions from Germany titled BVerfGE 73, 118 and 160. Gábor POLYÁK: *A médiarendszer kialakítása*, HVG-Orac, Budapest 2008., p. 51.

In Germany, it is the constitutional court's practice that freedom of the press *does not serve the individual expressions of the owners or workers of media organs, but instead the global enforcement of the freedom of opinions*, which also entails a free and comprehensive flow of information.[6]

The right to free expression is eminent even among fundamental rights. Typically, only the violation of another fundamental right, such as the right to human dignity can bring about any restrictions. Upon closer inspection, however, we can observe that certain superficial „infringements" upon the right to free expression (deemed as such by overly individualistic views) only serve to reinforce and expand the social prominence of this right.

Let us visualise the realisation of the right to free expression through an individual example, a „personalised fiction manifestation". Often, the archetypical hero of this particular freedom is the lonely and conscientious orator making a stand for the sake of principles and against tyranny.

When does someone possess freedom of expression? When they are able to communicate their thoughts without restrictions. Can anyone be forced to relay others' thoughts? Normally, the answer is no. Yet, exceptions certainly arise on moral grounds.[7] For instance, if a storm approaches the scene of a public speech, can the speaker not be expected to interrupt the address and warn the audience of the impending danger? Furthermore, while others' ideas cannot be forced to be conveyed as someone's own, they can still be transmitted with a reference to their origins.

An even more expressive scenario would be to envision an agora, *a forum of public speaking.* The electronic press is indeed a type of modern *agora*, its main function being the dissemination of information, from which the public can make educated decisions on their common affairs.[8] Undoubtedly, this is the cornerstone of the communal view on press freedoms. The number of speakers here is limited. Who may enter first? Is it dependent on the order of arrival? Are there people with a substantive right to participate, regardless of this order? These questions are just as valid for the media in general.

The state-directed distribution of the limited amount of radio frequencies physically available is virtually a necessity; without it, chaos and „piracy" would reign. According to the fiction theory, it is akin to wishing to enter a locked room to engage in conversation there: one must first ask for the key. After a while, however, the room gets filled and latecomers will not be able to enter. Obviously, the advent of digital media substantially decreased the significance of this matter.

6 POLYÁK, p. 26.
7 LAJOS Edina: A jog és erkölcs összefüggésének alapjai, *KRE-DIt*, 2023/1., 164–169.
8 KOLTAY 2009., p. 212.

Certain theorists of constitutional law (such as Antal Ádám) do not even consider free speech the human rights basis of media freedoms. Instead, it is the freedom to express and publish information, which encompasses not only subjective opinions, but also neutral facts and other types of information serving the public interest. As such, freedom of expression is the *genus proximum* of communication freedoms.[9] On the national level, it becomes the freedom of mass-communication, further reinforcing the communal theory.

The freedom of individual opinions must be integrated in a way that also allows for the cumulation of opinions to be free.

The principles of complete press freedom and no censorship were discarded with the appearance of electronic media, because the finity of frequencies physically eliminates the possibility that everyone gets to express their opinions. In other words, it is possible to print any number of newspapers, but not to run an unlimited number of media channels.

The facts above possess such cardinal importance exactly because they are the main legitimating factors of media regulation.

First to respond to this challenge were the Radio Act of 1927 and the Communications Act of 1934 in the United States, establishing the Federal Communications Commission for the purpose of regulating radio frequencies. They would lay down the principle that while freedom of expression must entail both the freedom of individual expression and institutional media freedoms, the rights of listeners and viewers enjoy primacy when pitted against the rights of the broadcasting station. Therefore, a balanced environment of mass-communication demands the prevention of the market's monopolisation.

In 1981, the constitutional court in Germany specified the matter even further, ruling that provincial legislators have two options in implementing balance. „Internal pluralism" would force every individual media organ to provide a balanced set of content, while „external pluralism" concerns itself only with the overall diversity of programmes visible across all channels. It is the former of these two that ultimately bestows a better protection upon the rule of law. It was here, in West Germany, that the idea first prominently emerged regarding the necessity to not only privatise some of the media-related aspects of public service, but also that here too, outside the public sector, there have to be guarantees for the constant diversity of views and against the monopolisation of opinions.

Once again, it is important to note that back then, the main reason for regulation was the limited nature of frequencies.

Regarding the challenges posed by digital media, the same constitutional court provided that „the end of the special situation (Sondersituation) caused

9 ÁDÁM Antal: *Alkotmányi értékek és alkotmánybíráskodás*, Osiris, 1998. Budapest, p. 141.

by the finiteness of broadcasting frequencies does not not necessitate the elimination of legislation it brought into being, regardless of the technological advances of recent years and the multiplication of broadcasting capacity. The significance of media regulations lies in the immense social influence, timeliness and persuasive power of their subject. (...) *All these effects are magnified by the fact that these new technologies extend and differentiate the scope, the methods and the service types of broadcasting.*" (BVerfG, 1 BvR 2270/05)[10].

In many countries – despite the technological advances present in Europe –, there still remain a significant number of people without access to digital television, restricted to ground-based (and therefore, limited) broadcasts they get to receive without licence fees.[11]

According to Gábor Polyák, the Constitutional Court of Hungary confused the aims and means of media regulation in a related decision: external and internal pluralism cannot be construed as goals in their own right.[12] Pluralism and diversity are instruments that legislators have a wide array of options in implementing. The contradiction is aggravated by the ruling of the same body that *„mandating internal pluralism for commercial radio and television stations is necessary only when they represent a significant opinion-shaping force".* Consequently, legislators would be required to clearly define the criteria of being such a signficiant opinion-shaping force and regulate only the broadcasters falling under this category.[13]

Wolfgang Hoffmann Riem differentiates several „dimensions" of media diversity.

- diversity of content, ensuring a pluralism of views and providing a platform to as many of the opinions holding a relevant presence in society as possible, preventing the monopolisation of ideas,
- diversity of persons, organisations and institutions involved with the media, opening it up to as many layers of society as possible,
- diversity of subjects, providing pluralism in terms of the content being broadcast and presenting different topics and life situations
- diversity of locations, offering territorial pluralism through regional, national and international programmes alike
- thematic diversity, creating a media environment working with many different themes and forms of communication

10 POLYÁK, p. 27.
11 KOLTAY 2009., pp. 209–210.
12 POLYÁK, p. 395.
13 On the other hand, Polyák remarks that if – in principle – content providers with a significant opinion-shaping force are allowed to operate, complete external pluralism becomes outright impossible.

- diversity of reception, enabling citizens to access content with a wide variety of devices

In addition to this, Meier and Trappel also list the diversity of media functions as a further requirement, which includes entertainment, education, providing general news and so on.[14] Never refers to pluralism as a form of weighted diversity, whose legal requirement constitutes a „central planning of opinions", twisting the process of how opinions are formed: „By placing emphasis on the equal representation of already established views, the court hinders the institutional guarantees existing to help facilitate the appearance of new ideas."

In his view, the diversity of ideas is nothing but a „product of the freedom of opinions previously established", concluding that diversity cannot be definitively prescribed by law; instead, it manifests only as the result of an entirely free competition of ideas.

Accordingly, legislation must not endeavour to weigh and rank opinions, but only to guarantee as much freedom as possible for new players to enter the media system and its great marketplace of ideas.

Contrasting the system of institutional guarantees prevailing in Germany, this concept adheres to the subjective-individualistic approach regarding freedom of the press.

Keeping to the „central planning" allegory, a way to a consensus between the two main viewpoints on the freedom of the press would be to relegate this state planning to the realm of entrepreneurial freedoms; and how best to broaden and safeguard them.[15]

Digital media have fundamentally changed media relations. The finite nature of frequencies has disappeared. (Let us add that the combined persuasive power of image and sound effects still exists as a specific regulatory reason.)

And here arises the „evergreen" question of our time: how far do the institutions of „new media"[16] interfere the traditional understanding of freedom of expression? In other words, is it possible to sanction not only those who express their thoughts (who post, etc.), but also the ones who own or manage the platforms? Fake news can cause social problems on an astonishing scale; some opinions even link it to war conflicts. Decades of globalisation have been exaggerated by the ‚new media' on a massive scale, which has been exacerbated by the pandemic. Due to current restrictions of state of emergency,

14 POLYÁK, p. 48.
15 POLYÁK, p. 56.
16 Denis MCQUAIL: *A tömegkommunikáció elmélete,* Complex Kiadó, Budapest, 2015. 664–665.

people trapped in the virtual world are heavily influenced by news (including fake news) and many have lost their sense of proportion and reality.[17]

It can be argued that, in addition to clarifying and tuning our legislation, especially on ‚new media', the definition and differentiation of the concept of „media" itself is an important factor.

In the European context, the 2011 Recommendation of the European Council on the protection and promotion of the universality, integrity and openness of the Internet, which seeks to define the category of media, is worth highlighting. The Recommendation is based on the premise that the ‚new media ecosystem' includes all the new actors involved in the process of producing and distributing media content, potentially reaching large numbers of people, and of which they have editorial influence or control over the content.

The Recommendation sets out six criteria, all of which, when met, fall under the definition of media:

- the intention to behave as media,
- operating according to the aims and intentions of the media (producing, collecting and distributing media content),
- editorial control,
- operation according to professional standards,
- Intention to reach the masses, dissemination,
- meeting audience expectations (accessibility, diversity, reliability, transparency, etc.)[18]

András Koltay, also taking into account the ideas of Sonja R. West (along the lines of the US Supreme Court decisions), points out that the excessive extension of the concept of media to new types of services also has side effects.[19]

17 Forensic linguists can help in assessing such cases. For more on this, see: Arató Balázs: Quo vadis, igazságügyi nyelvészet? Magyar Jogi Nyelv; 2020/2.; pp. 8–15. https://joginyelv.hu/quo-vadis-igaszsagugyi-nyelveszet/. On constitutional guarantees, see: Arató, Balázs: A tisztességes eljáráshoz fűződő jog, különös tekintettel a tisztességes igazságügyi szakértői eljárásra; in: Tóth J. Zoltán (ed.): Az Abtv. 27. §-a szerinti alkotmányjogi panasz. Tanulmányok a „valódi" alkotmányjogi panasz alkotmánybírósági gyakorlatáról; Budapest, KRE-ÁJK; Patrocinium; 2023; p. 216.; pp. 9–30.

18 KOLTAY András: *Tíz tanulmány a szólásszabadságról*. Wolters Kluwer, Budapest, 2018. 276.

19 BALÁZS Géza: Az internet népe. Ludovika Egyetemi Kiadó, Budapest, 2023; BALÁZS Géza: Újmédia-kislexikon. IKU, Budapest, 2023. (IKU-Tár 22.); KOLTAY András: *Az új média és a szólásszabadság, A nyilvánosság alkotmányos alapjainak újragondolása*. Wolters Kluwer, Budapest, 2019. 63., TÖRÖK Bernát: *Szabadon szólni, demokráciában. A szólásszabadság magyar doktrínája az amerikai jogirodalom tükrében.* HVG-ORAC, Budapest, 2018. 184.

The evolution of the online environment has also had a significant impact on fundamental rights in other respects. Vast amount of personal data collected, with or without consent, provides potential opportunities for economic actors, in addition to political actors, to target advertising or to engage in exclusionary economic practices against undesirable social groups. Reflecting the importance of data protection concerns in the online space, legislators are seeking to create an appropriate legislative environment, albeit essentially at a disadvantage; privacy in this segment must also be ensured.[20] The status of new subjects of the fundamental right to expression may arise. (They like to classify themselves not as content providers but as technology companies with fewer constraints.[21]

20 ARATÓ Balázs: *A titok fogalma a jogban*. In BALÁZS Géza (et al.) (ed.): A titok szemiotikája. Magyar Szemiotikai Társaság, Budapest, 2019. 29–39; and BALÁZS Géza: A titok antropológiája és szemiotikája, In BALÁZS Géza (et al.) (ed.): A titok szemiotikája. Magyar Szemiotikai Társaság, Budapest, 2019. 15–28.
21 CHEUNG, Anne S. Y.: Az internetes tárhelyszolgáltatók felelőssége rágalmazási ügyekben, *In Medias Res,* 2014/1., 47.

Certain Questions of the Judicial Liability in a Legal Historian Perspective

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The study focuses on the analysis of the judicial liability in the perspective of legal history from 1936 to 1954 in Hungary. During the indicated time period the disciplinary liability of the judges was regulated by the Act III of 1936. The forthcoming regulation reflecting the zeitgeist was Act XXII of 1948 introducing changes to liability of the judges. Subsequently the framework of the disciplinary proceedings was laid down by Act II of 1954 and the detailed rules was declared by the Council of Ministers of the Hungarian People's Republic decree 1.051/1954 (VI. 30.). Act III of 1936 and Act II of 1954 are the results of two political eras which are significantly different in content, and this study focuses on these differences.
Keywords: *judicial profession, liability of the judges, disciplinary liability of the judges, relocation of the judges*

The Judicial Liability observed in a historical approach means a special responsibility that can be interpreted in two dimensions. On the hand, the definition includes the liability of the employee status consisting of unique aspects that are beyond the official work since it involves expectations regarding the private life activities of the judges. On the other hand, it also incorporates a constitutional liability.[1] Within the framework of the rule of law, all these aspects are restricted by the inviolability of the judicial independence. It is worth approaching the question of the judicial independence from two perspective. One is the organizational independence of the courts and the other one is the "individual independence" of the judges.[2]

1 Handó Tünde: A bírói felelősség és függetlenség. In: Majtényi László – Szabó Máté Dániel (ed.): *Mi fenyegeti a Köztársaságot?* Eötvös Károly Intézet, Budapest, 2009, (140.), and on the constitutional framework for the judiciary, see: Arató, Balázs: A tisztességes eljáráshoz fűződő jog, különös tekintettel a tisztességes igazságügyi szakértői eljárásra; in: Tóth J. Zoltán (ed.): Az Abtv. 27. §-a szerinti alkotmányjogi panasz. Tanulmányok a „valódi" alkotmányjogi panasz alkotmánybírósági gyakorlatáról; Budapest, KRE-ÁJK; Patrocinium; 2023; p. 216.; pp. 9-30.
2 Cservák Csaba: *A bírói függetlenség, különös tekintettel az Emberi Jogok Európai Bíróságának gyakorlatára és a testületi szervekre.* Manuscript, 2023.

The study focuses on the analysis of the judicial liability in the perspective of legal history from 1936 to 1954. During the indicated time period the disciplinary liability of the judges[3] was regulated by the Act III of 1936. The forthcoming regulation reflecting the zeitgeist entered into force on 23rd of March in 1948. Namely it was the Act XXII of 1948 introducing changes to liability of the judges. Subsequently the framework of the disciplinary proceedings was laid down by Act II of 1954 and the detailed rules was declared by Council of Ministers of the Hungarian People's Republic decree 1.051/1954 (VI. 30.).

Disciplinary proceedings based on Act III of 1936

According to section 5 of the Act disciplinary offence is committed by:

"1. violating the performance of official duty by serious misconduct or wilful misconduct;

2. wilfully or negligently violating the authority of position (employment) by his lifestyle or behaviour."

Act VIII of 1871 had priorly regulated the institution of misconduct in office since at that time there was no Criminal Code in force. Act III of 1936 did not include the misconduct in office since in the meantime Csemegei Code entered into force setting out the detailed rules of the criminal liability.[4] The Act determined the following disciplinary sanctions: reprimand, financial penalties, loss of office.[5] Furthermore, the relocation of the judges was possible too as a side consequence to serve the public interest. So if "the function of a person on duty at their current seat or current employment, and the court or authority where functioned so far cannot be aligned with the interest of the jurisdiction within the framework of the disciplinary liability – the Disciplinary Court, beside inflicting reprimand or financial penalties as disciplinary sanction or without finding disciplinary mis-

3 This study does not observe the liability of the arbiters. On the topic of arbitration see in detail: Boóc Ádám: Az arbiter fogalma a római jogban. *Magyar Jog*, 2020/4., (221-226.) On the topic of regulations on arbitrators in force see: Boóc Ádám: Észrevételek a választottbíró felelősségéhez. *Magyar Jog*, 2020/9., (535-543.); Boóc Ádám: Észrevételek a kereskedelmi választottbírósági ítéletek érvénytelenítéséről a közrendbe ütközés okán a magyar jogban. *Jogtudományi Közlöny*, 2020/4., (167-173.).; Boóc Ádám: Elméleti észrevételek a nemzetközi kereskedelmi választottbírósági ítéletek érvénytelenítése vonatkozásában. *Jogtudományi Közlöny*, 2019/9., (367-372.).

4 Bódiné Beliznai Kinga: A bírák és a bírósági tisztviselők felelősségének szabályozása (1936). *Kúriai Döntések Bírósági Határozatok,* 2022/ 2. (305.).

5 Section 6 of Act III of 1936.

conduct, is entitled to relocate them by court decision [...] to another seat, court or authority."[6]

Act III of 1936 declared the forensic audit to be mandatory during the disciplinary proceedings.[7] According to the legal justification of the Act, the purpose of the forensic audit was revealing the factual situations of the disciplinary misconduct. Corresponding to this principle, to acquire evidence it positioned the supervisory authority in the same legal status as the judge leading criminal trials.[8]

Based on the observed archive documents so far, one can state in general that mostly those legal disputes stayed in the stage of the supervisory audit which were filed by barristers due to detrimental decisions, however these cases could not serve as a basis for the disciplinary proceedings. During these cases the barristers utilized the possibility of complaint as an "appeal" against the court decisions to support the interests of their clients. Most of the time, the Disciplinary Court rejected these pleas arguing that the judicial interpretation of the law shall not provide basis for finding disciplinary misconduct.[9]

Taking a look at the judicial practice, one may highlight that "The Disciplinary Court shall answer the question whether the conduct of complainant shall be considered as negligent or serious breach of official duties."[10] Furthermore: "the question of whether the court decision is correct on the merits falls outside of the scope of the disciplinary proceedings since the correctness of a thoroughly reasoned and obviously not malfeasant judicial decision shall not be the subject of overruling by disciplinary or supervisory proceedings."[11]

As it is elaborated above, the Act regulated two factual situations of the disciplinary misconduct. Therefore, the study presents a typical proceeding for both the breach of the official duty and the violation (threat) of the judicial authority through archive documents.[12]

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6 Section 15 of Act III of 1936.

7 Section 32 of Act III of 1936. „Disciplinary proceedings are always preceded by a supervisory audit."

8 Justification of Act III of 1936.

9 Navratil Szonja: *A jogászi hivatásrendek története Magyarországon (1868/1869–1937).* ELTE Eötvös Kiadó, Budapest, 2014, (131–132.); Antal Tamás: *Fejezetek a Szegedi Ítélőtábla történetéből III. A Szegedi Királyi Ítélőtábla története 1921–1938 között.* Országos Bírósági Hivatal. Budapest–Szeged, 2017, (42.).

10 Budapest City Archives (hereinafter BCA.) VII.1.b. 86. (1942), 6/1942. Zsöllei Kálmán.

11 BCA. VII.1.b. 86. (1943), 9/1943. Disciplinary case of Gémesi István, Sajó Lajos, vitéz Szent Iványi Ádám.

12 Conf. Bódiné Beliznai Kinga: Történetek a bírói felelősség köréből. In: Gosztonyi

Dezső László the judge of the Royal Criminal Tribunal of Budapest was condemned to reprimand by the Royal Magistrate's Court of Budapest on 22nd of October in 1938.[13] According to the factual situation, the accused was delayed in writing the judgement for 23 times and administered false data in the trial diary on the writing down the judgements. The reasons given by the disciplinary court were as follows: "It was established from these that the accused [...] had in many cases written his judgments [...] with a delay of one to two months and, in order to cover up this omission, had filled in the boxes in the trial diary indicating the date of writing the judgments with false information."[14]

The confession of the accused can be read in the report of the president of the Royal Tribunal of Budapest that clearly reveals the false reports diverting from the truth were submitted to the presidents on a monthly basis stating he had no judgements to be written beyond 15 days overdue.

"The accused – regarding the fact he missed to write the judgements with significant delay for 23 times, and in some cases with several months delay – neglected his official duty – however, the Disciplinary Court considered it as a disciplinary misconduct due to the fact that the accused indicated false data in the trial diary and in his reports submitted to the president of the Tribunal with the intention to hide the aforementioned delays, and by that consistently mislead the supervisory authority which conduct equals to the wilful breach of the official duty that is particularly unworthy of a judge."[15]

The accused appealed against the judgement, but the first instance of the judgement was upheld by the Royal Hungarian Curia on 25th of February in 1939.[16]

According to the following source, the Disciplinary Council of the Royal Court of Justice of Budapest found Lajos Spolarich, the vice-president of the Royal Central District Court of Budapest guilty based on the disciplinary offence defined in point 2 of section 5 of Act III of 1936, therefore inflicted reprimand on 27th of April in 1944.[17]

Gergely – Révész T Mihály (ed.): *Jogtörténeti parerga II: Ünnepi tanulmányok Mezey Barna 65. születésnapja tiszteletére.* Budapest, ELTE Eötvös Kiadó, 2018, (61-66.); Homoki-Nagy Mária: A bírói felelősség kérdéseinek megítélése a gyakorlatban. *Pro Publico Bono, Magyar Közigazgatás*, 2020/3. (221-222.).

13 BCA. VII.1.b. 84. (1938), 18/1938. Disciplinary case of László Dezső.

14 Ibid.

15 Ibid.

16 Ibid.

17 BCA. VII.1.b. 86. (1944), 2/1944. Disciplinary case of Spolarich Lajos.

The Disciplinary Court elaborated that: "A judge shall every time pay attention to present a good example to others, not to offend others without just cause and especially not to scandalize others by his acts carried out in his private life or during his social interactions. He shall keep his burst of emotions at bay even if it was due to a reasonable cause and to preserve the honour of his position he shall align with the norms and expectations of the society – particularly in the presence of ladies – in a way that the required gentleman attitude from him shall not raise any concern. An opposite behaviour threatens the honour of the judicial profession and may lead to the loss of the public confidence in the judge. [...] The conduct of the accused as outlined in the statement of facts – consisting of bursting into a flat of foreign ownership swinging a stick during night hours where group of ladies and gentleman was merrymaking, therefore labelled them with seriously offensive words and expressions then breaking the seat of a chair that is a movable property of foreign ownership considering his ownership – is of obvious scandalized behaviour that is unworthy of a judge and may cause the honour of his profession to be destabilised and raise concerns about his undisputed education."[18]

The minor Disciplinary Council of the Royal Hungarian Curia upheld the judgement of the court of first instance in terms of finding the guilt and its qualification. However, considering the infliction of the sanction it revised the judgement based on section 46 of Act III of 1936 and ordered the accused to pay 300 pengo.

Changes in the disciplinary liability of the judges after 1945

"There is a need for lawyers, but for a new type of socialist lawyers. The main duty of the lawyer apparat is construing new legislation and applying it in alignment with the changed conditions."[19]

From 1945 the independence of judiciary began to be abolished[20] that had a significant impact on the disciplinary liability of the judges. At that time the Act III of 1936 was still in force but practically it was less likely to be applied. As György Uttó said: "Its maintenance in force can be considered more of a formal legal fact".[21]

18 Ibid.

19 „There is a need for new socialist lawyers." Nyírségi Magyar Nép, 1949/56. sz. (2.).

20 See in detail: Peres Zsuzsanna: A bírói függetlenség felszámolása (1945-1989). *Kúriai Döntések, Bírósági Határozatok*, 2023/5. sz. (952-965.).

21 Uttó György: Az igazságügyi alkalmazottakkal szembeni fegyelmi eljárás múltja, jelene és jövője. *Magyar Jog*, 2011/11. sz. (584.).

The composition of the Disciplinary Court regulated by section 19 of Act III of 1936 was amended by section 1 of Decree 6.760/1945. ME. on the amendment of the organization of the Supreme Disciplinary Court[22] whereas section 23 (Supreme Disciplinary Court) of the Act was abolished by section 2 of the Decree. It entered into force on 22nd of August in 1945.

Act XXII of 1948 temporally regulated the relocation of the judges and also included the retirement of the judges and state prosecutors.[23]

According to the first section of the Act, "The Minister of Justice is entitled to relocate any of the judges under his supervision – without the consent of the certain judge – to another court."

As per the justification of the Act: "In time of significant organizational changes, the need to temporarily suspend the non-transferability of the judges has already arisen in the past. This need – considering the territorial changes and the aspects of the democratic transformation – still exists..."

The Minister of Justice was allowed to carry out relocations until 31st of December in 1949.[24] The judge who already turned 50 years old when he was informed about his relocation, was allowed to request retirement within 30 days from receiving the notice instead of undertaking the appointed position.[25] The judge who had not turned 50 years old when he received the notice of relocation and did not undertake the newly appointed position, shall be considered as if he renounced his public employment and need for care, and all claims based on duty.[26]

Section 14-16 of statutory decree 46 of 1950 on the amendment of the authority and proceedings in respect of the judicial organization declared the regulation of disciplinary and supervisory power. The statutory decree laid down that "the disciplinary council of the county court has the jurisdiction to act at first instance in the disciplinary case of the president, vice-

22 "According to section 19 of Act III of 1936, the Supreme Disciplinary Tribunal shall consist of thirty-six members in addition to the President, namely the eighteen to eighteen most senior Presidents of Chambers or Judges of the Curia and the Administrative Court." Decree No. 6.760 M. E. 1945 of the Provisional National Government amending the organisation of the Supreme Disciplinary Court section 1. List of decrees, 1945, (635.).
23 Bódiné Beliznai Kinga: A bírói függetlenség és garanciái (1848–1948). *Kúriai Döntések, Bírósági Határozatok*, 2023/5. sz., (946-948.); Bódiné Beliznai Kinga: A bírói fegyelmi felelősség szabályozása 1945 után. In: Birher Nándor – Miskolczi-Bodnár Péter – Nagy Péter – Tóth J. Zoltán (szerk.): *Studia in honorem István Stipta*. Budapest, KRE ÁJK, 2022, (a továbbiakban: Bódiné Beliznai 2022/a), (123-125.).
24 Section 1 point 4 of Act XXII of 1948 on the temporary regulation of the relocation of the judges and the retirement of the judges and state prosecutors.
25 Section 2 point 2 of Act XXII of 1948
26 Section 2 point 3 of Act XXII of 1948

president, and the judges of the district court. For the establishment of the disciplinary council and its proceedings, those regulations shall be applied that are in alignment with the regulation of the disciplinary council of the superior court laid down by Act III of 1936. The minor disciplinary council of the Supreme Court is assigned to act at second instance in these disciplinary cases."[27]

The Decree 107/1950 (IV. 15.) M. T. on the amendment of certain sections of Act III of 1936 amended the regulations of the suspension regarding the persons subjected to disciplinary proceedings.[28]

The disciplinary offence as per Act II of 1954

According to section 53 point 1 of Act II of 1954, "the judge of the Hungarian People's Republic shall be politically and morally irreproachable and shall at all times perform his official duties with honesty, vigilance and diligence."

The Act determined the disciplinary misconduct[29] as it follows: "a judges who is negligent and irresponsible considering his duty, or breaches the discipline of his office, behaves in a unworthy manner of a judge of the People's Republic of Hungary, or offends the authority of the people's judiciary, commits disciplinary misconduct."[30] The disciplinary sanctions[31] were: notice of scold, reprimand, serious reprimand, and recall[32] also belonged to this list.

The detailed rules of disciplinary proceedings were laid down in Resolution 1.051/1954 (VI. 30.) issued by the Council of Ministers of the Hungarian People's Republic and signed by Imre Nagy. Whereas previously the Disciplinary Court attached to the Court of Magistrates decided disciplinary cases at the first instance, under the new rules the Disciplinary Council attached to the county or district courts acted as the first instance.[33] Unlike the Act III of 1936, the decision did not provide for a (compulsory) supervisory examination. The disciplinary meeting - also unlike before - was not held in public.[34]

27 Section 14 point 1 of Statutory Decree 46 of 1950.
28 Magyar Közlöny, Minisztertanácsi és miniszteri rendeletek tára, 1950/64. sz. 1950. április 15., (552.).
29 Bódiné Beliznai (2022/a), (127–129.).
30 Section 53 point 2 of Act II of 1954
31 Section 58 point 1 of Act II of 1954
32 Section 58 point 2 of Act II of 1954
33 Section 55 of Act II of 1954
34 Section 16 point 1 of No. 1.051/1954 (VI. 30.) order

In the disciplinary cases – within shorter period of time than previously – the decision had to be delivered within 4 weeks from the commencement of the proceedings.[35] The judge subjected to disciplinary proceedings was allowed to appeal, whereas the prosecutor was allowed to lodge a protest.[36]

The significant differences between the legislations are presented below in the following chart:

Act III of 1936	**Comparison aspects**	**Act II of 1954 and Decree 1.051/1954 (VI. 30.) by the Council of Ministers of the Hungarian People's Republic**
1. breach of official duty 2. violation/threat of the honour of the judicial profession	**Factual situation of the disciplinary misconduct**	- breach of the discipline in office - violating the authority of the people's jurisdiction by unworthy behaviour
- reprimand - financial penalty - loss of office + relocation (side consequence)	**Types of disciplinary sanctions**	- notice of scold - reprimand - serious reprimand - recall
1. mandatory supervisory audit 2. (public) disciplinary trial 3. judgement	**Disciplinary proceeding**	1. finding the factual situation (by the judge appointed by the disciplinary council) 2. non-public trial 3. court order

Summary

Act III of 1936 and Act II of 1954 are the results of two political eras which are significantly different in content, and that main differences are mentioned above. To summarize, the regulations of the judicial profession,

35 Section 19 point 1 of No. 1.051/1954 (VI. 30.) order
36 Section 26 point 1 of No. 1.051/1954 (VI. 30.) order

more specifically the liability of the judges, were meant to preserve the authority and dignity of the jurisdiction, and to protect the interest of the legal services until 1945. At the same time, the legal system of disciplinary proceedings guaranteed a thorough investigation of the cases and the protection of the rights of the judge who was subject to the proceedings. On the contrary, the regime change after 1945, especially after 1948 utilized the official pragmatics in the field of jurisdiction to select the apparat of the jurisdiction, and considered the disciplinary proceeding as a tool of the new socialist judges.

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The a *Semet Ipso Exigere* Obligation of the *Negotiorum Gestor* Concerning Interest Payment

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Negotiorum gestio could be limited to a specific business, but it could also refer to all the affairs of a person, or to all those he has in a specific city or province. In the latter cases the obligation of the *negotiorum gestor* was not to neglect any act included in the sphere of management that he has undertaken: in this regard, particular importance was given by jurisprudence to the obligation to demand credits towards third parties as well as from himself (*a semet ipso exigere*), with the effect of *actio negotiorum gestorum* even the obligations that for whatever reason pre-existed between the *negotiorum gestor* and the principal could be enforced. In the following, fragments from the primary legal sources of the *negotiorum gestio* (D. 3, 5) will be analysed, in which the interest payment obligation of the *negotiorum gestor* arises in connection with the *a semet ipso exigere* principle. Hopefully, the results of this paper will prove useful in the area of researches dealing with the liability of the *negotiorum gestor*.
Keywords: *a semet ipso exigere, negotiorum gestio, liability of the negotiorum gestor*

Introduction

An unauthorized administrator has a fundamental obligation to compensate the *dominus negotii* for the damages and expenses incurred as a consequence of his intervention.[1] *Negotiorum gestio* was based on *bonae fidei iudicium*, hence conduct of the *negotiorum gestor* was assessed according to the criteria of *bona fides*[2] and the *gestor* was already held liable in classical law for slight negligence *(culpa levis)*[3]. The *dominus* could enforce his claims

1 Max Kaser: *Das Römische Privatrecht*. München, C. H. Beck'sche Verlagsbuchhandlung, 1971[2]. 589.
2 Reinhard Zimmermann: *The Law of Obligations. Roman Foundations of the Civilian Tradition*. Oxford, Oxford University Press, 1996. 445.
3 The same liability of the *negotiorum gestor* as the category of stakeholder originally only be realised by breaking through the 'Utilitätsprinzip', since he had nothing to gain from protecting the interests of the *dominus* – as long as his claims for reimbursement

against the *gestor* by *actio negotiorum gestorum directa*,[4] while the latter could claim reimbursement of his necessary expenses by *contraria actio*[5].

On the one hand, the administration of another's affairs included the recovery of claims of the *dominus* against third parties,[6] and on the other, the *gestor* was obliged to pay his own debts *(sibi solvere)*[7] to the *dominus*,[8] whether incurred before or during the administration. Failure to collect or pay the due debts would have induce the consequences of delayed payment.[9] The literature refers to the accounting obligation of the *gestor* by the authentic term *a semet ipso exigere*.

The present article deals with those fragments of the *De negotiis gestis* title of the Digest, which are directly related to the *a semet ipso exigere* obligation concerning interest payment. The aim of our analysis is to detect, on the basis of the sources, the correlation between the *a semet ipso exigere* principle and the obligation to pay interest and to identify the most important factors develop the liability system of the *negotiorum gestor* in that structure.

Economic background

The following cases are related to the obligation of *negotiorum gestor* to pay interest. Since interest regulation was a central element of Roman credit life, it is worth briefly reviewing its basic features.

Interest is an antique legal institution, thus was known not only by Greeks and Romans, but in ancient Eastern societies such as Egypt, China and India as well.[10] As we know, interest is as old as loan and it also gained legal regulation along with that.[11]

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have not been recognized: Bernhard Kübler: Die Haftung für Verschulden bei kontraktsähnlichen und deliktsähnlichen Schuldverhältnissen. *SZ* 39 (1918), 172–223. 196.

4 Otto Lenel: *Das Edictum Perpetuum. Ein Versuch zu seiner Wiederherstellung*. Leipzig, Verlag von Bernhard Tauchnitz, 1927[3]. 102.

5 Hans Ankum: Utiliter gestum. *OIR* 1995/1, 19–53. 45.

6 Vincenzo Arangio-Ruiz: *Istituzioni di diritto romano*. Napoli, Jovene, 1991[14]. 359.

7 Paul. 2 *ad Nerat*. D. 3, 5, 18.

8 Giovanni Finazzi: *Ricerche in tema di negotiorum gestio. Obbligazioni gravanti sul gestore e sul gerito e responsabilità.* Vol. II/2. Cassino, Edizioni dell'Università degli Studi di Cassino, 2006. 47.

9 Vincenzo Arangio-Ruiz: *Il mandato in diritto romano*. Napoli, Jovene, 1949. 26.

10 Benjamin S. Horack: A Survey of the General Usury Laws. *Law and Contemporary Problems* 8 (1941), 36–53. 36.

11 Hans-Peter Benöhr: Versura. *SZ* 107 (1990), 216–248. 219.

As the Latin term for interest, the words *fenus* and *usura* are both found in the sources of Roman law. From the end of the Republic, the latter naming became dominant.[12]

Roman law mainly laid down rules on the collection of interest, the level of interest rates and the limitation of the amount of interest.[13] The obligation of interest payment could have resulted from a contractual clause or from a statutory provision.[14]

In Rome, the maximum interest rate was first established by the Law of the Twelve Tables *(unciarium foenus)*.[15] Over time, it became necessary to regulate widespread abuses in the field of interest collection by separate acts.[16]

The rate of interest was probably set at $8^1/_3$% by the Twelve Tables. Then, in the eras of Roman law, it took on different values: At the time of the principate it was already 12% per annum,[17] and then Iustinian reduced it to 6% in general[18].

Roman society was impelled by land and interest usury, therefore high interest collection caused serious problems in circulation for a long time.[19] This permanent problem is also reported by Pliny the Younger in his letter to the Emperor Trajan.[20]

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12 Elemér Pólay: Kamat a római jogban. *Miskolci Jogászélet*, 1942/18. 72–96, 73.

13 András Földi—Gábor Hamza: *A római jog története és institúciói*. Budapest, Novissima Kiadó, 2022[26]. 416. Usury was also punished. Although, Romans meant something different by usury than what modern private law defines as such. Anyone who exceeded the maximum interest rate by any amount was considered as a usurer. Roman law prohibited both forms of compound interest — the *anatocismus coniuncustus* and the *separatus*: Elemér Pólay: Kamat a római jogban (Folytatás). *Miskolci Jogászélet*, 1942/18. 107–110, 107–108.

14 Ferenc Benedek—Attila Pókecz Kovács: *Római magánjog*. Budapest, Ludovika Egyetemi Kiadó, 2021[9]. 260.

15 János Zlinszky: *A tizenkéttáblás törvény töredékei*. Budapest, Nemzeti Tankönyvkiadó, 1995. 30.

16 Several laws were passed in the 5th and 4th centuries BC, e.g. *Lex Licinia Sextia*, *Lex Duilia et Menenia de unciario fenore*, *Lex Martia de usuris reddendis*, *Lex Genucia*, but even these could not settle the economic relations satisfactorily.

17 Mario Talamanca: *Istituzioni di diritto romano*. Milano, Giuffrè, 1990. 545–546.

18 Iustinian allowed the following exceptions to the rate of interest: 4% for members of the upper classes, 8% for merchants and bankers, and 12% for the maritime loan: Max Kaser—Rolf Knütel—Sebastian Lohsse: *Römisches Privatrecht*. München, C. H. Beck, 2021[22]. 173.

19 Imre Molnár—Éva Jakab: *Római jog*. Szeged, Leges, Diligens, 2021[9]. 251.

20 Trajan's campaigns took a heavy toll on the financial resources of the empire, tax revenue decreased, especially the maintenance of the army required significant ex-

Plin. Sec. *Epist*. 10,54: "Thanks to your foresight, Sir, the sums owed to public funds have been paid in under my administration, or are in process of being so; but I am afraid the money may remain uninvested. There is no opportunity, or practically none, of purchasing landed property, and people cannot be found who will borrow from public funds, especially at the rate of twelve per cent, the same rate as for private loans. Would you then consider, Sir, whether you think that the rate of interest should be lowered to attract suitable borrowers, and, if they are still not forthcoming, whether the money might be loaned out among the town councillors upon their giving the State proper security? They may be unwilling to accept it, but it will be less of a burden to them if the rate of interest is reduced."[21]

As can be seen, in Pliny's time, only a few people could afford to buy land, and taking out a loan had very unfavourable consequences for the debtor, accordingly, most people tried to avoid paying the legal interest.[22] But they could hardly exempt themselves from high interest rates, as both the state and the creditors endeavoured to compensate somewhat the damage caused by the economic crises through the "exploiting" of the debtors.[23]

Obligation of the *negotiorum gestor* to fulfil his own debt

Our first text in which the *a semet ipso exigere* obligation is discussed, comes from Tryphoninus and is thus probably a product of the late classical period.[24]

Tryph. 2 *disp*. D. 3, 5, 37: *Qui sine usuris pecuniam debebat, creditoris sui gessit negotia: quaesitum est, an negotiorum gestorum actione summae illius*

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penses. Arable farming and agricultural production began to decline, which led to grain shortages: Károly Visky: *Spuren der Wirtschaftskrise der Kaiserzeit in den römischen Rechtsquellen*. Budapest, Akadémiai Kiadó, 1983. 14.

21 Translation by Betty Radice.

22 On the economic problems noted by Pliny, see René Martin: Plinius der Jüngere und die wirtschaftlichen Probleme seiner Zeit. In: Helmuth Schneider (ed.): *Sozial- und Wirtschaftsgeschichte der römischen Kaiserzeit*. Darmstadt, Wissenschaftliche Buchgesellschaft, 1981. 196–233.

23 Usurious loan was already punished in the republican era: William F. Allen: The Monetary Crisis in Rome, A.D. 33. *Transactions of the American Philological Association*, 1887/18. 5–18, 8. The defencelessness of inferior debtors was somewhat alleviated by the abolition of debt slavery in the *Lex Poetelia Papiria* (326 BC): Robert P. Maloney: Usury in Greek, Roman and Rabbinic thought. *Traditio* 27 (1971), 79–109. 88. The laws of Caesar, Augustus, Tiberius and later Claudius also allowed interest-free *(sine usurae)* borrowing in times of economic crisis: Tac. *Ann*. 6,16-17; 9,13; Suet. *Iul*. 27, 42; *Aug*. 41; *Tib*. 48.

24 Wolfgang Kunkel: *Herkunft und soziale Stellung der römischen Juristen*. Weimar, Hermann Böhlaus Nachfolger, 1952. 231.

usuras praestare debeat. Dixi, si a semet ipso exigere eum oportuit, debiturum usuras: quod si dies solvendae pecuniae tempore quo negotia gerebat nondum venerat, usuras non debiturum: sed die praeterito si non intulit rationibus creditoris cuius negotia gerebat eam pecuniam a se debitam, merito usuras bonae fidei iudicio praestaturum. Sed quas usuras debebit, videamus: utrum eas, quibus aliis idem creditor faenerasset, an et maximas usuras: quoniam ubi quis eius pecuniam, cuius tutelam negotiave administrat, aut magistratus municipii publicam in usus suos convertit, maximas usuras praestat, ut est constitutum a divis principibus. Sed istius diversa causa est, qui non sibi sumpsit ex administratione nummos, sed ab amico accepit et ante negotiorum administrationem. Nam illi, de quibus constitutum est, cum gratuitam certe integram et abstinentem omni lucro praestare fidem deberent, licentia, qua videntur abuti, maximis usuris vice cuiusdam poenae subiciuntur: hic bona ratione accepit ab alio mutuum et usuris, quia non solvit, non quia ex negotiis quae gerebat ad se pecuniam transtulit, condemnandus est. Multum autem refert, incipiat nunc debitum an ante nomen fuerit debitoris, quod satis est ex non usurario facere usurarium.

According to the fact pattern, the original legal relationship of the parties was an interest-free, overdue debt from an earlier loan agreement.[25] The debtor may have later undertaken to manage the creditor's affairs, that is there is a contractual relationship between them regarding the loan and a quasi-contractual regarding the *negotiorum gestio*. A *condictio* would be available to the creditor to claim the loan, but with this, he cannot sue for the interests.[26] Thus, the question is whether the creditor can recover the interest on the debt from the debtor by an *actio negotiorum gestorum directa*.

Tryphoninus replied that if the debtor was under *a semet ipso exigere* obligation, then he must pay the interest. But, if the debt is not yet due, he does not have to pay it. The jurist therefore makes the interest payment dependent on the omission of the *a semet ipso exigere* obligation or the occurrence of the duty date. The *negotiorum gestor* had to record the payment in the creditor's account book in order to fulfil the obligation *(intulit rationibus creditoris)*.[27]

25 Alfons Bürge: Fiktion und Wirklichkeit. Soziale und rechtliche Strukturen des römischen Bankwesens. *SZ* 104 (1987), 465–558. 543.

26 It was not possible to fix the interest rate under a loan agreement, the parties had to create a separate *stipulatio* for that purpose: Salvatore Riccobono: Stipulatio ed instrumentum nel Diritto giustinianeo. *SZ* 43 (1922), 262–397. 321.

27 The Romans managed their finances in account books *(codex accepti et expensi)*. In the sources, the words *rationes* or *tabulae* refer to the registration of private loan claims ('private Darlehensforderungen'), the concept of *kalendarium* rather included a register of commercial money lenders. Bookkeeping not only made it possible to control the money paid out and the money reimbursed with interest, but it was actually a

As the loan is a *stricti iuris* real–contract, not on the basis of a *condictio*, the interest could only be claimed by means of a separate interest stipulation.[28] On the other hand, we have no information about that a *stipulatio* would have been established between the parties.[29] The other solution might have been stipulating the interest rate within the framework of an informal agreement, but the loan did not make this possible.[30] However, Tryphoninus does not consider the interest payment on the basis of an additional obligation, rather he finds the fair solution to enforce the *bonae fidei iudicium* derived from *negotiorum gestio*.[31]

The jurist points out, through an analogy, what type of interest the *gestor* has to pay. In accordance with the basic case, those which the creditor normally lends *(quibus aliis idem creditor faenerasset)*. But, in special situation, when someone manages another's affairs — for example as a guardian or administrator[32] — or if, as a *magistratus municipii*[33], he embezzles public

list of stipulated credit claims. However, if the claim was established in *stipulatio* and a deadline was set for the payment of the interest-bearing debt, then the content of the *kalendarium* was only nominal: Ralf Michael Thilo: *Der Codex accepti et expensi im Römischen Recht. Ein Beitrag zur Lehre von der Litteralobligation*. Göttingen–Zürich–Frankfurt, Muster–Schmidt, 1980. 107-108.

28 Paul du Plessis: *Borkowski's Textbook on Roman Law*. Oxford, Oxford University Press, 2010. 295.

29 *Stricti iuris obligatio* would exclude the possibility of assessing diligence. As the object of *mutuum* is fungible, it would result an objective liability, however no interest payment obligation could arise from *mutui datio*: Kaser 1971, 531. Theoretically, based on a *stipulatio usurarum* connected to the loan, the debtor could be obliged to pay interest, but this possibility can also be rejected in the context of the fragment *(incipiat nunc debitum an ante nomen fuerit debitoris)*. Cf. Paul. 4 resp. D. 22, 1, 12.

30 George Mousourakis: *Roman Law and the Origins of the Civil Law Tradition*. Cham–Heidelberg–New York–Dordrecht–London, Springer, 2015. 129. For the distinction between *pactum* and *stipulatio*, see György Diósdi: *Contract in Roman Law. From the Twelve Tables to the Glossators*. Budapest, Akadémiai Kiadó, 1981. 127.

31 Cf. Attila Pókecz Kovács: Rücktrittsvorbehalt und pactum displicentiae (Ulp. D.19.5.20pr.). *Revue internationale des droits de l'antiquité*, 2011/58, 315–338. 319. Interestingly, the interest on the amount of money lent by the cities could also be claimed *ex nudo pacto*: Paul. *sing. reg*. D. 22, 1, 30.

32 *Negotiorum gestio* was a subsidiary institution, in the absence of applicability of *actio mandati* and *actio tutelae*, the parties could sue by *actio negotiorum gestorum*: Josef Partsch: Studien zur Negotiorum Gestio. Vol. I. *Sitzungsberichte der Heidelberger Akademie der Wissenschaften, Philosophisch-historische Klasse*, 1913/12. 46.

33 The term *magistratus municipales* included the *duumvires* or *quattuorvires* belonging to the *municipium* or *colonia*: Adolf Friedrich Rudorff: *Das Recht der Vormundschaft aus den gemeinen in Deutschland geltenden Rechten entwickelt*. Bd. 3. Berlin, Ferdinand Dümmler, 1834. 159.

money, then he will be obliged to pay the maximum interest rate of 12%,[34] prescribed by the *divi principes*[35]. This is to be understood as, that those administrators, guardians and *magistratus* are obliged to pay the legal interest maximum, who abused his rights in a manner contrary to the nature of the *fides (licentia, qua videntur abuti*[36]*)* and intended to profit from foreign money. They have to pay the highest interest rate as a kind of punishment *(vice cuiusdam poenae subiciuntur)*.[37]

After presenting the analogy, the jurist returns to the case in front of him with the phrase, *Sed istius diversa causa est* and summarizes the legal problem. Those to whom the emperor's decree extends, that is who gratuitously, certainly altruistically attended and abstained from any profit, are responsible for *fides*.[38] Furthermore, the fact pattern also includes the situation when someone received a loan from a friend, before starting the management *(ab*

34 Tryphoninus, however, did not link the interest payment obligation arising from the infringement of the *a semet ipso exigere* principle to the legal regulation. It seems that the action of the *negotiorum gestor* is not subject to the same consideration as those who otherwise carry out asset management activities: Finazzi 2006, 52. Cf. the specific rules on guardianship: Éva Jakab: Vis ac potestas. Gyámi vagyonkezelés a klasszikus római jogban. In: Márta Görög—Andrea Hegedűs (ed.): *Lege duce, comite familia. Ünnepi tanulmányok Tóthné Fábián Eszter tiszteletére, jogászi pályafutásának 60. évfordulójára*. Szeged, Iurisperitus Kiadó, 2017. 199–211, 201; 209. For the relation between *cura*, *tutela* and *negotiorum gestio*, see Emese Újvári: Összetett eszköztár a gyámolt érdekeinek védelmében a klasszikus korban: a C.5.75.1 tanúsága. In: Béla P. Szabó—Emese Újvári (ed.): *Risus cum lacrimis. Könyv Babják Ildikó emlékére (tanulmányok, baráti írások)*. Debreceni Egyetem Marton Géza Állam és Jogtudományi Doktori Iskola, Debrecen, Lícium-Art Könyvkiadó, 2017. 267–280, 270.

35 Regarding *divi principes*, the names of Marcus Aurelius and Lucius Verus, as well as Septimius Severus and Caracalla have appeared in the literature: Giovanni Gualandi: *Legislazione imperiale e giurisprudenza*. Vol. II. Milano, Giuffrè, 1963. 190.

36 Here the pejorative sense of *licentia* is used, referring to licentious, impudent behaviour: Adolf Berger: *Encyclopedic Dictionary of Roman Law*. Philadelphia, The American Philosophical Society, 1980. 564.

37 For the relationship between interest payments and public funds, see Roger Vigneron: Franco Gnoli: Ricerche sul crimen peculatus. *SZ* 99 (1982), 412–417. 416. With respect to the *a semet ipso exigere*, no connection can be shown between the facts presented in the analogy and the specific case, since the latter is not subject to the provisions on interest maximisation: Finazzi 2006, 52. On the question of the interest payment obligation of *magistratus municipii*, see Paul. *sing. usuris* D. 22, 1, 17, 7.

38 The Roman category of *fides* originally meant truthfulness and honesty, the objective concept entered in the *bonae fidei iudicium* was presumably developed in pre-classical law: András Földi: Remarks on the notion of 'bona fides'. *Annales Universitatis Scientiarum Budapestinensis de Rolando* Eötvös *Nominatae - Sectio Iuridica 48*. (2007), 53–72. 58.

amico accepit et ante negotiorum administrationem). Therefore, we should assess the liability and the interest payment obligation of the *negotiorum gestor* in the light of *bona fides*.

The *gestor* obtained the money loan in an honest way *(bona ratione accepit)*, but since he failed to register the performance in the account book *(quia non solvit)*,[39] he acted negligently and is liable for it. In addition, it must be considered that the debt has only just arisen or existed before the administration began.[40] In the latter case, it is sufficient to convert the non-interest-bearing debt into an interest-bearing one *(satis est ex non usurario facere usurarium)*. Due to failure to repay the debt within the deadline, the *gestor* becomes a debtor in default and has to pay the resulting interest.[41]

Therefore, it is not an interest-bearing debt stipulated in an accessory obligation — this did not take place either at the start of the administration or its duration —, the *negotiorum gestor* is obliged to pay the default interest due to the non-fulfilment of the original obligation, the loan. If the interest payment emerged from debtor default, beyond due date and the *interpellatio* of the creditor, imputation is also belonged to the factual elements.[42] This is based on contractual liability, thus, according to *bona fides*, he is justly liable for the interests *(merito usuras bonae fidei iudicio praestaturum)*.

Although, the jurist stated at the very beginning of his opinion that the infringement of the *a semet ipso exigere* obligation in itself provides a legal basis for demanding the interest payment *(a semet ipso exigere eum oportuit, debiturum usuras)*,[43] Tryphoninus finally identified *bona fides* as its legal title.[44]

39 The accounting of performance ('Solutionsakt') does not in itself fulfil the obligation, at the same time, the *gestor* had to actually pay his debt: Andreas Wacke: Tilgungsakte durch Insichgeschäft. Zur Leistung eines Tutors oder Prokurators an sich selbst. *SZ* 103 (1986), 223–247. 229. Cf. Hans Peters: Generelle und spezielle Aktionen. *SZ* 32 (1911), 179–307. 269.

40 Cf. Aldo Cenderelli: *La negotiorum gestio. Corso esegetico di diritto romano*. Vol. I. Torino, Giappichelli, 1995. 191-192.

41 Matteo Marrone: *Manuale di diritto privato romano*. Torino, Giappichelli, 2004. 261.

42 Róbert Brósz—Elemér Pólay: *Római jog*. Budapest, Tankönyvkiadó, 1986[4]. 354.

43 The *a semet ipso exigere* principle, as a *lex specialis*, is a prerequisite ('presupposto') for the payment of interest: Finazzi 2006, ibid. Knütel states that the jurists did not impose an obligation to pay interest only on the basis of a clause or default, but in all cases where the debtor could use other people's money for his own benefit: Rolf Knütel: Zum Nutzungszins. *SZ* 105 (1988), 514–541. 530.

44 Cf. Marc. 4 *reg*. D. 22, 1, 32.

The amount of the interest rate is not clear from the fragment.[45] It could be determined either by the *rescriptum* or by the jurisprudence.[46] Probably only the average rate of interest could be demanded from the bona fide manager.[47]

In the text by Tryphoninus, the *negotiorum gestor*'s obligation to pay interest partly depends on the breach of the *a semet ipso exigere* principle,[48] partly the due date of the bond itself[49]. *Solutio sibi* was lacking on the part of the *gestor*, that is registry of payment of his own debt in the account book, hence in this case, the interest payment obligation follows from the non-fulfilment of the contract.[50]

Obligation of the *negotiorum gestor* to collect foreign debt

A very similar situation to D. 3, 5, 37 is found in the following fragments. The interest payment obligation is also at the centre of the Ulpian text, with the difference that this time the *negotiorum gestor* is bound to collect debts from debtors of the *dominus negotii*. The continuation of D. 3, 5, 5, 14 can be found at Paul, who provides us valuable information on the assessment of the liability of the *gestor*.

Ulp. 10 *ad ed*. D. 3, 5, 5, 14: *Videamus in persona eius, qui negotia administrat, si quaedam gessit quaedam non, contemplatione tamen eius alius ad haec non accessit, et si vir diligens (quod ab eo exigimus) etiam ea gesturus*

45 According to Bürge, the rate of interest was determined by the usual practice of the given region: Bürge 1987, 543. Cf. Ulp. 10 *ad ed*. D. 22, 1, 37. The *bonae fidei iudicium* could also provide a basis for taking (legal) customs into account: Ulp. 1 *ad ed. aed. cur*. D. 21, 1, 31, 20, see the exegesis of the text: Éva Jakab: Die ädilizischen Stipulationen. In: János Zlinszky (ed.): *Questions de responsabilité. XLVème Session de la Société Internationale „Fernand de Visscher" pour l'Histoire des Droits de l'Antiquité. 14-22 Septembre 1991*. Miskolc-Eger, Hongrie, Miskolc 1993. 167–178, 174-175. Finazzi on the other hand, notes that the interest rate generally applied by the *dominus* did not necessarily coincide with the *mos regionis*; thus, they could also paid regard to that, in case of timely performance, the principal would have used the money according to his own habits: Finazzi 2006, 51.

46 Finazzi 2006, 53.

47 Wacke 1986, 229.

48 Hans Kreller: Das Edikt de negotiis gestis in der klassischen Praxis. *SZ* 59 (1939), 390–431. 402.

49 For the relationship between contractual interest and default interest: Rolf Knütel: Stipulatio und pacta. In: Dieter Medicus—Hans Hermann Seiler (ed.): *Festschrift für Max Kaser zum 70. Geburtstag*. München, C. H. Beck'sche Verlagsbuchhandlung, 1976. 201–228, 221.

50 Finazzi 2006, 50.

fuit: an dici debeat negotiorum gestorum eum teneri et propter ea quae non gessit? Quod puto verius. Certe si quid a se exigere debuit, procul dubio hoc ei imputabitur. Quamquam enim hoc ei imputari non possit, cur alios debitores non convenerit, quoniam conveniendi eos iudicio facultatem non habuit, qui nullam actionem intendere potuit: tamen a semet ipso cur non exegerit, ei imputabitur: et si forte non fuerit usurarium debitum, incipit esse usurarium, ut divus Pius Flavio Longino rescripsit: nisi forte, inquit, usuras ei remiserat:

Paul. 9 *ad ed*. D. 3, 5, 6: *Quia tantundem in bonae fidei iudiciis officium iudicis valet, quantum in stipulatione nominatim eius rei facta interrogatio.*

During the — presumably general — administration, the *negotiorum gestor* attended to some matters and neglected others *(quaedam gessit quaedam non)*,[51] regarding to this *(contemplatione)*[52], another party could not take charge of what was neglected *(alius ad haec non accessit)*.[53] Ulpian compares his act to the conduct of a prudent person *(vir diligens)*[54], as this is the social requirement *(quod ab eo exigimus)*.[55] The *vir diligens* would have completed all matters, including those that the *gestor* failed to do *(etiam ea gesturus fuit)*. Whether he ought to be considered liable in a suit based on business transacted, including those things which he neglected? According to the jurist, yes, because, the *gestor* can undoubtedly be blamed for the failure to collect what he was obliged to *(a se exigere debuit)*. However, he cannot be blamed for not suing the other debtors, since he had not the power to do so, as he was not authorized to institute any legal proceedings *(quoniam conveniendi eos iudicio facultatem non habuit)*.[56] Consequently, he can only be held liable based on *a semet ipso exigere* obligation.[57]

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51 The administration scope of the *gestor* could have been quite broad: Hans Hermann Seiler: *Der Tatbestand der negotiorum gestio im römischen Recht*. Köln–Graz, Böhlau Verlag, 1968. 16.

52 *Contemplatione domini* is considered an innovation by Iustinian: Raymond Monier: *Manuel* élémentaire *de droit romain*. Vol. 2. Paris, Scientia Verlag Aalen, 1970^{5}. 209.

53 According to Arangio-Ruiz, the action of the *gestor* is a "truly unique construction", which seems dissonant with the generally used *negotia administrare* passage: Vincenzo Arangio-Ruiz: *Responsabilità contrattuale in diritto romano*. Jovene, Napoli, 1958^{2}. 214.

54 The measure formulated by Paul is the same as the care of the diligent *pater familias*: Francesco M. de Robertis: *La responsabilità contrattuale nel sistema della grande compilazione*. Vol. II. Bari, Cacucci, 1982. 812.

55 The structure of *vir diligens* is believed interpolated by Peters 1911, 270. and Heinrich H. Pflüger: Zur Lehre von der Haftung des Schuldners nach römischem Recht. *SZ* 65 (1947), 121–218. 187.

56 Cf. C. 2, 18, 20, 2.

57 Wacke 1986, 228.

At first glance, it seems as if the liability of the *gestor* can be traced back to two causes. The *gestor* did not comply with the *a semet ipso exigere* obligation, in this manner — according to Ulpian — he is undoubtedly liable.[58] On the other hand, the *vir diligens* would have fulfilled this obligation, but there was no opportunity for such a careful person to intervene, as the *gestor* impeded this.[59] Potential administrators probably knew about the activities of the *negotiorum gestor* and therefore did not even attempt to intercede, because they trusted that he would perform the administration perfectly.[60] The jurist presupposes that, as a result of the *gestor*'s intervention, among the persons, who are no longer able to act in the interest of the principal, there could be one, who would have performed the task with due diligence.[61]

A conception arose in literature, which identifies the administrator as a *procurator omnium bonorum*.[62] This theory seems reasonable, if we accept

58 Perhaps because he trusted that he could abstain from doing other businesses without harming the *dominus* ('senza danno astenere dall'intervento in altri affari'): Arangio-Ruiz 1958, ibid.

59 Seiler 1968, 15.

60 To impede the interference of other, it is not necessary for the *negotiorum gestor* to pretend to be a guardian or a general agent. It is sufficient if, based on the objective context, a third person – who would otherwise interfere in another's affairs – believes that someone else is already managing the matter: Finazzi 2006, 37-38. Naturally, the ascertainment of liability does not require that a third person actually offers to perform the administration: Rudolf Jhering (ed.): *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts*. Vol. 19. Jena, Mauke, 1881. 261.

61 Finazzi points out that the obligation of the *negotiorum gestor* could only be limited to the case in which others would have undertaken to manage the affairs of the principal, even before he began to do so: Finazzi 2006, 37. According to Peters, the requirement of *a semet ipso exigere* forms the basis of general administration ('generelle Geschäftsführung'): Peters 1911, 270-271.

62 Giovanni Nicosia: *Gestione di affari altrui (premessa storica)*. In: Enciclopedia del Diritto. Vol. XVIII. Milano, Giuffrè, 1969. 628–644, 643. The literature on the institution of *procurator omnium bonorum* is quite controversial. On the legal basis and the powers of the *procurator* – to mention only the two most important issues – there are different views among Romanists. According to Schlossmann, there was no legal relationship between the *dominus* and the *procurator omnium bonorum*: Siegmund Schlossmann: *Der Besitzerwerb durch Dritte nach römischem und heutigem Rechte. Ein Beitrag zur Lehre von der Stellvertretung*. Leipzig, Breitkopf & Härtel, 1881. 104. This view is partly shared by Serrao, who believes that slaves, due to their services *(ministerium)* and purely within the framework of family customs ('costume familiare') managed the assets of the principal in his absence, or performed a specific economic activity. However, he does not consider servile obligations of this kind to be *procuratio* and according to him, extensive administrative activities cannot be traced back to the mandate either: Feliciano Serrao: *Il procurator*. Milano, Giuffrè, 1947. 1; 111ff.

that the *procurator* acting *sine mandato*, belongs to the fact pattern of *negotiorum gestio* and in accordance with that, shall be subject to the rights and obligations of the *gestor*.[63] In our case, this question may be relevant to the extent that the *negotiorum gestor*, who was obliged to take care of several affairs, was seen by an outsider, a third party, possibly as a general agent.[64]

If the debts to be collected were originally interest-free, they would become interest-bearing *(si forte non fuerit usurarium debitum, incipit esse*

Levy regards the *procurator omnium bonorum* as a general agent under the power of the *dominus*: Ernst Levy: *Weströmisches Vulgarrecht. Das Obligationenrecht*. Weimar, Hermann Böhlaus Nachfolger, 1956. 60. Behrends considers the *procurator omnium rerum*, who took care of the affairs of the absent person, to have the same social status as the *dominus* (he believes that this term has classical origin): Okko Behrends: Die Prokuratur des klassischen römischen Zivilrechts. *SZ* 88 (1971), 215–299. 231; 216[7]. Angelini defines the *procurator* as a general trustee: Piero Angelini: *Il procurator*. Milano, Giuffrè, 1971. 122. Claus asserts that the *procurator omnium bonorum* could act on the basis of the *praepositio* of the *dominus*: Axel Claus: *Gewillkürte Stellvertretung im Römischen Privatrecht*. Berlin, Duncker & Humblot, 1973. 308ff. Kaser assumes a *procurator* with general administrative authority ('Gesamtprokurator') was initially freed and therefore his activity fell within the fact pattern of *negotiorum gestio*, but certain types of cases could only be carried out by special mandate – even by a person of a higher social class: Max Kaser: Stellvertretung und „notwendige Entgeltlichkeit". *SZ* 91 (1974), 146–204. 190-191; 186. Beside the unlimited power ('poteri illimitati'), it is also recorded by Miceli that until the 2nd century the relationship between the *dominus* and the *procurator* was regulated exclusively by the *actio negotiorum gestorum*: Maria Miceli: *Studi sulla «rappresentanza» nel diritto romano*. Vol. I. Milano, Giuffrè, 2008. 140-143. Watson and Zimmermann definitely mention a dual scope of subjects and general management authority: Zimmermann 1996, 53. Alan Watson: *The Law of Obligations in the Later Roman Republic*. Oxford, Oxford University Press, 1984. 193. Despite of the wide range of situations which could be administered by *procurator omnium bonorum*, the concrete term appears in only four places in the Digest: Paul. 10 *ad ed*. D. 3, 6, 7 pr.; Scaev. 1 *resp.* D. 17, 1, 60, 4; Gai. *sing. ad form. hypoth*. D. 20, 6, 7, 1; Ulp. 76 *ad ed*. D. 44, 4, 4, 18.

63 Koenraad Verboven: *The Economy of Friends. Economic Aspects of Amicitia and Patronage in the Late Republic*. Brussels, Latomus, 2002. 235-236. The designation of *negotiorum gestor* as a *procurator omnium bonorum* can be derived from the 2nd century: Franz-Stefan Meissel: Altruismus und Rationalität. Zur „Ökonomie" der negotiorum gestio. In: Ulrike Babusiaux—Peter Nobel—Johannes Platschek (ed.): *Der* Bürge *einst und jetzt. Festschrift für Alfons* Bürge. Zürich-Basel-Genf, Schulthess, 2017. 255–288, 280. Cf. Kaser 1971, 587. A contrary position is taken by Benedikt Frese: Prokurator und negotiorum gestio im römischen Recht. In: Emilio Albertario—Émile Jobbé-Duval (ed.): *Mélanges de droit romain dédiés à Georges Cornil*, Vol. I. Gand-Paris, 1926. 326–384, 348-349.

64 Finazzi 2006, 40.

usurarium),[65] as the emperor wrote in his rescript addressed to Flavius Longinus[66]. The *gestor*, who fails to comply with *a semet ipso exigere* obligation must therefore pay the interest. The legal basis for interest payment is the same here: The *negotiorum gestor* acted negligently, he did not pay the due debt, so he is liable for the payment of default interests.[67] However, the interest payment is not unconditional, the principal is entitled to exempt him from this obligation.

If the *dominus* were to litigate the capital claim with *negotiorum gestorum actio*, then the determination of the obligation to pay interest — just as with regard to compensation[68] — would belong judicial discretion. Which, according to Paul, has the same force as if the debtor had promised the creditor the interest payment in a *stipulatio*. Fragment D. 3, 5, 6 appears as an underlying rule, which in the case of *bonae fidei iudicia* defines the ascertainment of interest payment as one of the roles of the judge *(officium iudicis)*.[69] This direction of interpretation ('linea interpretativa') ensures the examination of the content of *bona fides* on a case-by-case basis, accompanied with the possibility of considering all the particularities of the facts.[70]

Observations

After the analysis of the interest payment obligation of the *negotiorum gestor* arising from the obligation of *a semet ipso exigere*, the following conclusions can be drawn.

The asset management activity of the *gestor* falls within the scope of the *a semet ipso exigere* principle.[71] This obligation refers to the fact that he must

65 The conversion of debt into an interest-bearing one is caused by *bonae fidei iudicium* cf. C. 4, 32, 13.

66 For the liability of the tutor prescribed *a divo Pio et ab imperatore nostro et divo patre*, see Ulp. 36 *ad ed*. D. 27, 3, 1, 13.

67 The *a semet ipso exigere* obligation of the *gestor* is also set into the requirements of *bona fides* by Proculus and Pegasus: Paul. 9 *ad ed*. D. 3, 5, 17.

68 Cf. Scaev. 1 *quaest*. D. 3, 5, 8.

69 Pap. 9 *quaest*. D. 16, 3, 24; Herm. 2 *iur. epit*. D. 19, 1, 49, 2; Paul. 5 *resp*. D. 19, 2, 54 pr.; Bürge 1987, 542ff.; Knütel 1988, 516ff.

70 Riccardo Cardilli: «*Bona fides*» tra *storia e sistema*. Torino, Giappichelli, 2014[3]. 70. In the fragment by Paul, *fides* means faithfulness to the promise ('Worthalten'), which establishes a bond between the promisor and the addressee: Luigi Lombardi: *Dalla «fides» alla «bona fides»*. Milano, Giuffrè, 1961. 105ff.

71 Here, *negotiorum gestio* is to be understood as a "generic term", which includes any person who perform general management activity and whose act is not subject to a special rule: Moriz Wlassak: *Zur Geschichte der negotiorum gestio. Eine rechtshistorische*

pay his debt based on the previous legal relationship established between him and the *dominus negotii*, as well as the collection of the claims of the principal against third parties.

In the light of *interpretatio systematica*, it can be concluded that the obligation of *negotiorum gestor* to collect does not change the general rules of contractual liability. The Tryphoninus fragment deserves special attention in this respect. The text first reads a compressed position — perhaps the conclusion of the jurist — according to which, *si a semet ipso exigere eum oportuit, debiturum usuras*. This detail suggests that the payment of interest is causally related to the infringement of the *a semet ipso exigere* obligation. But, later Tryphoninus himself formulates the basis for determining liability: *merito usuras bonae fidei iudicio praestaturum*.

Therefore, the obligation of the *negotiorum gestor* to interest payment regardless of the *a semet ipso exigere* principle derives from the *bonae fidei iudicium*, [72] because in these cases it is *usurae moratoriae*, which arise as a consequence of non-fulfilment of the obligation: *...quia non solvit* — as Tryhoninus writes.

Ulpian also refers to the *gestor*'s contractual liability with the requirement of the diligence of the *vir diligens*, the neglect of certain areas of management entails the liability of the general agent for *culpa levis*.[73] The use of the term *a semet ipso exigere* beside the verb *imputare* can also refer to the fact pattern of debt default.

It should be noted that the liability rule arising from default also applies to the debtor acting as *negotiorum gestor*.[74] However, this only foresees risk bearing, as the specific extent of the liability of the *gestor* was assessed by the judge, regarding the *bonae fidei iudicium*.

It can be established that the *a semet ipso exigere* obligation protected the interests of the *dominus* and existed only, if there was a risk of delays in

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Untersuchung. Jena, Gustav Fischer, 1879. 29. Accordingly, the *a semet ipso exigere* obligation is imposed on the debtor of any transactions that may fall under the fact pattern of *negotiorum gestio* – e.g. *tutor*, *curator*, *procurator* or *mandatarius*. Cf. Finazzi 2006, 83; Peters 1911, 186ff.

72 Cf. Riccardo Cardilli: *L'obbligazione di «praestare»* e la *responsabilità contrattuale in diritto romano (II sec. A.C. – II sec. D. C.)*. Milano, Giuffrè, 1995, 403.

73 Arangio-Ruiz and Kunkel also detect *culpa levis* liability, however, they consider it to be of post-classical origin: Arangio-Ruiz 1958, 214; Wolfgang Kunkel: Diligentia. *SZ* 45 (1925), 266–351. 291-292.

74 The responsibility of the *gestor*, who is considered a debtor in default, becomes stricter *(perpetuatio obligationis)*, therefore, hypothetically, he may even be liable for *casus maior*: Jan Dirk Harke: *Mora debitoris und mora creditoris im klassischen römischen Recht*. Berlin, Duncker & Humblot, 2005. 14.

performance concerning a debt from earlier or if the debt arose after the beginning of the administration.[75]

The examination embedded in the question of the obligation to interest payment ends with the reply of Emperor Trajan, which he sent to Pliny, who had complained about the bitterness of the Roman credit life.

Plin. Sec. *Epist*. 10,55: "Neither can I see any other solution myself, my dear Pliny, to the problem of investing public funds, unless the rate of interest on loans is lowered. You can fix the rate yourself, according to the number of potential borrowers. But to force a loan on unwilling persons, who may perhaps have no means of making use of it themselves, is not in accordance with the justice of our times."[76]

75 It can be assumed that for the *a semet ipso exigere* to arise, there had to be a conceptual or juridical relationship between the administration and the debt of the *gestor*: Finazzi 2006, 81.

76 Translation by Betty Radice.

Law and Morality in the Context of the Ombudsman

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If you look around the world, you see single-headed and multi-headed ombudsmen. It cannot take decisions that can be enforced by authority - this is the conceptual definition of the Ombudsman. Persons holding this position are given a diverse array of titles worldwide. The office was first installed in early 1700s Sweden, though similar state functions had already existed earlier. Gabriele Kucsko-Stadlmayer differentiates three main types based on the subject and rules of supervision, as well as their scopes of authority: the basic or classical model, the rule of law model, and the human rights model. In particular, it can investigate public authorities, public service bodies, public administration, such as notaries and bailiffs. Law consists of 4 layers, the layer of the text of law, the layer of legal doctrine, the layer of fundamental constitutional rights and the layer of judicial law.
Keywords: *ombudsman, single-headed system, fundamental rights, constitutional law, layers of law, maladministration*

The concept of ombudsman in international comparison refers to an official who is the defender of human rights and, in some states, the guardian of the functioning of public administration, i.e. of legality and fairness. The term technically originated in Sweden in the early 1700s, and some believe that it had its roots in the Ottoman Sultan's court.[1]

If you look around the world, you see single-headed and multi-headed ombudsmen, like a dragon. Actually, the single-headedness of the ombudsman means that the office is run by a single head, there may be deputies to the ombudsman, but it is the head who gives the verdict on important matters. A multi-headed ombudsman, on the other hand, implies that some fundamental rights have separate, distinct defenders who are free to decide on matters within their own competence. The international legal comparison recognises corporate ombudsmen, where one or other ombudsman has no

1 CSERVÁK Csaba: *Az alapjogokat érvényesítő intézményrendszer*, Lícium-Art, 2018. Budapest, 48-50.

independent power to act, but can only act and decide by a corporate majority decision. Take Austria or Greece, for example. I note that in Europe, out of 49 systems, about 40 can be considered monocratic. So one-man management can make better use of the press. In a multi-headed system, separate ombudsmen are not only unnecessary, they are also seen as counterproductive.[2]

It is of cardinal importance that ombudsmen are armed with recommendations and publicity. It cannot take decisions that can be enforced by authority - this is the conceptual definition of the Ombudsman.

In the academic literature of constitutional law, the ombudsman has long constituted a widely accepted category. Persons holding this position are given a diverse array of titles worldwide. In Hungary, they are the Commissioner for Fundamental Rights, in the Ukraine the Parliament Commissioner for Human Rights. They are named High Commissioner for Human Rights in the Russian Federation and in Azerbaijan, while Spain, Czechia and Slovakia use 'Defender of the People' or 'Public Defender of Rights'. In Albania and Croatia, it is the People's Advocate, and in Macedonia, the People's Attorney. France, Belgium and Luxembourg call it Mediator. Portugal refers to the post as 'Justice Provider'.[3]

The office was first installed in early 1700s Sweden, though similar state functions had already existed earlier.[4] International organisations advocating for human rights (among others) routinely call upon their member states to create such offices. Both the Council of Europe and its handbook dealing with administrative requirements touch upon the topic, with the Council having issued an official recommendation to establish ombudsmen.[5] A 2003 Council resolution explicitly focusing on ombudsmen emphasised the importance of such independent officials in protecting human rights and the rule of law alike.[6]

Academic literature remains rather brief on the categorisation of ombudsmen. Gabriele Kucsko-Stadlmayer differentiates three main types based on the subject and rules of supervision, as well as their scopes of authority.

2 CSERVÁK 2018., 63.

3 Gabriele KUCSKO-STADLMAYER: *Európai ombudsman-intézmények*, ELTE Eötvös Kiadó, 2010 Budapest, p. 27.

4 VARGA Zs. András: *Ombudsmanok Magyarországon*, Rejtjel Kiadó 2004. p. 14.

5 VARGA 2004., pp. 30-31.

6 KUCSKO-STADLMAYER p. 29. On some specific powers of the Ombudsman, see: Arató, Balázs: A közbeszerzési jogorvoslat története; in: Jogelméleti szemle 16: 3; 2015, pp. 2-33., p. 32.

- the basic or classical model
- the rule of law model
- the human rights model

In the first case, „soft" powers, such as recommendations are typical when overseeing administrative organisations. The second category sports a wider array of rights, while the third focuses specifically on human rights.[7]

In the author's view, such a colourful international repertoire of powers is rather difficult to compress into three categories only. The borders between them would be hard to define and many additional types might arise.[8]

Interestingly, the traditional ombudsman used to be a counterweight against the misdeeds and inequities of the public administration only.[9] These days – at least in the Hungarian public mind – it is a guardian of fundamental and constitutional rights. The extensive study of relevant academic literature only strengthened the author's conviction that not only is there a lack of contradiction here, but these two approaches are strongly connected, since administrative acts violating fundamental rights are automatically unlawful and almost certainly an infringement on human rights.[10]

There are many nuanced theories around this topic. The subject matter for the procedures of the Commissioner for Fundamental Rights – with a general set of powers – is always a contravention (a violation of some legislation

7 KUCSKO-STADLMAYER pp. 97-101. The author also alludes to the dichotomy of „classic" and „hybrid" espoused by Linda Reif, which is even more restrictive and difficult to differentiate (see: KUCSKO-STADLMAYER i.m. p. 96). Under her system, the current Hungarian ombudsman would fall mainly under the human rights classification model. It is very interesting to note that in Israel, the ombudsman's tasks are effectively carried out by the state audit office.

8 An instrument of differentiation could be whether or not the ombudsman even possesses any powers regarding the human rights in question – and if so, are these rights dominant within the commissoner's scope of authority? The introduction of a „constitutional complaint on grounds of a human right violation" could well serve as an additional power for ombudsmen organised under the aegis of the human rights model. The Hungarian system, for one, does not strictly belong to it.

9 VARGA 2004, p. 32.

10 According to certain views, the right to a fair public administration is a fundamental right on its own. „Critiques of the office of the ombudsman have noted that commissioners have often established the violation of a 'right to legal certainty', as a contravention against a constitutional right. Citing Paragraph 1 of Article 2 in the Fundamental Law of Hungary, ombudsmen have interpreted the unlawful and erroneous rulings of the public administration as a breach of legal certainty and elevated them to the level of constitutional contraventions." And yet, they could not refer to a classical fundamental right in every case in this manner. See: SOMODY Bernadette: Hol húzódnak az ombudsman alapjog-értelmezésének határai?, *Jogtudományi közlöny*, 2004, Issue 10, p. 327.

or the danger thereof) related to fundamental rights. *Administrative errors*, that is, faulty acts or rulings of the public administration not in violation of these right *do not give grounds for an ombudsman procedure*. „Constitutional contraventions" do not equal „maladministration", especially since it isn't the commissioner's task in Hungary to monitor the effective workings of the public administration. In spite of this, there have often been references to the fundamental right of citizens to legal certainty and fair proceedings, justifying such interventions from the ombudsman into administrative matters not strictly constitutional in nature.[11] Once again, this only projects the appearance of a contradiction, since the human right to fair proceedings undoubtedly resembles the original function of the very first ombudsmen: that is, to detect and combat administrative errors.[12] The dilemma could be resolved by allowing the ombudsman to act only in cases where the contravention complained of would not only violate professional, but also legal norms and the applicant's substantive rights. If the error has no consequence towards the individual, then an appeal within the internal framework of the public administration should suffice; be it addressed to the actor's immediate superior authority, the Government Control Office, the State Audit Office or, as a last resort, a prosecutor. If the applicant's personal freedom is infringed, but in a way that cannot be traced back to the violation any single legal norm, then commissioners might still employ their „soft law" arsenal and request the amendment of current legislation in order to eliminate legal vacuums.[13]

The functions mused on above are further complicated by the fact that aside from their task to protect fundamental rights, some also consider

11 SOMODY Bernadette: A húszéves országgyűlési biztosi intézmény: ki nem használt lehetőség, Új Magyar Közigazgatás, Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., October-November 2009, Volume 2, Issue 10-11, p. 10.

12 See: SOMODY 2004., p. 328., on the right to a fair trial, see also: Arató, Balázs: A tisztességes eljáráshoz fűződő jog, különös tekintettel a tisztességes igazságügyi szakértői eljárásra; in: Tóth J. Zoltán (ed.): Az Abtv. 27. §-a szerinti alkotmányjogi panasz. Tanulmányok a „valódi" alkotmányjogi panasz alkotmánybírósági gyakorlatáról; Budapest, KRE-ÁJK; Patrocinium; 2023; p. 216.; pp. 9-30.

13 In other words, when it's „only" the applicant's freedoms under violation, but without the compulsion to take any action on the applicant's part, then the commissioner may step up. On the further differentiation of these two categories, see: POKOL Béla: *Autentikus jogelmélet* (Dialóg-Campus Kiadó, 2010. Budapest-Pécs), pp. 188-196.; For details on the requirement of norm clarity, see: Arató Balázs: *Norm clarity in the light of Hungarian case law.* Magyar Nyelvőr, 2022/5. (82–83), see also in this context: Arató Balázs - Balázs Géza: *The linguistic norm and norm of legal language*; Magyar Nyelvőr 146: 91–103.; 2022; DOI: 10.38143/Nyr.2022.5.91.; https://nyelvor.mnyknt.hu/wp-content/uploads/146507.pdf.

ombudsmen to be the general-purpose guardians of the constitution itself,[14] while others firmly deny this position.[15]

A common denominator of all offices denoted as ombudsmen is the supervision of public administration in its broadest sense. Their main instruments are recommendations, which means they only employ „soft law" that cannot be enforced. This „weakness" of theirs is offset by their authority, their deep professional knowledge and their great maneuvering space. The latter means that ombudsmen may sometimes put aside the rigid text of the law and make overtures to the world of *de lege ferenda* and ideal law. They can place a lot of things under scrutiny, but they often aren't mandated to, thus gaining even more room to assess and evaluate.

If we look at the domestic status of the office-holder, we can observe that after the regime change, there were two other fully equivalent ombudsmen in addition to the parliamentary commissioner for citizens' rights. There was also a Minority Affairs Commissioner and a Data Protection Commissioner. On 1 January 2012, the system was made single-headed because of management uncertainty. Instead of the Parliamentary Commissioner for Civil Liberties, the title was changed to Commissioner for Fundamental Rights, who has 2 deputies: the Deputy Commissioner for Fundamental Rights, who protects the rights of nationalities living in Hungary, and the Deputy Commissioner for Fundamental Rights, who protects the interests of future generations. The Data Protection Commissioner is replaced by an autonomous state administration body, the National Authority for Data Protection and Freedom of Information. The Chief Ombudsman is a Minister and the Deputy Chief Ombudsman is a State Secretary. We can now turn to what exactly the Ombudsman can do: what he can investigate, what his powers are. Well, as a general rule, it can make recommendations, it can approach the body or supervisory body under investigation, it can initiate legislation in the event of a legal vacuum, it can file a criminal complaint, it can request ex-post control of the law by the Constitutional Court. What can and cannot be investigated by the Ombudsman?

14 SOMODY Bernadette: *Ombudsmanok a magyar alkotmányos rendszerben*, In. (ed.) HARMATHY Attila: Jogi tanulmányok, ELTE-ÁJTK, 2001. Budapest, The author implies that – at least the first – general commissioner crossed the line from guardian of individual fundamental rights into that of the constitution itself.

15 VARGA 2004, p. 176. This also has to do with the author's notion that the ombudsman is no general supervisor; as a rule of thumb, the commissioner only acts upon citizen's complaints (VARGA 2004, p. 81). And yet, when it comes to the applicants, individual provisions of the constitution have, by now, practically fallen under the same regard as constitutional rights.

In particular, it can investigate public authorities, public service bodies (BKK, BKV), public administration, such as notaries and bailiffs. It may not investigate the Parliament, the President of the Republic, the Constitutional Court, the State Audit Office, courts and prosecutors' offices, except for the investigating prosecutor's office.

Our main question, the main motive of our theme, is what does the right of Ombudsman mean? Our starting point is the theory of the layer of Béla Pokol. According to this theory, law consists of 4 layers, the layer of the text of law, the layer of legal doctrine, the layer of fundamental constitutional rights and the layer of judicial law.[16] In relation to the sources of law, we can distinguish between external and internal sources of law. According to Cservák's distinctions, we can also distinguish between the layers of formal and substantive law, or external and internal layers of law. So where does the layer come from? And from what can we read what it contains? In concrete terms, obviously, the text layer of law comes from parliament, the layer of judicial law comes from the courts, the layer of legal doctrine comes from the representatives of jurisprudence from universities and academia. But here the main question in my lecture is what is the inner layer of fundamental constitutional rights, what is the origin of fundamental constitutional rights.

As a rule, since the Basic Law only briefly explains them, their concrete content is left to the Constitutional Court to interpret. In addition to the Constitutional Court, several other bodies defend and interpret this layer of fundamental rights, including of course the Ombudsman.[17] The Ombudsman's interpretation of the law and his recommendations belong to the layer of constitutional fundamental rights, which is one of the four layers of law. What is the relationship between the 2 layers, the Constitutional Court and the Ombudsman's legal material. Since the Constitutional Court has the power of annulment and the decisions of the Ombudsman are binding on the decisions of the Constitutional Court, the Constitutional Court clearly has primacy in the relationship between the 2 bodies. The importance of the Ombudsman's right has been increased by the fact that there was previously no genuine constitutional complaint. It was only possible to appeal to the Constitutional Court if the legislation applied was itself unconstitutional. The new Basic Law and the Constitutional Court Act have changed this. It is very important that, since a genuine constitutional complaint already has an impact on the Constitutional Court in terms of the application of the law, the gap in the interpretation of fundamental rights that was previously only

16 POKOL Béla: *Jogelmélet*, Századvég Kiadó, Budapest, 2005., 19-37.
17 CSERVÁK Csaba: *Az ombudsmantól az Alkotmánybíróságig - az alapvető jogok védelmének rendszere*, 2014. Debrecen: Licium - Art, 22.,75.

filled by the Ombudsman could be filled. It therefore somewhat diminishes the role of the Ombudsman. Adding that the authority and knowledge of the specific holder of the office may also contribute to this. Obviously, the word of such an authoritative official, such a professor, carries more weight.

A minor official may not be able to express such a strong opinion. Not even for the following reasons. How is the law different from any other norm? It can be enforced by the state. I pointed out at the beginning of my presentation that the Ombudsman lacks coercion, and in this sense the Ombudsman's acts are norms that are not enforceable, but by classical definition do not belong to the world of law, but almost to the world of morality. Of course, if there is voluntary compliance with the law, in whatever relationship, between a citizen and the administration, we can still say that it is impossible to know, because there is no enforcement, whether the citizen has obeyed morality or complied with the letter of the law, if he has engaged in norm-control behaviour.[18] This is particularly the case for the Ombudsman. I would like to highlight one other interesting point that we have to make in this connection. If we start from the four layers of law and say that the Ombudsman's recommendations are to some extent of a jurisprudential, legal-dogmatic nature, but that they are made by a public official and not by a representative of science, then we could say, as several professors have done in their publications, that the Ombudsman's law is legal dogmatics elevated to the status of an official state. In this connection, I would like to point out that in the practice of the Constitutional Court, there is either a violation of fundamental rights or there is not.

The practice of the Independent Police Complaints Board, which has now been merged into the Ombudsman, was a serious or slight violation of fundamental rights.[19] Most importantly, the concept of maladministration arises in relation to the Ombudsman. It is important to stress that it is the duty of the Fundamental Rights Ombudsman to investigate and take initiatives in relation to cases of abuse of fundamental rights that come to his attention. An abuse is an improper, abnormal, inconvenient situation, a violation of fundamental rights or an imminent threat of such a violation. In other words, the Ombudsman may investigate a violation of a fundamental

18 On the interesting conflict situations that arise in this context, see for example: Arató Balázs: A titok fogalma a jogban; in: Balázs, Géza; Minya, Károly; Pölcz, Ádám (ed.): A titok szemiotikája; Budapest; Magyar Szemiotikai Társaság; 2019; p. 367; pp. 29-39, and BALÁZS Géza: A titok antropológiája és szemiotikája. in: Balázs, Géza; Minya, Károly; Pölcz Ádám (ed.): A titok szemiotikája; Budapest; Magyar Szemiotikai Társaság; 2019. p. 367; pp. 15—28.

19 LUKÁCSI Dániel Csaba: Az Országgyűlés ellenőrző szervei, *KRE-DIt*, 2019/1., p. 11-14.

right that has not yet occurred. This also puts the office-holder somewhat on the borderline between law and morality. The soft legal instrument is the recommendation. The Ombudsman can act even where no specific breach of fundamental rights has occurred. In that case, the world of norms is not clearly the world of law, but some kind of borderline between law and morality. It is a curiosity that in Poland the moral values and social sensitivity of the candidate are also expected. In Slovakia, the ombudsman may be a person of integrity, which is also closely linked to morality. We might add that in our country the professional standards are high. The Ombudsman must have 10 years of explicitly outstanding experience in defending fundamental rights.

From an international perspective, I think it is adequate and somewhere in the middle. In the Swedish model, and in Portugal and Spain, which also have a strong ombudsman, there is no qualification criterion. In Romania, the Ombudsman is expected to have 18 years of adequate legal practice. There are some very interesting cases concerning the Ombudsman. The most striking is the series of infringements by the BKV. If a person does not buy a ticket for a vehicle, he is essentially entering into an implied contract to board the means of transport, but he is not fulfilling the main contractual obligation. In this respect, BKV and other transport companies tend to impose extremely severe penalties, even though this is not a matter of tort law but of civil law. It is a very strange diffusion relationship between civil and criminal law. Although the conditions for exemption under criminal law are not met, it is for this reason that it feels very exaggerated to say that the surcharge is a multiple of the ticket price. Moreover, if students can buy a season ticket and travel with it, and the inspectors find that their season ticket is not valid for some reason, or even that their student card is not valid, they will be deemed to have committed an offence. Very often, they act as authorities and restrain travellers. It is an interesting complex legal relationship with a small financial stake, yet it is an activity that causes moral damage to many people. It was precisely in this mediating role that the Ombudsman was shown to be located in the transitional sphere between law and morality. It is no coincidence that in France, Belgium and Luxembourg this function is called mediator.

The question of whether a monocratic or a „multi-headed" system is preferable is most likely the greatest matter of contention in our topic. The latter model, that is, the one operating with multiple commissioners has been gradually transformed into a single-ombudsman configuration due primarily to concerns arising from perceptions of command structure confusion. Yet, these reforms were also followed by professional criticism. „The deputy system possesses an inherent contradiction: on the one hand, this

structure creates (deputy) commissioner offices with the expectation that they fulfill their mandates with the authority provided by them personally taking action, but on the other hand, they receive no independence in doing so. A deputy commissioner would be hard-pressed to apply the force of personal persuation to an argument that he or she only represents due to an agreement or an order coming from the higher echelons of the ombudsman system. In such a case, specialisation could provide a worthy alternative to the singular, general authority ombudsman, enabling us to bypass the disadvantages outlined above and also enjoy the numerous benefits of a college of independent, specialised and differentiated professionals."[20] On the other hand, as András Zs. Varga expertly points out, a system of multiple and equal commissioners also carries further hazards. „It is uncontestable that a commissioner elected to safeguard a certain constitutional right must first and foremost keep this specific right in sight. At first glance, this should not pose a problem, not even when every such right is allocated to a different individual commissioner: one constitutional right for one ombudsman, ergo, full-scale protection. *But we are falling into error if we consider fundamental rights nothing more than a set of independent legal values.* These rights are inseparable from the entities carrying them: that is, natural persons. As such, the rights natural persons are entitled to also cannot be separated from each other, for their proper interpretation requires joint scrutiny."[21] A further problem of the „multi-headed" system is that by establishing which fundamental rights are entitled to a commissioner of their own, legislators unwittingly begin to rank these rights in an order of importance. Only those they deem important enough will receive their own ombudsman, effectively sweeping the rest under the purview of the general commissioner. The most difficult dilemma tends to be when two fundamental rights collide. For instance, upon the conflict of the right to human dignity and the right to free expression, whose ombudsman would get to act, out of the two? According to András Jakab, a singular ombudsman also works better with the media, able to utilise publicity with effectiveness, whereupon multiple commissioners

20 SOMODY Bernadette: *A húszéves országgyűlési biztosi intézmény: ki nem használt lehetőség*, Új Magyar Közigazgatás, Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., October-November 2009, Volume 2, Issue 10-11, p. 7. Citing László Majtényi, Somody argues against the hierarchical model, considering it vulnerable to criticism and noting that any potential influence on the main commissioner's person would affect the whole office.

21 VARGA Zs. András: *A magyar ombudsmani intézményrendszer továbbfejlesztéséről*, In. (ed): CHRONOWSKI Nóra–PETRÉTEI József: Tanulmányok ÁDÁM Antal professor emeritus születésének 80. évfordulójára, Studia Iuridica Auctoritate Universitatis Pécs Publicata, Pécs, 2010., p. 433.

would not only be needless, but outright counterproductive. This is also why, out of the 49 ombudsman systems currently operating in Europe, 40 can be classified as monocratic.[22] „It comes without a doubt, however, that the true counterpart to the singular ombudsman model is the collective ombudsman body, working as a panel.[23]

The Commissioner for Fundamental Rights has made many recommendations against BKV. He recommends that passengers boarding the vehicle should be checked for tickets before entering the metro area and not afterwards. Inspectors are not allowed to touch passengers, they can only ask them to show their passes and tickets.[24] This is extremely important! I think that this was one of the positive roles played by the Ombudsman, alongside the many legendary legal cases, and here we are clearly showing that the Commissioner for Fundamental Rights in Hungary, although a high-ranking legal official, is clearly operating on the borderline between law and morality.

22 JAKAB András: *Az új Alaptörvény keletkezése és gyakorlati következményei*, HVGORAC, Budapest 2011. p. 138.
23 Such as the Austrian and Greek systems.
24 ARATÓ Balázs-CSERVÁK Csaba: Részvénytársaság - egy hatóság képében, *Jogelméleti Szemle* 2003/2.

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Religious Freedom in the System of Fundamental Rights

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In my study entitled Religious Freedom in the System of Fundamental Rights, I presented the history and content of the fundamental right of religious freedom. I presented the elements of freedom of conscience and freedom of religion as a fundamental right for all. I looked at the provisions in force at national and international level. I examined the legal rules on the neutrality of the State.
Keywords: *freedom of religion, religious community, established church, registered church, registered church or religious association*

The content of the fundamental right to freedom of religion

The right to freedom of thought, conscience and religion is a first-generation fundamental right, one of the basic freedoms. The right to religious freedom has existed since the Reformation. The age of Reformation contributed to the recognition and guarantee of freedom of conscience and religion through the birth of the idea of religious tolerance.

Freedom of conscience and religion means the autonomy of thought, the freedom to form one's world view, to profess it, to reject it, to practise it, to abstain from it. It can be exercised both individually and collectively, and freedom of religious practice is not bound to any form of organisation. In terms of its dogmatic classification, it can only rarely be assessed as a competing fundamental right.[1]

1 According to Cservák Csaba's classification, fundamental rights can be considered competing fundamental rights where the exercise of a fundamental right by one person reduces the effectiveness of the exercise of the same fundamental right by another. In the case of freedom of religion, this is only the case for forcibly converting churches/religions. See Cservák Csaba: The impact of digitalisation on the exercise and enforcement of fundamental rights, In (ed.) Árpád Olivér Homicskó: *The impact of digitalisation in specific areas of law*, KRE-ÁJK, 2020. Budapest, p. 55.

The position of Szilvia Köbel expresses the content of this fundamental right in the most essential way, according to her view, religion and religious belief are an inseparable part of the human personality, since it expresses the whole existential existence, i.e. the physical, mental and spiritual unity of man, and this is the deepest link between religious freedom and human dignity. In his view, constitutional law understands the right to human dignity as the most general right of the person, the fundamental constituent elements of which are freedom of self-determination, the right to privacy, freedom of action and, finally, the right to the free development of the person. These rights are closely linked to human personality and dignity, which are also the basis for non-discrimination. Religious freedom therefore includes freedom to express religious beliefs, whether individual or collective, in the private or public sphere, in religious practices and rituals, and is complemented by the freedom to change one's beliefs.[2]

The elements of religious freedom are freedom of belief, freedom of worship, including the so-called negative religious freedom, i.e. the right not to manifest one's belief, freedom of assembly and association (collective and public worship, teaching).[3]

According to Article 18 of the International Covenant on Civil and Political Rights[4], everyone has the right to freedom of thought, conscience and religion. This right shall include freedom to choose or adopt a religion or belief and freedom, either individually or in community with others and in public or private, to manifest, practise and teach his religion or belief in religious acts and observances. No one shall be subjected to any constraint which would impair his freedom to have or to adopt his own religion or belief. Freedom of expression of religion or belief shall be subject only to such limitations as are prescribed by law and are necessary to protect public security, public order, public health, morals or the fundamental rights and freedoms of others.

According to Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and on the Legal Status of Churches, Religious Associations and Religious Communities, freedom of conscience and religion is a fundamental right for everyone and cannot be tied to any legal form. The right to freedom

2 Szilvia Köbel: *The Foundations of State and Denominational Church Law* Patrocinium Kiadó Budapest, 2019. 2nd revised edition.

3 Zsolt Szabó: *Dance Guide for the Constitutional Law Final Examination* 6th revised edition, Patrocínium Kiadó 2018.

4 Decree-Law No 8 of 1976 on the proclamation of the International Covenant on Civil and Political Rights adopted by the United Nations General Assembly at its twenty-first session on 16 December 1966.

of conscience and religion includes the freedom to choose or change one's religion or other belief and the freedom to manifest, refrain from manifesting, practise or teach one's religion or other belief, whether individually or in community with others, in public or in private, through religious acts, observances or other means. No one shall suffer any advantage or disadvantage by reason of the choice, acceptance, expression or profession of a conscientious or religious belief or by reason of the modification or practice thereof.

Legal provisions relating to the fundamental right to freedom of religion

Article VII of the Constitution contains provisions on the fundamental right to freedom of thought, conscience and religion. Article VII(1) states that everyone has the right to freedom of thought, conscience and religion, i.e. that this fundamental right is equally enjoyed by all persons.

This provision of the Fundamental Law also defines the essential content of the fundamental right. The right to freedom of thought, conscience and religion includes the freedom to choose or change one's religion or belief and the freedom to manifest, practise or teach one's religion or belief, whether individually or in community with others, in public or in private, by religious acts, observances or other means. The freedom to choose or change one's religion or belief is therefore guaranteed to all people. This provision of the Fundamental Law also includes the freedom to manifest or refrain from manifesting one's religion or belief, either individually or in association with others, collectively, publicly or expressly in private, by religious acts or observances or otherwise.

The Fundamental Law also regulates the basic issues of the relationship between the state and the church. It declares that people of the same faith may form religious communities for the purpose of practising their religion, and emphasises their autonomy. The establishment of religious communities may take the organisational form laid down in a cardinal law. The Fundamental Law stipulates that religious communities and the State shall function separately, but also provides that the State and religious communities may cooperate to achieve the objectives of the community.[5] The cooperation must be

5 Fundamental Law Article VII (2) People who share the same beliefs may establish a religious community for the purpose of practising their religion in an organisational form determined by a cardinal law.
(3) The state and religious communities operate separately. Religious communities are autonomous.
(4) The state and religious communities can work together to achieve community goals. The National Assembly decides on cooperation on the basis of a request from the reli-

initiated and requested by the religious community, which Parliament is entitled to decide on. Religious communities participating in cooperation may operate as established churches and, as such, are granted special additional rights by the state.

In accordance with the provisions of the Fundamental Law, a cardinal law defines the common rules for religious communities, the framework and conditions for cooperation, the established churches and the detailed rules applicable to them.

Act CCVI of 2011[6] lays down detailed rules on the legal status of religious communities. The legal personality of religious communities was redefined by Act CXXXII of 2018. The law defines religious communities, considers religious communities as communities of natural persons, which, regardless of their organisational form, legal personality or denomination, are established for the practice of religion and primarily carry out religious activities. As regards their organisational form, religious communities may operate without legal personality or with legal personality.[7]

Under the current rules, a religious community with legal personality is a religious association, a registered church, a registered church and a professed church.

The established church, the registered church, the registered church and the religious association are autonomous organisations of natural persons professing the same beliefs and having self-government.[8]

The law also defines the concept of religious activity, by religious activity we mean the activity of a religious community related to a worldview that is supernatural, has a system of beliefs, its doctrines apply to the whole of reality and embraces the whole of human personality with specific standards of conduct.

A religious association may be formed for the purpose of practising their religion, for the purpose of religious activity, by natural persons who share the same beliefs. The manner in which membership and the exercise of membership rights shall be established, as well as the scope, duties and powers of the

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gious community. Religious communities participating in cooperation shall operate as established churches. The State shall grant specific rights to established churches with regard to their participation in tasks aimed at achieving community objectives.
(5) A cardinal law lays down common rules for religious communities, the conditions for cooperation, the established churches and the detailed rules governing them.

6 Act CCVI of 2011 on the Right to Freedom of Conscience and Religion, and on the Legal Status of Churches, Religious Associations and Religious Communities.

7 Act CCVI of 2011, § 6 A religious community is any community of natural persons, regardless of its organisational form, legal personality or name, which is established for the practice of religion and which primarily carries out religious activities.

8 Act CCVI of 2011, § 7 (2).

persons having legal relations with the religious association who are entitled to take and control internal decisions concerning the operation of the association, and to manage and represent it, may be determined by derogation from the rules applicable to the association. The State may conclude agreements with religious associations for a limited period of up to five years for the performance of certain public activities or for the promotion of religious activities.

A religious association shall be registered as a registered church on the basis of a request to this effect, if it has received on average at least 1,000 individual donations of the portion of personal income tax paid to it, as determined by a special law, during the 3 years preceding the submission of the application for registration, and has been operating as a religious association for at least 5 years or has 100 years of independent international operation in an organised form.

A religious association shall also be registered as a registered church, upon application, if it has at least 1,000 registered members residing or domiciled in Hungary, has been operating as a religious association for at least 5 years, and it declares that it does not, after submitting its application, receive any support for its religious or public activities from subsystems of the public budget, from programmes financed from European Union funds or under an international agreement, by means of a tender or outside the tender system, on the basis of an individual decision. The State may conclude an agreement with a registered church for a maximum period of ten years for the performance of a public service activity or for the support of religious activities.

A religious association must be registered as a registered church if, upon application, it has received, on average over the 5 years preceding the submission of the application for registration, at least 4,000 individual contributions of the portion of personal income tax paid to it, as determined by a special law, and has been operating as a religious association for at least 20 years or has 100 years of independent international operation in an organised form.

Upon application, a registered church shall be registered as a registered church if it has received an average of 4,000 individual donations of the portion of its personal income tax paid, as determined by a special law, over the 5 years preceding the submission of the application for registration, and has been operating as a registered church for at least 15 years or has 100 years of independent international operation in an organised form.

The state may conclude an agreement with a registered church for a fixed term of up to 15 years to provide a public service or to support religious activity.

A registered church is a registered church with which the State has concluded a comprehensive agreement on cooperation for community purposes. When concluding or amending a comprehensive agreement, the Minister responsible for coordinating relations with churches acts on behalf of the State.

Religious neutrality of the State

Article VII of the Fundamental Law provides that religious communities and the state shall function separately. This provision explicitly provides and guarantees the ideological neutrality of the State. The old constitution declared[9] that the church was separate from the state. In Szilvia Köbel's view, the different wording is the legislator's way of expressing that the situation was not created by the will of the state or a third party, but rather reflects a stable situation created by the mutual will of both parties. [10]

According to the AB Decision 4/1993 (II.12.) [11], it follows from the principle of separation that the State may not be institutionally connected with the churches or with any church; that the State does not identify itself with the doctrine of any church; and that the State may not interfere in the internal affairs of the churches, and in particular may not take a position on matters of faith truth. It follows that the State must treat the churches as equals.[12] Since the state cannot take a position on the very substantive issues that make religion a religion, it can only create abstract framework rules on religion and church, applicable to all religions or churches, which make them fit into the neutral legal order, and must rely on the self-interpretation of religions and churches on substantive issues. Through a neutral and general legal framework, the separation of church and state ensures the fullest possible freedom of religion.

It is important to point out that the neutrality of the state in relation to the right to religious freedom does not mean inaction. The State has a duty to provide a space for the expression, teaching and practice of religious belief, for the functioning of churches, and likewise for the rejection of religion and silence on religious belief, in which different beliefs can freely form and develop, and thereby allow the free development of individual convictions. On the one hand, the state must ensure this free communication process; this obligation also derives from the right to freedom of thought and expression.

9 Article 60 (3) of the Constitution.

10 Szilvia Köbel: *The Foundations of State and Denominational Church Law* Patrocinium Kiadó Budapest, 2019. 2nd revised edition.

11 The AB decision 27/2014 (23.VII.) adopted these ideas, but instead of the principle of separation, it now uses the principle of separate functioning and autonomy of religious communities.

12 The Greek practice is very interesting. There, although religious freedom prevails in the Orthodox Church, which is almost a state church, conversion in the interests of certain churches is punished by imprisonment, even in extreme cases. See Edina Lajos: *On the European perception of religious freedom and Christianity, with special reference to the Greek specificities*, KRE-DIt, 2022/2., pp. 1–9.

According to Szilvia Köbel, it is often the obligation that pushes the state to play an active role, the main aim of which is to promote free choice between pluralistic values.[13]

On the other hand, it must also ensure that other fundamental rights are protected against religious freedom where appropriate. Finally, positive regulation of the right to religious freedom itself may also be necessary. The state must create a regulated compromise where state regulation creates a situation in which freedom of religion and freedom from religion are mutually restrictive. Such a ‚space' is, for example, the education of the worldview in the context of compulsory schooling.[14]

In relation to the neutrality of the state, Act CCVI of 2011 declares[15] that the state may not operate or establish a body for the management or supervision of religious communities.

It stipulates that the enforcement of a decision taken on the basis of the religious community's credo, internal law, statutes, rules of organisation and operation or other corresponding rules shall not be subject to state coercion or review by a state authority.

It further provides that a decision of a religious community based on an internal rule may not be modified or overruled by a public authority, and that a public authority has no jurisdiction to rule on disputes arising from internal legal relations not regulated by law.

According to the AB decision 4/1993 (II.12.), the church is not the same for a given religion and for state law. The neutral state cannot follow the church concepts of different religions. However, the State may take into account all the ways in which religious communities and churches in general differ, in terms of their history and their role in society, from social organisations, associations and interest groups which may be established under the Fundamental Law (Article VIII).

The Constitutional Court in its Decision 27/2014 (23.VII.) AB emphasises the provisions of Decision 8/1993 (27.II.) AB, according to which the state may not be institutionally associated not only with religious communities, but with any religion or religious group, may not identify itself with the teachings of any religion, and may not take a position on the question of religious truths. No constitutional interference with the autonomy of religious communities, irrespective of their specific religious nature, is possible.

13 Szilvia Köbel: *The Foundations of State and Denominational Church Law* Patrocinium Kiadó Budapest, 2019. 2nd revised edition.
14 4/1993 (II.12.) AB decision.
15 Act CCVI of 2011, § 8.

According to the AB Decision 4/1993 (II.12.) the state must be neutral in religious matters. Therefore, public schools must also be neutral. It is through these schools, which are open to all, that the State realises the right to education and ensures the condition of compulsory education. Neutrality requires that the curriculum, organisation and supervision of its schools be designed by the State in such a way that religious and philosophical information and knowledge are transmitted to pupils in an „objective, critical and pluralist manner". The state school must not provide education which could be considered as disregarding the convictions of parents (and the child).

Pursuant to Article 19/C of Act CCVI of 2011, the income of religious associations and religious legal persons for religious purposes and their use may not be controlled by a public body. The State Audit Office of Hungary (SAO) is responsible for the control of the use of the non-religious subsidies in accordance with the law.

According to the Constitutional Court, the criteria governing a religiously neutral state are the following: the state may not be institutionally linked to religious communities or to any religious community, the state may not identify itself with the teachings of any religious community, the state may not interfere in the internal affairs of religious communities, the state may not take a position on religious truths, the state must treat religious communities as equals.[16]

From the point of view of the religious neutrality of the state, the interpretation of the idea laid down in Article R(4) of the Seventh Amendment to the Fundamental Law[17], according to which the protection of Hungary's constitutional identity and Christian culture is the duty of all organs of the state, may be questioned.

16 Stefánia Bódi- Gábor Sweizer: *Fundamental Rights - The Constitutional Protection of Human Rights in Hungary*, Ludovika University Publishing House, Budapest 2021, 202. o.
17 Cf. Edina Lajos: *Legal Interpretation and Morality*, KRE-DIt, 2022/2., pp. 1–9.

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The Language of Law in Intercultural Context in the Light of British and American English

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The complex processes that determine intercultural legal communication take place in various legal systems using a great variety of languages. It is inevitable to take into consideration the context, the specific demands and the needs of the participants that apply to the intertwining sphere of legal translation. Although the primary aim of legal communication in intercultural settings is explicitly defined, the underlying concept of cultural embeddedness is unavoidable. From the linguistic point of view, the complex nature of intercultural legal procedures and transactions presumes one single governing law based on a special legal system, which includes the linguistic level as opposed to the cultural one. Whether a legal term can be translated or interpreted properly depends on the common features of the legal systems rather than the languages used in the interaction.[1] The paper undertakes to present some features of linguistic and cultural variations related to British and American English in legal communication. Moreover, there are references to the variations based on the differences between British and American English negotiation styles.
Keywords: *legal language, legal terminology, intercultural communication, British and American English, common ground*

Introduction

As Taylor puts it, "the great challenge of this century, both for politics and social science, is that of understanding the other as such. The days are long gone when European and other Westerners could consider their experience and culture as the norm toward which the whole of humanity was headed, so that the other could be understood as an earlier stage on the same

1 See, for example, the different meanings of the concept of a secret in colloquial and legal language here: Arató, Balázs: A titok fogalma a jogban; in: Balázs, Géza; Minya, Károly; Pölcz, Ádám (ed.): A titok szemiotikája; Budapest; Magyar Szemiotikai Társaság; 2019; p. 367; pp. 29–39, and: BALÁZS, Géza: A titok antropológiája és szemiotikája; in: Balázs, Géza; Minya, Károly; Pölcz, Ádám (ed.): A titok szemiotikája; Budapest; Magyar Szemiotikai Társaság; 2019; p. 367; pp. 15–28.

road that they had trodden."[2] Even in terms of translation and interpretation participants can experience a certain kind of ethnocentric approach to make a swift judgement towards the other party, which may influence the quality of the cooperation to a considerable degree.

The current essay aims to investigate specific problems that language users can face in legal interaction in intercultural context.[3] The intercultural legal community serves as a meeting point for legal specialists from diverse locations who participate in joint legal procedures. In order to communicate adequately in various language settings where cultural barriers also prevail, participants in the interaction need to use the language of one of them or they may resort to interact with the help of a third language that is neutral for both parties.[4] The use of a common means of communication makes it possible for participants to use a language as a lingua franca.[5]

Principles of Legal Translation

Since there is a constant need for the transmission of precise and exact information, legal translation follows a clearly specified purpose along translation strategies and techniques that produce appropriate translation. Nord's suggestion involves the establishment of translation commissions that inspires legal professionals to improve the quality of translation on the basis of the intended target-text function, the receivers, the time, place and the motive of production and reception of the text.[6]

2 TAYLOR, Charles. *Understanding the Other: A Gadamerian View on Conceptual Schemes*. Idem, Dilemmas and Connections. Selected Essays. Belknap Press, Cambridge, 2011. p. 24.

3 See further approaches here: Balázs, Géza: Interkulturális hatások a jelhasználatra; in: Balázs, Géza; H. Varga, Gyula (ed.): Társadalom és jelek. Társadalomkutatók a szemiotikai perspektívákról; Semiotica Agriensis 2–3; Budapest; Magyar Szemiotikai Társaság; Eger; Líceum Kiadó; 2006; pp. 75–84.

4 See further details on the specific features on intercultural communication here: Balázs, Géza: Magyarok, a magyar nyelv idegen tükörben. Az interkulturális kommunikáció mint a kulturális nyelvészet egyik aspektusa; in: Frantisek Alabán (ed.): Jazykové aspekty interkulturálnej komunikácie v stredo-európskom kontexte/Az interkulturális kommunikáció nyelvi aspektusai közép-európai közegben; Univerzita Mateja Bela Fakulta humanitnych vied Katedra hungaristiky; Banská Bystrica; 2009; pp. 7–14.

5 See further thoughts on the anthropological approach towards intercultural communication here: Balázs, Géza: Az interkulturális kommunikáció antropológiai meghatározottsága. Gondolatok egy európai kulturális-kommunikációs stratégiához. 103–111. In: Jubileumi kötet Lizanec Péter professzor 90. születésnapjára. Főszerk.: Zékány Krisztina. Ungvári Nemzeti Egyetem, Magyar Filológiai Tanszék, 2020. ISBN 978-617-7796-18-2

6 NORD, Christiane. *Translating as a purposeful activity: Functionalist approaches ex-*

Focussing on the intercultural aspect of legal translation practices Vermeer's approach defines translation as an intercultural transfer.[7] In his view the source and the target language are both embedded in the cultures concerning the participants' origin. Moreover, he argues that the translator must play the crucial role of an intercultural expert who acquires the ability of what Nord refers to as translating means comparing cultures.[8] Following his line of thinking his approach anticipates the interpretation of the source culture based on the translator's own knowledge of the source and target culture for the target culture audience. This assumes the shared knowledge of both the translator and the audience. In terms of intercultural pragmatics the common ground of the two parties plays a vital role in the proper interpretation of the target text. Although Kecskes applies the concept of common ground which refers to the sum of all the information that people assume they share in intercultural context, its role can also be analysed along the translating process.[9]

The issue of common ground requires the analysis of culture with the primary focus on translation. Vermeer states that the legal system is an underlying part of a culture, which indicates that the entire setting of norms and conventions an individual as a member of his society must know in order to be like everybody – or to be able to be different from everybody.[10] Vermeer's culture definition reinforces that translators working on legal documents need to be intercultural experts with knowledge of the legal systems in translation. As Ting-Toomey and Oetzel puts it, it is a prerequisite for a translator to be sensitive to personal, situational and cultural factors that can form interactions and they need to develop a certain level of mental flexibility.[11]

The investigation of legal communication is based on the notion that autonomous legal systems are independent of legal languages. Moreover, these legal systems form a considerable part of specific social and political environments. This independence shows that there is not any direct relationship between legal systems and legal languages. This can be argued as follows:

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plained. St. Jerome, Manchester, 1997. p. 137.

7 VERMEER, Hans J. *What does it mean to translate?* Indian Journal of Applied Linguistics 13 (2): 25–33. 1987.

8 NORD, Christiane. Translating as a purposeful activity: Functionalist approaches explained. St. Jerome, Manchester, 1997. p. 34.

9 KECSKES, Istvan. *Intercultural pragmatics*. Oxford University Press, Oxford, 2013. p. 151.

10 VERMEER, Hans J. *What does it mean to translate?* Indian Journal of Applied Linguistics 13 (2): 25–33. 1987.

11 TING-TOOMEY, Stella – OETZEL, John G. *Managing Intercultural Conflict Effectively*. Sage Publications, London, 2001. p. 178.

(a) one legal system uses various legal languages (e.g. Canada, Austria, Italy);

(b) one language (with minor differences) can be divided into several legal systems (e.g. the UK or the USA).[12]

House's European common language theory emphasises the distinction between languages for communication and languages for identification. In the first case language is used by speakers for interpersonal communication in daily interaction, whereas in the latter one language is a means of expressing and maintaining one's identity within a community.[13] House's distinction serves as a continuum along which legal language – for obvious reasons – should be placed closer to the communication side. The legal context offers legal professionals the opportunity to be part of an international or intercultural community in which they use the language to take part in legal discussions, negotiations and interactions.

Features of Legal English

Before elaborating on the distinctive features of legal English, it is worth clarifying the terminology related to this technical language. Some scholars make a careful approach to differentiate between the concept of 'legal language' and 'the language of law'. Busse[14] and Tiersma[15] use 'language of the law' which may also refer to legislative language or the language of legislation. As Mazzarese puts it, 'legal language' involves the law-maker language and the judicial language as well.[16]

12 KOCBEK, Alenka. *Language and culture in international legal communication*. Managing Global Transitions 3 (4): 231–47. 2006. p. 239.

13 HOUSE, Juliane. *English as a lingua franca for Europe*. In: Pulverness, Alan (ed.): IATEFL 2001: Brighton conference selections; 82–84. Whitstable: IATEFL. 2001.

14 BUSSE, Dietrich. *Die juristische Fachsprache als Institutionensprache am Beispiel von Gesetzen und ihrer Auslegung*. In: HOFFMANN, Lothar – KALVERKÄMPER, Hartwig –WIEGAND, Herbert Ernst (ed.): Fachsprachen – Languages for Special Purposes. Ein internationales Handbuch zur Fachsprachenforschung und Terminologiewissenschaft – An International Handbook of Special Languages and Terminology Research. Vol. 2. De Gruyter, Berlin/New York, 1999. 1382–1391.

15 TIERSMA, Peter Meijes. *A History of the Languages of Law*. In: TIERSMA, Peter M. and SOLAN, Lawrence M. (ed.): The Oxford Handbook of Language and Law. Oxford University Press, Oxford, 13–26. 2012.

16 MAZZARESE, Tecla. *Legal interpretation as Translation*. In: ZACCARIA, Guiseppe (ed.): Übersetzung im Recht – Translation in Law (Ars interpretandi, 5). LIT, Münster, 161–188. 2000.

Tiersma's approach to his concept of legal language is expressed as follows: Our law is a law of words. Words are also a lawyer's most essential tools.[17] This quote exemplifies how important the study of language is either in intra- or intercultural communication. Understanding passages of law and comprehending its core content is essential not only for lawyers and other legal professionals, but also for translators cooperating in legal processes.

Given the specific features of legal English, it does not only convey information but also it affects and modifies an individual's attitude and behaviour. The multitude of statutes, regulations, court decisions and legal and business contracts create a diversity of norms in different countries. Based on Austin's Speech Act Theory legal language use passes judgements, grants permission, expresses prohibition and imposes obligations. These utterances show performative power of legal language.

The vocabulary of legal English, which is also worth investigating, shows unique features because of its complex system. Cao's approach clearly describes the unparalleled state of legal language: its inner system displays the history, development and culture of a specific legal system.[18] The choice of words depends on independent legal terminology referring to particular patterns of legal thinking. These patterns developed along one of the eight legal families that Zweigert and Kötz specify as follows: the Germanic, Romanistic, Nordic, Common Law, Socialist, Far Eastern Law, Hindu and Islamic Laws.[19] The two major legal families that prevail in most countries are the Civil Law (e.g. France, Switzerland) and the Common Law (e.g. the UK, the USA). The legal families influence the degree of the translatability of legal concepts according to which de Groot establishes four fundamental categories:

(a) the legal systems and the languages involved are closely related (e.g. France and Switzerland);

(b) the legal systems are closely related, but the languages are not (e.g. the law in the Netherlands and in France);

(c) the legal systems are different, but the languages are related (e.g. Germany and the Netherlands;

(d) both the legal system and the languages are unrelated (e.g. laws in English and in Slovene).[20]

17 TIERSMA, Peter Meijes. *Legal Language*. The University of Chicago Press, Chicago. 2000. p. 1.

18 CAO, Deborah. *Translating law*. Multilingual Matters, Clevedon. 2007.

19 ZWEIGERT, Konrad –KÖTZ, Hein. *An introduction to comparative law*. Oxford, Clarendon. 1992.

20 GROOT de, Gerard-René. *Recht, Rechtssprache und Rechtssystem: Betrachtungen über die Problematik der Übersetzung juristischer Texte*. Terminologie et Traduction (3): 279–316. 1992.

Whether legal systems are related or not, during the translation process there are other factors that influence the quality of translation. Most frequently the syntax, the pragmatics and the style of a specific language need to be considered: the most distinctive features of legal language are the formal and impersonal style and the relatively complex sentences. Bathia lists the extensive use of conditions and exceptions that may serve as a barrier to preparing perfect translation samples.[21] Besides these universal features that affects the quality of translation in the English language the use of complex structures, multiple negations, prepositional phrases and passive voices compels the translator to select the best possible alternatives from the source language to the target language.

The particular features of legal English involve clarity, consistency and effectiveness. In order to make legal text clear, careful attention should be paid to avoid expressions such as *modus operandi* (method) or *soi disant* (so-called). Another requirement to help non-legal persons follow legal discussions or read legal text is to avoid inconsistent terms. A few examples may shed light to terms such as *assign* (in relation to intangible property) and *transfer* (in relation to tangible property). Other examples include *contract* (in relation to a specific written contract with legal effect) and *agreement* (in a more general sense to refer to loose understandings or oral agreements), *obligation* (a specific duty under a legal contract) and *liability* (legal consequences). In terms of effectiveness users of legal English should select the adequate adjective or adverb as their meaning can vary greatly according to the context and the user's intention.[22] Instead of using *forthwith* or *promptly* it is worth specifying the exact time limits. These are only a few examples that show minor issues that may contribute to better translating or interpreting practices.

The impersonal style of legal English is predominantly inductive, which excludes diverse interpretation in specific cases. Taking into account the style of British and American English, the legal language involves extremely long and extended sentences and the complex system of doublets and triplets. Phrases such as *touch and concern*, *uphold and support* (doublets) or *hold, possess and enjoy* and *pay, satisfy and discharge* (triplets) may pose problems for the translator and make him select single terms in the target language. Other significant examples include *as the case may be*, *they shall cause it to be made*, *otherwise alter* or *fail to comply with*.

21 BHATIA, Vijay. *Translating legal genres*. In: TROSBORG, Anna (ed.): Text typology and translation. Benajmins, Amsterdam, 1997, 147–62.

22 For a typical example of contextualisation in general, regardless of the language used, see: Arató, Balázs: A végrendeletek értelmezésének egyes kérdései; in: Magyar Nyelvőr 147; 2023; pp. 78-92.; DOI: 10.38143/Nyr.2023.1.78.

The use of legal terminology in both British English and American English varies to a considerable extent. Further examples also prove that there are differences that exist in the mentality and cultural values of the two varieties of English. The choice of words and expressions is reflected in the use of words as they are used in legal texts and interactions. The individual negotiation style of the speakers of both varieties determines the choice of words. American businessmen and especially legal experts have a reputation of being the world's toughest and most aggressive negotiators since success is a key factor for them. Success and setback are essential measure for them, and this type of goal orientation can be traced in several expressions such as *take a look at* or *take a bath* as opposed to the British English *have a look at* or *have a bath*. Kövecses explains the use of the verb *take* instead of *have* with the fact that for Americans these and other activities happen in a speedy manner.[23] The same attitude can also be witnessed in legal processes and in the courtroom. Experience also shows that Americans are frequently consistent, though they are sometimes naïve about the values and cultures of other countries. British legal professionals act as diplomatic amateurs, though they can show a certain degree of ruthlessness when it is needed. Table 1 shows the primary negotiation features of British and American legal professionals.

British (British English)	American (American English)
indirect language	direct language
use of understatement	use of exaggeration
avoiding open disagreement	disagreeing openly
use of humour as a tactic	use of humour to break the ice
interested in long-term relationships	interested in getting the deal

Table 1 British and American attitudes of negotiation

Translating legal texts

The intercultural feature of translation is reflected in the translatability of complex words and phrases, which affects the purposes of texts to be translated. Translation is divided into two types by Nord who distinguishes documentary translation from instrumental translation. In the first case the type of translation refers to a document in the target language of a communicative interaction where the source culture sender communicates with the source culture receiver via the source text. In the latter case the type of translation involves the target language as an instrument for the interaction

23 KÖVECSES, Zoltán. *Az amerikai angol*. ELTE Eötvös kiadó, Budapest, 1996. p. 275.

between the source culture sender and the target language receiver.[24]

The exact direction of translation is refined by Cao who offers three categories: (a) translation for normative purposes deals with one source text that is translated into another language or several other languages resulting in texts as authentic legal instruments; (b) translation for informative purposes provide legal texts to provide information with more informative value and less legal force; (c) translation for general legal of judicial purposes involves texts that are used in court proceedings to help those clients who do not speak the language used in court.[25] The multi-layered methods and types of the translating process offer alternatives for translators of whom the more experienced experts have the skill to decide which method and type to use in a special legal setting.

Conclusion

The interference of legal system and legal languages challenges the translators' competence since legal language is a system-bound language, i.e. a language related to a specific legal system.[26] As it is highlighted in the paper a specific system of legal terminology is created and generated for a particular legal system. Moreover, it is inevitably related to the culture, values and law traditions of the nation. It is widely accepted that besides a good command of languages, one also need a thorough knowledge of the nations, their values, norms and customs.[27]

The intercultural nature of any specific or technical communication, in this case legal interaction, requires an interdisciplinary approach that merges the characteristic features of legal systems and legal languages. Balázs calls our attention to the complex system of the use of the Internet for the purposes of general and specialised communication.[28] The increasing demand for legal translation indicates that more and more legal and business professional should be able to handle the complex network of translation strategies and

24 NORD, Christiane. *Translating as a purposeful activity: Functionalist approaches explained*. St. Jerome, Manchester. 1997.

25 CAO, Deborah. *Translating law*. Multilingual Matters, Clevedon. 2007.

26 de GROOT, Gerard-René – van LAER, Conrad J. P. *The Dubious Quality of Legal Dictionaries, Translation and Meaning 7*. 2007. available from the Internet: http://arno.unimaas.nl/show.cgi?fid=9112 [accessed 10 August 2023]

27 See the distinctive approaches towards the complex phenomena of technology and interculturality here: Balázs, Géza. Hibriditás: kulturális sokk. A techno- és interkulturális világ feszültségekkel teli jelenségei, és ezek kezelésének lehetséges módjai. Vasi Szemle 2019/3. pp. 262–268. ISSN 0505-0332

28 Balázs, Géza. *Az internet népe*. Ludovika Egyetemi Kiadó, Budapest, 2023. pp. 281–288.

techniques parallel to the language and the cultural background of a nation as outlined above.

The features of legal English (both British and American) and the general behaviour and negotiation style of native English-speaking legal experts emphasise the role of legal translation in intercultural communication. The translator himself forms the future direction of legal communication by analysing the peculiarities of any legal systems in order to achieve a higher level of success in intercultural technical communication.

Our New Old Friend: Can Latin Become the Common Legal Language Again in Europe?

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This article explores the viability of adopting Latin as a common language for Europe, with a specific focus on the challenges it poses for legal translation in Central Europe. By analysing the historical context, linguistic dynamics, advantages, and challenges, the article aims to contribute to the ongoing discourse on European linguistic unity and legal harmonization.
Keywords: *Latin, history, common legal language, linguistic unity*

Introduction

The diverse and culturally rich continent of Europe is home to a complex legal landscape, shaped by centuries of history, tradition, and evolving socio-political dynamics. Amidst this diversity, the pursuit of a common legal language has been a goal of the European Union (EU) and other regional organizations. The objective is to facilitate effective communication and cooperation across borders. However, the quest for a harmonized legal language in Europe is not without its challenges and problematics. The diversity of legal languages is an obstacle to integration, and therefore the plurality must be eliminated.[1] Although this raises the issue of whether Europe can possibly develop the common legal language when it does not even have a common general language (*lingua franca*). The use of a common language, such as English or French, is seen as a means to overcome linguistic barriers and promote unity. However, the pursuit of a single legal language faces several obstacles in this case. For example, when a French lawyer mentions *contrat*, the meaning of this word is radically different from the notion of *contract* in the mind of a common-law lawyer. Similar language translation problems

1 S. Wright. A Community That Can Communicate? The Linguistic Factor in European Integration. – Whose Europe? The Turn Towards Democracy. Oxford: Blackwell 1999, pp. 79–103.

could be solved by using a common language for legal texts.[2] But which language could become a common legal language? While several languages, such as English and French, have been considered due to their widespread usage, an unconventional yet intriguing option emerges: Latin. Often associated with legal and academic traditions, Latin presents both advantages and challenges as a potential common legal language for Europe.

The History of Latin in the Development of Law

The history of Latin in the development of law is a rich and influential one, deeply intertwined with the evolution of legal systems, governance, and intellectual traditions. Latin, as the language of the Roman Empire and the dominant medium of communication in medieval Europe, played a pivotal role in shaping legal concepts, terminologies, and institutions that continue to influence legal systems today. In a way, Latin can be called the common mother tongue (*the lingua franca*) of Europe. Latin has influenced the development of all European languages. The language was carried by Roman soldiers, administrators, settlers, and traders to the various parts of their growing empire. The consequence was that a common civilisation was developed that varied little from country to country. Latin became the new common language of the new ruling power, was from this point on the language of government and administration, legalisation and the judiciary, trade and army operations as well. After the fall of the Roman Empire in 476, the significance of Latin did not lessen. In Europe during the Middle Ages and in the Renaissance and the Reformation etc., Latin was used in particular as the common language of the church, education and science as well. Latin served as the lingua franca of academia during the medieval and early modern periods. Legal education, especially in the study of canon law, relied heavily on Latin texts and lectures. Prominent universities, such as the University of Bologna, conducted legal instruction in Latin, ensuring that legal professionals across Europe had a common foundation of legal knowledge The diplomacy and communication between states and nations was managed in Latin, as was the correspondence of intellectuals and scholars. The place of Latin in the history of the development of the law is also well known. The importance of Latin as the legal language may be traced back to the 450-451 BC, when the Twelve Tables were created and formed the basics

2 For example, in cross-border probate proceedings, the question of the translation and interpretation of wills arises in a new context. On the basic problem, see: Arató, Balázs: A végrendeletek értelmezésének egyes kérdései; in: Magyar Nyelvőr 147; 2023; pp. 78–92.; DOI: 10.38143/Nyr.2023.1.78.

of the subsequent development of Roman law. All major sources of our knowledge of Roman law are written in Latin. (For example: the *Corpus Iuris Civilis*, wich is the collection of Roman Emperor Justinian).[3] In conclusion, the history of Latin in the development of law is a testament to the enduring impact of a language on legal systems and intellectual traditions. Latin's role in codifying Roman law, fostering legal scholarship, and shaping legal terminology has left an indelible mark on the evolution of legal systems and practices across Europe and beyond.[4]

Legal Translation Challenges in Central Europe: Navigating Linguistic and Juridical Complexities

Central Europe, marked by its linguistic diversity and unique legal traditions, presents a challenging landscape for legal translation.[5] The region encompasses countries with distinct languages such as German, Czech, Polish, Hungarian, and more. As legal systems and terminology differ across these languages, accurate and effective legal translation becomes a complex endeavour.[6] Central Europe's linguistic mosaic complicates legal translation. Translators must be proficient not only in the source and target languages but also in the intricacies of the legal systems they represent. Nuances in legal vocabulary and concepts often do not have direct equivalents, posing challenges in preserving meaning, intent, and accuracy. But this was not always the case. Before the emergence of nation-states, Latin was the common legal language, and in some cases the official language.[7] Translating legal terms requires more than word substitution; it involves conveying complex legal concepts accurately. As legal systems vary across

3 Anna Petrasovszky (2019): A latin nyelv és az európai jogfejlődés. *Magyar Jogi Nyelv,* 2019.06.27.

4 See examples of terminology in the langauges of Europe here: Balázs, Géza: Euroterminológia és a magyar nyelv. Szaknyelvi kommunikáció és nyelvstratégiai munka. Magyar Orvosi Nyelv, 2003/1: 9–12.

5 See further approaches to cases of rapport management here: Balázs Géza: Euroterminológia és a magyar nyelv (Szaknyelvi kommunikáció és nyelvstratégiai munka). 279-288. In: Balázs Géza szerk.: A magyar nyelvi kultúra jelene és jövője I. MTA Társadalomkutató Központ, Budapest, 2004.

6 See the challenges of harmonising terminology of various languages here: Balázs Géza: Euro terminology and the hungarian language. 18-29. In: Ed. Balaskó, M.-Balázs, G.-Galinski Ch.-Pusztay, J.-Skujina, V.: European Profiles of Language Policy. Terminologia et Corpora 1.Berzsenyi Dániel College, Szombathely, 2003. (2004) [2005]

7 Axer, Jerzy, and Maria Bozenna Fedewicz. "Latin in Poland and East-Central Europe: Continuity and Discontinuity." *European Review* 2, no. 4 (1994): 305–9.

Central European countries, a legal term in one language may not carry the same connotations or implications when translated into another language. The role of a legal translator is to bridge these differences while maintaining legal integrity. The common legal language in Central Europe could remove this difficulty. This also naturally raises the question of which language would be suitable to function as the common language in Central Europe?

Constructed International Language or Latin?

The question of whether to use Esperanto or Latin as a common language in Europe is a complex one and depends on various factors. Both languages have their advantages and challenges, and the choice between them would require considering linguistic, cultural, historical, and practical aspects. Before anything else, Esperanto is a constructed international auxiliary language created in the late 19th century by L. L. Zamenhof. It was designed to be easy to learn and neutral, without the cultural baggage that natural languages often carry. Being a constructed language, Esperanto is free from the historical, political, and cultural associations that natural languages might have, potentially reducing linguistic biases.[8] Although this neutrality of Esperanto could be disadvantage as well, because Latin, as discussed earlier, has a historical connection to European legal, academic, and cultural traditions, but Esperanto does not have this privilage history. Also, if we look at the Esperanto legal language, we can see that Esperanto also uses words and expressions of Latin origin. The question then arises: why use an artificial language when you can use Latin? As the general common language, Latin can perform the same functions as the artificial Esperanto language. Ultimately, the choice between Esperanto and Latin would depend on the goals, preferences, and practical considerations of the European nations. Both options have their merits and challenges, and any move towards a common language would require careful consideration of linguistic, cultural, educational, and political factors. It's also worth noting that the adoption of a common language in Europe is a complex and multifaceted issue that involves more than just linguistic aspects. This is why, in my opinion, Esperanto cannot solve the language problems of Central Europe.

8 Pierre Janton: Esperanto – Language, Literature and Community. State University of New York Press, 1977.

Conclusion

The pursuit of a common legal language in Europe is a complex endeavour that necessitates a thoughtful examination of its potential benefits and drawbacks. While a unified legal language could undoubtedly enhance cross-border communication and cooperation, the cultural, linguistic, and legal diversities of the continent must not be overshadowed. A balanced approach that respects both unity and diversity could pave the way for a more effective and inclusive legal framework in Europe. The proposal to make Latin the common legal language of Europe offers a unique perspective on addressing the challenges of linguistic diversity while honouring the historical foundations of legal systems across the continent. While there are clear advantages in terms of neutrality, precision, and cultural heritage, the practicality of implementing Latin as a working legal language should be carefully assessed. Striking a balance between tradition and the needs of modern legal systems is essential. Ultimately, the idea of Latin as a common legal language prompts a thought-provoking debate that highlights the intricate interplay between history, culture, and the evolving nature of law in Europe.

Human Rights and Legitimacy

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The constitution of a country is the primary bearer of popular sovereignty. Either a constitution is legitimized by the will of the people as a whole, or by the legal continuity. Democratic elections are of paramount importance for the legitimacy of law. This includes the prevention of frauds and a proper electoral system. The legal profession is important, but the system must not become a "juristocracy". The application of the law has two main types: hierarchical and norm controlling. It is essential that the general rules set out by law shall be the best possible ones for the society. But this has its individual victims. Democracy is not just the rule of the majority, but the rule of the majority - with the protection of the interests of the minority.
Keywords: *human rights, constitution, legitimacy, election, democracy, European Law*

According to certain views, it is human rights that constitute the true fundaments of law, overriding in their importance every other consideration.

Contesting such sentiments is the opinion that an „elitist" circle being able to ignore the decisions of the parliament, itself the most legitimate and most direct manifestation of popular sovereignty is worrisome, to say the least.

In the author's view, a healthy compromise can be reached between these theories, as antagonistic as they might appear at first glance, depending on the specific legal dilemma and life situation at hand. One must tread carefully when balancing such fundamental interests.

The constitution of a country is the primary bearer of popular sovereignty and as such, it must have very prominent legitimacy. It is no mere legislation; it is the highest norm of society. During their development, law and state alike had an essential impact on one another and neither can truly exist without the other. Society needed a set of rules to prosper and endure. Law is exactly these rules, without which there is only chaos. As a system, law also has its intricate internal framework and properties, in whose absence a norm cannot be considered law. Jurists themselves have a very significant

role in upholding this system, however, they cannot go against the will of society for long. (Whether society can be protected from itself is a rhetorical question at best. In a way, this is exactly the function of representative democracy, as well as the reason that certain subjects are ineligible to call a referendum on.) Though it might seem evident these days, we still ought to ask the question: why is representative democracy a necessity? Technical infeasibility is already a major point against direct democracy, as well as the fact that certain issues requiring professional knowledge would be beyond the scope of regular citizens to weigh and judge with due wisdom. Wouldn't this lead to the necessary conclusion, however, that there should be strict educational requirements for parliamentary representatives?

Considerations of lawfulness and expediency are, unfortunately, often blended together. Decisions on the latter cannot be taken away from the people, and the panel they elected and legitimised. Matters of lawfulness, however, require specific professional knowledge. Without making this acknowledgement, we would be questioning the legal nature of law itself. The constitution, though part of the legal system, is fundamentally a product of decisions made along evaluations of expediency. The same can be said about legislation. And yet, all of these must be kept within the professional confines of law: their specific terms and internal logics must adhere to the paradigms of jurisprudence. To ensure this is the task of constitutional courts, their proper application being guaranteed by professional and independent regular courts.

The consolidation of organised society and the coalescence of the state required its inhabitants to resign their former, arbitrary ways of conflict resolution, such as revenge killings, and task an independent entity — the state — with carrying out justice. But they preserved certain other rights, rights which cling closely to the human condition. In other words, their human rights. These rights become fundamental the moment they are enshrined in a country's constitution. Their true legal nature, however, is granted by the ability to vindicate and enforce them, which is, in essence, what constitutional courts do.[1] From the above, it also follows that the protection of human

1 Judging fundamental rights based on abstract third generation human rights (environmental rights, right to family) can be highly subjective. These rights become much more tangible when they are spelled out in detail in specific legislation. For example, the right to a family can be detailed in rules providing special benefits for family businesses. On family businesses, see: Arató, Balázs: Családi vállalkozások; családi alkotmány és generációváltás, Budapest, Patrocinium, 2023, 241 p., ISBN: 9789634133797, Arató, Balázs: A családi vállalkozások utódlásának és vagyonmegóvásának jogi aspe-

rights cannot harm society as a whole. To expand, a human rights „movement" can be deemed extreme whenever its actual practice in significantly great numbers would endanger the very existence of society. An example would be gay marriage, or the adoption rights of homosexual couples, but a more significant matter here is the prevention of effective and efficient countermeasures against the perpetrators of willful and serious criminal offences, under the guise of human rights protection.

Either a constitution is legitimized by the will of the people as a whole, or by the legal continuity[2]. (The former would ideally mean that all the people would vote for every paragraph of the constitution.) The latter is related to the formal rule of law. But how far back can that be traced? For example, in most of the states in Central and Eastern Europe, the change of regime took place on the basis of legality and legal continuity. A rhetorical question: how far can the rule of law be formally traced back? What is the legal basis if the starting point was a system that was substantively a very questionable one?... Because the predecessors of any state that developed on the basis of the continuity of law were undemocratic from today's point of view. In the face of these problems of the formal rule of law, the rule of law in its substance could be seen as an etalon, but its subjectivity could be a problem[3]. *The rule of law is not a goal, but a tool. It is* a tool to ensure that society should continue to exist, and its will shall be carried out (this is the basis of the state), including the guarantee of human rights (this serves as the basis of law).[4]

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ktusai; in: Glossa Iuridica 7:1–2.; pp. 141–177; 2020, see also: Arató, Balázs: The Legal Institutions of Asset Preservation and Asset Transfer in Hungary; in: Karoli Mundus 1:1; pp. 229–240.; 2021., or Arató, Balázs: A családi vállalkozások jellegmegóvásának eszközei (Instruments to preserve the character of family businesses), in: Gazdaság és Jog 3–4.; 2023.; Orac; p. 31–38., and Arató, Balázs: Családi vállalkozások nemzetközi kitekintésben: Jogalkotási irányok, jó gyakorlatok; in: GLOSSA IURIDICA 7: 3–4; pp. 263–285., 23 p. (2020).

2 Because then the will of society can be traced back to the creation of the state itself. On the continuity of law see. Zoltán József Tóth: Some Observations on the Interpretation of the Fundamental Law, Polgári Szemle, 2013/1–2, pp. 13–40.

3 According to some approaches, some people can explain their own subjective will into the malleable concept of the rule of law at will. Cf. Varga Zs. András Varga: Eszményből bálvány? – a joguralom dogmatikája, Századvég Kiadó, 2015.

4 On the rule of law and its specific aspects, see for example: Arató, Balázs: A tisztességes eljáráshoz fűződő jog, különös tekintettel a tisztességes igazságügyi szakértői eljárásra, in: Tóth, J Zoltán (ed.): Az Abtv. 27. §-a szerinti alkotmányjogi panasz. Tanulmányok a „valódi" alkotmányjogi panasz alkotmánybírósági gyakorlatáról, Budapest, Károli Gáspár University of the Reformed Church in Hungary, Faculty of Law, Patrocinium 2023, 216 p. pp. 9–30., 22 p.

We must ask the question of principle: What is the interest or will of the society?[5] What is wanted by 51% but opposed by 49%? Or what is that something that 67% (i.e. 2/3) agree upon, but totally against the basic interests of the 10%? It's hard to calculate such an "aggregate index" in social science, but in my view, this is roughly the limit is complying with the human rights. Enforcement of fundamental rights means that the most basic interests of all people are taken into account.

Of course, the perception of the situation also depends on how abstractly the interests are formulated. However, the cardinal question is whether in specific cases this is not overwritten by individual interests. This is why legislation must be separated from lawmaking. Legislation is not case-specific, but normative and forward-looking. And here we would like to refer to the difference between decisions on legality and expediency[6], which is also the

5 Measuring this from a party-political perspective is also very difficult. Some voters have a strong attachment to certain parties. Others struggle to choose between 2. Some voters may be sympathetic to one candidate, but on a list (if there is one) they would vote for a completely different political community. It is not unprecedented for a voter to decide only which party should not win. (The latter, of course, requires an extraordinary degree of civic awareness, information and intelligence.)
The ideal electoral system is sociologically adapted to the electorate. Of course, the political composition of society, the „macro" behavior of the electorate, changes from cycle to cycle, even from month to month. Even a single major event can have a major impact on people's attitudes towards political parties. (It would therefore be justified, ad absurdum, to introduce a different electoral system for each electoral period. But this would be an extreme violation of the rule of law, and it is hardly realistic for the parliamentary majority of the time to change the electoral system for the ‚common good' rather than to promote its own victory.) For example, a system of relative majorities (based on single-member districts) is not a very objective measure of public will in a state where the rejection of one of the parties of choice is extremely high (it may be possible to win with 30% support in a relative majority model, with 70% of society expressly rejecting that particular political force). For more on this, see Csaba Cservák, Categorical and Ordinal Electoral Systems, Iustum Aequum Salutare, Vol. XIII, 2017/3, 27–40.
6 Of course, rigid demarcation is not always easy. According to some views, the Montesquieuian notion of the law enforcer, i.e. that the law enforcer is a quasi-automatic machine, just the „mouth of the law", does not apply to the law enforcement activity of public administrations. Decisions made by discretion can (also) be qualified as expediency, and if we deny it, if we admit it, the decision-maker makes the gap between the framework of the law by his autonomous decision Cf. Péter Kántás: The dilemmas of discretion, Jogelméleti szemle, No. 3, 2001, p. 1. This problematic indeed concerns mainly the law-making activity of public administration, and as far as the state/legal decisions as a whole are concerned, in my opinion, it has received less attention than it deserves. Professionalism is also important for public administrations (e.g. the required higher education qualifications of civil servants), but the professional domi-

basis for the division of powers.

Of course, people's interest, and their perception of their own interest can change from time to time; this is manifested in the elections (usually) held in every four years.

In legislation two competing trends can be identified. The exemplary one, a principled model and the casuistic one, an enumerated model of regulation. Their appropriateness varies from one area of law to another, and is quite different in criminal law, in administrative law, which also imposes sanctions, and also in civil law.[7] (The choice of regulatory style is not only a question of legality but also of expediency, but the decision should be made by consulting a legal expert. The legal profession is important, but the system must not become a "juristocracy"[8]. A risk of subjectivity arises if some people want to use the internal context of the law to question the legitimate state legislation or the application of the law. For a remedy, we would recommend that the most important legal principles should be enshrined in a constitution having strong legitimacy.)

How directly can we apply human rights or constitutional norms? In the author's approach, the application of the law has two main types: hierarchical and norm controlling. In the former case, taking into account the established hierarchy of legal norms, the regulations closest to the events of the actual case — the *lege specialis* — are to be employed. According to the latter category, as seen under the aegis of the Supreme Court of the United States, legislation contrary to higher-level norms (such as the constitution) is to be put aside without application, placing norm control in the hands of individual judges. Such a view used to be wholly alien to European legal practice, but the direct usage of the European Union's certain norms brought a change into this paradigm. The author considers the most permissible compromise for the direct application of fundamental rights, is that they be employed only in the case of

nance of the legal profession is most pronounced in the courts and other ‚independent law enforcement bodies'. (In some ‚mixed-function bodies', such as media authorities or data protection authorities, the professionalism of other relevant disciplines, such as info-communications, deserves attention in addition to legal professionalism.)

7 Furthermore, if the legislator regulates in an area using only abstract standards, then the legislators themselves will start to fill in the gaps with more precise rules. Béla Pokol, The Juristocratic State, p. 117

8 The essence of juristocracy is the „rule of jurisprudence" instead of democracy, i.e. legislative activity wrapped up in a dysfunctional way in the application of law. In other words, making unauthorised (subjective) expediency decisions instead of lawfulness decisions. See Béla Pokol, The Juristocratic State, Dialóg Campus Kiadó, Budapest, 2017, 160 p.

a legal vacuum. Therefore, the constitution itself is to be used in lieu of an explicit *lex specialis* only. In every other case, fundamental rights are the fundaments of legal interpretation only; one of the many possible methods, their weight and importance depending on a case-by-case basis. Other, important means of interpretation operate according to the plausible intention of legal norms or the general principles of law.

In conclusion, there are a number of things to lay down. There is a resounding need for a constitution with great legitimacy, compiled with the highest degree of professional aptitude. There must also be a parliament reinforced by full popular sovereignty and made as efficient as it is possible within the principles outlined above. The parliament's main consideration must be expediency, while the constitutional court remains the judge of what is constitutional and what is not. It is entitled only to interpret, but not to create or modify a constitution. Admittedly, clear-cut differentiation between the two areas isn't always possible. There is always the odd grey area, especially regarding whether or not the creation of legal norms derived from the constitution, but not expressly present in it before is an act of constitutional codification.

Popular sovereignty possesses three layers. The most visible of these is the election of the parliament, the legislative body that is the popular will made manifest.

Even more important is the legitimacy of the constitution, which must also stem from the popular will.

Lastly, we must harken back to the creation of organised society itself. The mere transformation of primitive local communities into societies (and the creation of the state) was an act of popular sovereignty as well. Likewise, popular sovereignty also governed the fact that a particular type of norm, law became the principal tool in the organisation of early society. A significant question here is how far can law distance itself — citing its unique and abstract internal logic and the requirement of a „long-term rule of law" — from the masses that created it and their popular will?

The literature on the internal logic of law (even legal doctrine), the professional criteria that determine the training of staff are often universal. It is precisely the non- contradictory dogmatics of constitutional law that is lacking in some literature, in comparison with civil or criminal law.[9] In other words, the legitimacy of the jurist-professional expectations that supersede the substantive law may be called into question on several occasions. Especially if it is of international origin and diverges from the will of the elec-

9 See Béla Pokol, Theory of Law, p. 80.

torate of the country concerned. A legal thesis can only be regarded as uncontroversial if it is presented in the same way in all relevant textbooks and monographs and if there is no authoritative professional opinion to the contrary. (In case of doubt, of course, the authoritative character would be disputed by some...)

Democratic elections are of paramount importance for the legitimacy of law. This includes the prevention of frauds and a proper electoral system. States have considerable leeway in designing the latter. *However, I believe that we must say this: the minority must not win against the majority. This is ensured partly by a sound electoral model and partly by a system of legal remedies with guaranteed elements.* Otherwise, we can only talk about democracy in a formal sense. We also have to formulate further constitutional requirements, such as the fact that it counts to be a violation of legal certainty if the electoral system is changed immediately before elections without sufficient preparation time.[10]

It is essential that the general rules set out by law shall be the best possible ones for the society. But this has its individual victims. In legislative terms: as a result of loopholes. We talk about a legal loophole when there is no rule on something, but there should be one because of some higher principle or norm. We can understand by a hidden legal loophole, – according to Larenz – a situation where there is a rule about something, but a higher-level provision or legal principle would justify the existence of a lex specialis; the subsumption of a general rule may be considered a matter of concern. "The loophole here consists in the absence of the imposition of a limitation."[11] The legitimate interests of these aggrieved persons must also be protected by law. Nor can we ignore the fact that legislation can be "flawed".[12] (Whether through a typo or through bad drafting, we can think of a legal effect other than the intended purpose - we do not wish to deal with "deliberate mistakes" arising from personal interests. Of course, it is not always easy to determine whether it is a "mistake" or whether it is a deliberate legislative act that disregards the interests of some.)[13] This may be

10 Obviously, this raises the issue of adequate preparation time. For an excellent general discussion of the latter, see. Tilk Péter-Kovács Ildikó: Gondolatok a kellő felkészülési idő számításának kezdőpontjáról, Jogtudományi Közlöny 2015./11. 549-555.

11 Béla Pokol: Theory of Law, Századvég Publishing House 2005. Budapest, p. 143.

12 On certain questions of interpretation of the laws, see for example: Arató Balázs: Quo vadis, igazságügyi nyelvészet? Magyar Jogi Nyelv; 2020/2.; pp. 8-15. https://joginyelv.hu/quo-vadis-igaszsagugyi-nyelveszet/.

13 On the requirement of norm clarity, see for example: Arató, Balázs: Norm clarity in the light of Hungarian case law; in: Magyar Nyelvőr 146; 2022; pp. 81–90.; DOI: 10.38143/

- the fault of legislators,
- or even the fault of the codification of the legislation. It is a sociological fact that, especially in the case of a law with several hundred paragraphs, it is the drafters who become the quasi decision- makers.
- And loopholes can also arise. These can be both original and ex post, depending on the time when they were created. In the former case, the legal loophole had already existed at the time when the legislation was drafted, the latter occurs when social, technical, or scientific developments make it necessary to regulate an area which did not previously require regulation. This was the case when criminal codes still usually punished the counterfeiting of coins; when paper money suddenly became widespread in Europe and began to have a high value, the principle of "*nullum crimen sine lege*" meant that the most serious offenders could not be punished. (It is less common for a rule to be repealed in an area that was originally regulated. This is most conceivable in the case of a detailed rule in a complex legal relationship. One long law is replaced by another long law – and one legal relationship is not thought of.) For this reason, there is a constant need for correction.

- This is primarily the purpose of the creation of "lex specialis", the creation of specific rules alongside the general ones. And in this context, feedback from the citizens concerned, the practitioners and the profession become particularly important. (In addition to the strict legality review, the ombudsman's legal protection is also a form of correction for legality. This is most relevant to our subject in relation to administrative acts. The ombudsman investigates abuses of fundamental rights; he can draw attention not only to unlawful but also to 'unfair and objectionable' rules.)
- Constitutional review, and in particular the genuine constitutional complaint, also serves to protect the victims of legal loopholes.
- In a certain sense, the protection of the interests of individual cases is also a means of control by the head of state, such as the right of veto and the right for pardon.[14]

It should be pointed out that democracy is not just the rule of the majority, but the rule of the majority – with the protection of the interests of the

Nyr.2022.5.81., see also: Arató Balázs - Balázs Géza: The linguistic norm and norm of legal language; Magyar Nyelvőr 146: 91–103.; 2022; DOI: 10.38143/Nyr.2022.5.91.; https://nyelvor.mnyknt.hu/wp-content/uploads/146507.pdf.

14 Presidents of the republic may have a number of such powers by international standards, for example to release irrecoverable state claims and (in a quasi-extension of the right to pardon to other areas of law) to grant derogations from the general application of the law. See Géza Kilényi, The Office of the President of the Republic in the Light of International Comparative Law. Hungarian Public Administration, 10/1994; pp., 577–584. 11/1994, 577–584, pp. 641–648.

minority. The interests of minorities are indirectly protected by attentive legislation, but the most powerful instrument for the national minorities is autonomy. *And the motto of all this should be: law for the people, not the people for the law!* A very big problem can be caused by democratic deficits, which the literature tends to mention mainly in the context of the European Union.[15] However, in my view, the concept can also be of great importance for individual states.

15 See for example András Körösényi: Democracy deficit, federalism, sovereignty, Political Science Review, 2004/3, pp. 143–161.