STUDIA JURIDICA *et* POLITICA JAURINENSIS

Studies, Conference Proceedings, and Working Papers
of the Faculty and Doctoral School of Law and Political Sciences of Széchenyi István University

A Széchenyi István Egyetem Állam- és Jogtudományi Karának és Doktori Iskolájának
Tanulmányai, Műhelytanulmányai és Konferencia-közleményei

STUDIA JURIDICA ET POLITICA JAURINENSIS
2018.1.

Editorial Office

Faculty of Law of Széchenyi István University, Győr, Hungary.

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Issue № 1 volume 5 (2018)

Imprint:

Published by Deák Ferenc Faculty of Law, Széchenyi István University, 9026, Győr, Hungary, Áldozat Street 12.

Responsibility for publishing: dean of the Law Faculty, Prof. Judit Lévayné Fazekas, responsible for editing: Prof. Péter Takács.

ISSN: HU 2064-5902

1867: TWO CONSTITUTIONAL TALES ON MINORITY NATIONALISM

THE AUSTRO-HUNGARIAN COMPROMISE AND THE BRITISH NORTH AMERICA ACT

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Constitutional moments have always been a matter of great interest in comparative constitutional law. Thus it is appropriate, in view of this interest, that I have chosen to compare Canadian and Austro-Hungarian constitutional moments at their 150th anniversary. In the Canadian case, that moment was vividly commemorated across the world. On the contrary, hardly any scholars paid tribute to the Austro-Hungarian Compromise, and no one has ever compared the two events with each other. What I wish to attempt in this paper is to fill this gap.

The multi-ethnic and paternalistic Austro-Hungarian monarchy faced a multitude of ethnic groups organized both territorially and non-territorially, as well as rival and *nested* nationalities clamouring for their own nation-state. Of course, the territorial attachment of Eastern-Central European ethnic communities cannot be separated from international relations. In hindsight, it is clear that it was a lost cause to try to maintain the unity of the multi-ethnic monarchy in the age of nationalism. In turn, essentially, the territorially more manageable ethno-nationalism was able to make Canada's accommodation of its minorities morally better than the Compromise in Eastern-Central Europe. If the British North America (BNA) Act was a success, what was its secret? Why was the subordination of Canada to the British monarchy and the constituent parts of the Dominion to Canada more successful than the subordination of Hungary to the Dual Monarchy, or subordination of the Croats to Hungary?

In this paper I identify 1867 as a constitutional moment, and take a look at the Austro-Hungarian and the Canadian cases. Finally, I want briefly to explore the plans promoting de-territorialization of minority rights in the Austro-Hungarian political context and then I put forward a way of deconstructing the widely used distinction between ethnic and civic nationalism. I shall conclude that in both cases, different nationalist ideologies play crucial functions, but while *Canada* should have been struggling with a sort of peripheral or defensive nationalism, nationalist movements in the former *Austria-Hungary* were driven by a hegemonic nationalism demanding their own homelands on ruins of the Hapsburg Empire.

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1867 as constitutional moment

Interpreting a unique historical event as it happened in the constitutional moment remains of significant importance both in our case in particular and in comparative constitutional law in general. This concept usually appears when we have serious doubt as to whether the political agreement is in fact a constitution or whether the socio-political context is sufficiently mature to adopt a constitution. In that sense, the concept of constitutional moment ubiquitously appeared once, when the plan for a European constitution was discussed by European public lawyers. If the European Union needs a constitution, then it needs one now – that is what was argued by many of them. Other scholars contended that the EU was not (yet) a (federative) state and never would be one; therefore, for a conceptual reason, a European constitution was not possible then or in the future, since the state and the constitution are conceptually inseparable. Some other scholars questioned the meaning of the constitution.[1]

No doubt, much ink has been spilled examining this intriguing conundrum, even though the European constitution in that form is no longer an issue. What we can say – unless we refuse to entertain the concept of constitutional moment[2] – is that it is generally not possible to determine immediately whether this or that moment is actually a *constitutional* one. A century and a half is probably adequate, though, to assess the BNA Act and the Compromise.

So what was going on in the world in 1867? A non-exhaustive and random list of events would include:

- United States of America bought Alaska from Russia for 2 cents per acre;
- Luxembourg became an independent state;
- Karl Marx published *Das Kapital*;
- the British Parliament rejected John Stuart Mill's proposal on women's suffrage; and
- Emily Stowe, the first Canadian woman doctor, begun to practise in Toronto.[3]

These events at the outset of the final third of the long 19th century[4] illustrate the emphasis on the formation of nation-states and federations, the emancipative efforts of

[1] Weiler, Joseph H. H.: The Constitution of Europe. "Do the New Clothes Have an Emperor?" and Other Essays on European Integration. Cambridge–New York, Cambridge University Press 1999; MacCormick, Neil: Questioning Sovereignty. Law, State, and Nation in the European Commonwealth. Oxford, Oxford University Press, Law, State, and Practical Reason, 1999; *Une constitution pour l'Europe?* Ed.: Renaud Dehousse. Paris, Presses de Sciences Po, 2002; Walker, Neil: Europe's Constitutional Momentum and the Search for Polity Legitimacy. *International Journal of Constitutional Law*. Vol. 4 (2005) 211–238. etc.

[2] Sajó, András: Constitution without the Constitutional Moment. A View from New Member States. *International Journal of Constitutional Law*. Vol. 3 (2005) 243–261.

[3] The source of this rather randomly selected information is www.onthisday.com and www.canadahistory.com

[4] See Blackbourn, David: *The Long Nineteenth Century. A History of Germany, 1780–1918*. Oxford–New York, Oxford University Press, 1998; and on its complement, the short twentieth century see Hobsbawn Eric, *The Age of Extreme. The Short Twentieth Century 1914–1991*.

individuals belonging to deprived groups and the writings that reflected these stages of development.

An immense body of historical literature[5] has already explored the historical context of the events surrounding 1867. The Seven Weeks' War of 1866 finished badly for Austria, which was whipped by Prussia at Königgrätz, and thus saw its power significantly weakened in Europe. At the same time, the Habsburgs lost the support of the Russian empire, which had been one of their most important illiberal allies. This meant that Austria was unable to subordinate definitively the Hungarian half of the Dual Monarchy; and obviously the non-Hungarian part of the monarchy would have been even weaker on its own. On the eastern side of the monarchy, Hungarian society was tired of the passive resistance to the Austrian oppression that followed in the wake of the failed popular rising, fuelled by national sentiment, to cast off the Austrian yoke (1848–9). The birth of an independent Italy and an emerging Germany in the geographical neighbourhood were both telling political arguments for consolidating the internal power arrangements.

Besides the *when*, the *where* should also be considered: where did the constitutional moments actually happen. When looking at Canada, comparative public lawyers and social scientists usually also pay attention to a good number of models including United States, Australia, New Zealand, Colombia, Cameroon, Belgium, United Kingdom, etc.[6] Nonetheless, there are important parallel references to Canada and Austria-Hungary to be discovered in political theory, global and nationalism studies. Whereas the Eurocentric concepts of nation and nationalism appear in the literature on Canada; and

London, Abacus 1994.

[5] As far as the Hungarian history of this epoch is concerned, see Ezra, William: *Austria-Hungary*. New York, P. F. Collier, 1907; Eckhart, Ferenc: *A Short History of the Hungarian People*. London, Grant Richard, 1931; Taylor Alan – Percivale, John: *The Habsburg Monarchy 1815–1918. A History of the Austrian Monarchy and Austria-Hungary*. London, Macmillan, 1942; Hanák, Péter: *Hungary in the Austro-Hungarian Monarchy. Preponderance or Dependency?* Houston, Rice University 1967. etc.

[6] Bothwell, Robert: *Canada and United States. The Politics of Partnership*. Toronto, Twayne, 1992; Charters, Claire: Comparative Constitutional Law and Indigenous Peoples. Canada, New Zealand and the USA. In: *Comparative Constitutional Law*. Eds.: Tom Ginsburg – Rosalind Dixon. Cheltenham & Northampton, MA:, Edward Elgar, 2011. 170–188.; Karmis, Dimitrios – Gagnon, Alain-G.: Federalism, Federation and Collective Identities in Canada and Belgium. Different Routes, Similar Fragmentation. In: *Multinational Democracies*. Eds.: Alain-G. Gagnon – James Tully. Cambridge, CUP, 2001. 137–175.; Arel, Dominique: Political Stability in Multinational Democracies. Comparing Language Dynamics in Brussels, Montreal and Barcelona. In: *Multinational Democracies*. 2001. 65–89.; Rocher, François – Rouillard Christian – Lecours, André: Recognition Claims, Partisan Politics and Constitutional Contraints. Belgium, Spain and Canada in a Comparative Perspective. In: *Multinational Democracies*. 2001. 176–200.; Coulombe, Pierre: Federalist Language Policies. The Cases of Canada and Spain. In: *Multinational Democracies*. 2001. 242–256.; Imbert, Patrick: Resentment and Multiculturalism. Kymlicka's Canada, Bonilla Maldonado's Colombia and Modood's UK. In: *Multicultural Interactions. Canada and the World. Politics and Literature*. Ed.: Patrick Imbert. Ottawa, University of Ottawa, 2014, 17–55.; Kuitche, Herman: Multiculturalism, Ethnicity and the Postcolonial State. Cameroon and Canada. In: *Multicultural Interactions*, 2014. 145–165.

vice versa, Canada appears as a good example for export to the multinational democracies in transition in the eastern part of Europe. It would be a shame to neglect the role of Canadian Studies as a proxy for the different branches of critical social sciences, including comparative legal scholarship and critical political theory.

Canada featured in several case studies of federalism and territorial autonomies in post-conflict societies of Eastern and Central Europe in the final decade of the twentieth century. Not surprisingly, while the multicultural Canadian model has been regarded as a positive example to be followed, the disintegrated *pseudo* federal states of the former Soviet Union, Yugoslavia and Czechoslovakia[7] have been categorized as failed models. Patrick Imbert's literature review on the Latin American reception of Kymlicka's multicultural political philosophy pinpoints the fact that if the receptive country is illiberal (like the former Yugoslavia or Egypt), then there is no place for *effective multiculturalism*.[8] While this claim is true that a satisfactorily articulated multicultural politics should take as granted that the society relies on the basic liberal tenets, the liberalism as such a complex worldview and it can be argued that in two different forms it existed in the fin de siècle Canada and Austria-Hungary.

There is indeed good reason for dwelling on a comparison of Canada and Austria-Hungary. What I wish to do here is to discover the reasons for the success and failure of the two different forms of minority nationalism. This project may pinpoint some less than self-evident practical truths about how the different nation-building projects developed at the end of the nineteenth century in different socio-political and geographical contexts shape the identity of our current political communities.

The Compromise compared to BNA

The chief negotiator from Vienna, Beust's letter addressed to the Hungarian political leader, Ferenc Deák, formulated the essence of the compromise in a pretty gothic way, as follows: *Gardez vos hordes, nous garderons les nôtres!*[9] Our best interpretation of his request may be as follows: in 1867, the political leaders of post-revolutionary Hungary and the representatives of the Habsburg monarchy were in search of a basic political

[7] Uniting Czechs and Slovaks, Czechoslovakia was essentially a unitary democratic republic. Some writers think that the main reason for the existence of this country – emerging right after the break-up of the Dual Monarchy – was 'to allow the Czechs to have more autonomy from the Austrians and Germans and the Slovaks to escape from the Hungarian domination.' Watts, Ronald L.: *Comparing Federal Systems.* Montreal, Kingston, etc. School of Policy Studies, Queen's University, McGill-Queen's University Press, 2nd ed. 1999. 31.

[8] For an excellent, fairly Canada-focused overview, see Smith, Graham: Mapping the Federal Condition. Ideology, Political Practice and Social Justice. In: *Federalism. The Multiethnic Challenge.* Ed.: Graham Smith. London – New York, Longman, 1995., 1–28; Imbert: Resentment and Multiculturalism. In *Multicultural Interactions.* 2014. 31.

[9] Quoted by Douin, Claude-Sophie: *Le fédéralisme autrichien.* Paris, Librarie Générale de Droit et de Jurisprudence, 1977. 7.

framework for their cohabitation within a Dual Monarchy, unified by a single king in the form of a Compromise.[10]

It was widely recognized by the Hungarian political elite that the badly handled claims of the national minorities had had a hugely negative impact during the previous fight for independence in 1848/49. The Compromise with Austria allowed the Hungarians to overcome their reluctance to enhance the rights of minority groups. Indeed, in 1868, a year after the Compromise, a statute in support of the national minorities was enacted. Baron Eötvös, the great liberal-conservative scholar who went to live in emigration after being shocked by the excesses of the Hungarian revolution, prepared the draft for this piece of legislation, which promoted a degree of tolerance. Less well known, probably, is that he advanced a plan for a constitutional court in 1854, just fifty years after the American *Marbury vs Madison*. Unfortunately, at the same time, and flying in the face of this progressive legislation, an intensive process of "Magyarization" set in. A similar compromise was reached in the same year with the largest territorially organized minority group, the Croats, after a Croat leadership was chosen that was not actually hostile to the Hungarians. In fact, the nationality question was not a specifically Hungarian problem, since several ethnic minority groups existed in the Austrian part of the monarchy – partly in geographically concentrated forms and partly in the form of different diasporas.

In the year of 1867 Compromise, the British parliament at Westminster presented a seemingly statutory act as a sort of 'constitutional gift' to establish One Dominion under the Name of Canada. Since it did not create a de facto independent Dominium, the BNA Act was originally not a constitution, but a statute. In the strict sense, the Austro-Hungarian Compromise was not a constitution either, even so a political deal that sought to smooth internal relations within the monarchy and restore the ancient constitutionalism in Hungary. While *Edwards* v. *Canada AG* [18 October 1929] upgraded the imperial act and endorsed a liberal interpretation of the text (precisely because the BNA Act can be seen as a constitution), nothing similar ever happened with the Compromise. The positive outcome of the Privy Council's decision was the enhancement of individual rights.

In the Hungarian part of the monarchy, the judicial enforcement of individual rights did not become an issue. As for Austria, in contrast, known as the first country to have a constitutional court (1920), the Basic Law of 21 December 1867 already contained a charter of rights. The territorial validity of this constitution was restricted to west of the Leitha (the frontier stream dividing Hungary and Austria). Apart from this it seems that the Austrian Constitutional Court was more a watchdog for the competencies of the sub-state entities in the federal states than a promoter of individual rights. That sort of moderation was not the case with the Privy Council, which introduced the metaphor of a *living tree* to justify an exceptionally liberal constitutional interpretation of the BNA.

[10] *Ausgleich* – this German word translates as 'Compromise', and its closest Hungarian equivalent is *kiegyezés*.

Until the fall of communism, this sort of individual right-based *new constitutionalism* was rejected in the Eastern-Central European legal culture. In Austria, the European Convention of Human Rights gained constitutional status in 1964, enabling the country to follow for the most part the Western (or Canadian) way of protecting individual rights.

Although no scholar has ever actually compared the Austria-Hungary and Canada, according to Leslie C. Tihany it would appear to be justified, since both countries were in search of suitable constitutional techniques in the service of modernization: "In its world historical contexts the Compromise was part of the late nineteenth-century modernizing process on the peripheries of the West, analogous to the attainment of dominion status by Canada, the Meiji restoration in Japan and the reconstruction of the Union after the American Civil War."[11] As a political regime, the Austro-Hungarian Dual Monarchy might therefore be visualized as occupying the centre of an imaginary spectrum, with the Victorian United Kingdom at one end and the despotic regime in Russia at the other.

Dissimilar to the BNA Act, the Dual Monarchy's foundational document did not aspire to establish a federation – which is a conceptual element in every federative constitution. The Compromise loosely unified the Austrian and Hungarian parts. One may also discover easily a similarity between the Compromise and the much earlier Act of Union enacted in 1707, giving birth to the United Kingdom by empowering the Hanoverian royal dynasty to succeed Queen Anne to the Scottish crown The so-called Pragmatic Sanction (1723) declared alike that even female members of the Hapsburg Family can be common king for both Austria and Hungary. Similarly to the British case, claiming the necessity of mutual acceptance of this act was the core of the constitutional reasoning which was developed by the Hungarian chief-negotiator, Ferenc Deak in order to maintain the Compromise in 1867. Yet the intention behind the Act of Union of 1707 was to resolve a succession crisis, later this Act, as a protoconstitution, became part of an unwritten constitution of the United Kingdom: "This is a very strong narrative in Scotland, where the idea of union, as articulated in the Acts of Union 1707, is central to constitutional understanding of the historical origins of the state. By this account, the 1707 acts were a kind of *protoconstitution* guaranteeing the survival of the distinctive institutions of Scottish public life and, in particular, of a separate legal system."[12] Unlike the 1707 Act of Union, the Compromise ultimately did not withstand the test of constitutional time, therefore there is no any compelling reason to interpret it as a "proto constitutional document".

[11] Tihany, Leslie C.: The Austro-Hungarian Compromise, 1867–1918. A Half Century of Diagnosis: Fifty Years of Post-Mortem. *Central European History.* Vol. 2. (1969) 2. 114., 138. and 136.

[12] Tierney, Stephan: Giving with One Hand. Scottish Devolution Within a Unitary State. In: *Constitutional Design for Divided Societies. Integration of Accommodation?* Ed.: Choudhry, Sujit. Oxford, Oxford University Press, 2008. 438–460. at 444.

The main reason why the Dual Monarchy stands apart from other multi-ethnic states is that there was a bizarre intention simultaneously to establish a unitary state (required by the drive for modernization) and a dual kingdom (as a historical legacy and a result of political realism). In so doing, the Compromise sought to sustain the duality of this Eastern-Central European kingdom and at the same time to forge an artificial KuK *(kaiserlich und königlich)* identity by the mere fact of having the same king in both parts of the monarchy. This hope was not as naïve as it seems today, or as it appeared from the satirical *fin de siècle* literature. The example of multi-ethnic Belgium (founded following secession in 1831) proves that a (multi)national unity can be assured by a single king endorsed by different groups from various ethnic communities. Of course, given the country's turbulent constitutional history, the example of Belgium also emphasizes the fragility of this assurance.

Leaving aside the common king, Austria and Hungary were integrated under the Compromise only in three fields, administrated by three joint ministries that were responsible for foreign affairs, for the armed forces and for funding these joint activities. Each of these ministries was responsible only for its own country's affairs, and did not involve itself in the other country's competencies. In all other fields, the two countries remained separate. Gyula Andrássy, later defending the Compromise against the Hungarian Independence Party[13], used a sort of comparative law argument. He rejected the notion that the Compromise had rendered Austria-Hungary similar to the federation in the United States. The main difference was that the list of competencies delegated to the common ministries was restricted. While federal organs – above all the courts – are able to expand the federative competencies at the expense of the federated states, this list remained set in stone in Austria-Hungary, where the two national parliaments controlled all the decisions taken by the mixed delegations that dealt with the common affairs. The Dual Monarchy was neither a personal union nor a federated state, according to him, but two independent states that regulated their common affairs just as two independent states determine their international relations.

The BNA Act compared with the Compromise

The BNA Act was intended to develop a constitutional design that enabled accommodation of the socio-cultural cleavages by a new political community in Canada. The subsequent birth of Manitoba – and the figure of the Métis leader, Louis Riel[14] – nevertheless revealed very clearly that the topics of ethnicity,[15] language and land were just as hot in the new dominion as in Eastern-Central Europe.

[13] Andrássy, Gyula: *Az 1867-iki kiegyezésről.* Budapast, Franklin-Társulat, 1896.

[14] E. Russell Hopkins, *Confederation at the Crossroads. The Canadian Constitution.* Toronto – Montreal, McClelland and Stewart, 1968. 173. and f.

[15] Bradford W Morse, John Giokas, 'Do the Métis Fall Within Section 91 (24) of the Constitution Act, 1867? In: *Aboriginal Self-Government. Legal and Constitutional Issues.* Eds.: Patrick Mackham et al. Ministry of Supply and Services, 1995. 140–273. 258.

Here again is an important difference between the Compromise and the BNA Act. In this part of Europe, the main question was the constitutional reconciliation between Hungarians and Austrians through having a common king, on the basis of the restoration of the rather scanty common constitutional traditions, as determined by the laws of 1123, 1713 and 1723. At the outset, though the distinctiveness existed, the so-called Quebec question did not appear to be the main issue during the negotiations over of the BNA Act. In this regard, it may appear again to be more fruitful to compare Canada in 1867 with the birth of the independent binational Belgium of 1830. On this matter, two fundamental differences have been pointed out by Dimitrios Karmis and Alain-G. Gagnon. First, they think that the plurality of identities was not as characteristic in Belgium as it was in Canada, because in Belgium, at the beginning, the Flemish population tended to be Francophone. This is true, yet I would contend that nationalism in Quebec was as late development as it was within the Flemish community. It is worth adding that Hungarians and other minorities in the Dual Monarchy were overwhelmingly Germanized during the nineteenth century. Secondly, the scholars rightly point out that federal settlement was not a goal in Belgium. On the contrary it was in Canada.[16] They argue that only later historical circumstances compelled Belgium to adjust its political regime to a polyethnic and federal state, whereas the original intention had been the creation of an independent Belgium as a unitary state.

As for the Canadian case, the peculiarity is that the founding fathers were not in favour of using the term *federation*, because it "had come to mean an association of sovereign entities".[17] They preferred *Confederation*, however with the meaning of *centralized union* – something similar to what we now call *federation*. Something similar has happened in Central Europe. As Gyula Andrássy argued, instead of supporting the Compromise with the Austrians – endorsed by only a part of the population after the Compromise – Kossuth intended to integrate Hungary into a larger confederation of the small nations living on the Danube. Though clearly nationalist, this might have implied greater loss of national sovereignty than the Dual Monarchy, which (according to Andrássy), maintained an equal relationship between the two sovereign states. Now, using the vocabulary of today, while Austria-Hungary established a limited confederation under the name of the *Dual Monarchy*,[18] the BNA Act gave birth to the Canadian federation (which is called a *confederation* only for historical reasons).

The road to the BNA Act – from early negotiations to enactment – scarcely differed in terms of time from the Austro-Hungarian negotiations, if we take Ferenc Deák's so called *Easter Article*, published at Easter's eve of 1867, as its starting point. Nonetheless,

[16] Karmis – Gagnon: Federalism, Federation and Collective Identities. In: *Multinational Democracies*. Eds.: Alain-G. Gagnon – James Tully. Cambridge, CUP, 2001. 137–175. at 145.

[17] Hopkins, Confederation at the Crossroads. 1968. 159.

[18] Douin, Claude-Sophie: *Le fédéralisme autrichien.* 1977. 7. : En matière législative, l'Autriche-Hongrie n'était donc rien de plus qu'une confédération d'Etats *[Staatenbund]*: il y avait deux Etats séparés, mais en union réelle.

what an observer should bear in mind is that, unlike Austria-Hungary, Canada was a dominion, and therefore the steps it took toward independence had to be compatible with the actual state of affairs of the main power. A "Kingdom of Canada" was out of question from the outset: it was considered too pretentious by the British and was rejected by the generally antimonarchical Americans.[19] The European powers remained relatively uninterested in the Canadian issue: Louis Napoleon was more involved in the question of his troops in Mexico; Westminster was primarily concerned with electoral reform; and Russia was concluding its Alaskan business with the Americans.[20]

As to its content, neither the Compromise, nor the BNA Act was intended to be exhaustive; but unlike the Compromise, in the case of the BNA, it was assumed that British constitutional principles were to be applied if a legal loophole arose.[21] Such an assumption never existed in the neighbouring United States, where the founding fathers were seeking a way of repudiating British public law, just as the French Revolution cast off the medieval constitutional legacy. On their behalves, Canadians were afraid of the decentralized model of the American federation, which had led to the recent civil war; also, because of the above-mentioned cleavages, a unitary state was not an option either. Founding fathers in Canada therefore insisted on the application of British common law, which is why the BNA Act uses the *good government* principle, rather than *self-government*. All things considered, the assignment of power to legislate for "peace, order and good government within the jurisdiction of the parliament is the widest possible assignment. Although Sections 91–92 of the BNA Act regulate the distribution of competencies more precisely than the Compromise does, the final decision on the exact line of demarcation between federal and local competencies depended almost exclusively on the lords of the Privy Council.[22]

The use of British public law offered a great opportunity to secure leverage of the constitutional principles in justifying decisions, as occurred in the Secession decision. This embedding of unwritten constitutional law into a written constitution may have been eventually an option in the case of the Compromise, since many Hungarian public lawyers considered Hungarian constitutional law to be similar in principle to British common law. Obviously, that was a romantic notion, hinting that their small nation could be as proud as the British monarchy of its historical roots. In practice, the Hungarian unwritten constitution was actually evidence of profound political disagreement, making it impossible to forge a nation by means of a written constitution. If one were to depart from history and slightly idealize the situation in the United Kingdom (as Hungarians certainly did), one could say that the origin of the British unwritten constitution was diametrically opposed to the Hungarian case, because there had been a strong, overlapping consensus over many centuries regarding the basic

[19] Hopkins: Confederation at the Crossroads. 1968. 162–163.
[20] *Ibid*, 165.
[21] *Ibid*, 178.
[22] Smiley, Donald V.: *The Canadian Political Nationality*. Toronto & London, Methuen, 1967. 20. and f.

principles of the political community. In addition, given that only the Hungarian part of the Dual Monarchy relied on an unwritten tradition, the constitutional settlement may have been transformed into an asymmetrical one: Austria's written constitution is part and parcel of its constitutional history (culminating in the federal constitution of 1920).[23]

Despite the plans for the constitutional courts, judicial review was not an option in Austria-Hungary at that time. Once the Austrian part of the monarchy became independent, judicial review was introduced to guarantee the fair distribution of competencies across the federal state of Austria and its constituent parts. Judges in Eastern-Central Europe were therefore ill prepared to handle the question of secession, as Canadian judges did later using non-written sources of the Canadian constitution;[24] and nor could they rely on rights-based legal reasoning.

Even though the BNA was enacted as an Imperial Statute, its popularity in Canadian society was probably much greater than the popularity that the constitutional deal reached between Kaiser Franz Joseph (1848–1906) and the post-revolutionary Hungarian élite enjoyed within either Hungarian or Austrian society. The dividing line was between those who still supported national independence and the spirit of 1848/49, and those who were in favour of compromise. The British imperial structure in Canada did not seem to have this loyalty effect. Canadian citizenship seems to have been separate from loyalty to the royal family of the United Kingdom. In turn, Canada's dominion status contributed to the emergence of a Canadian state-nationalism vis-à-vis the United States, where the notion of national identity rested basically on the constitution. The imperial structure was important because of the repatriation problem, on the one hand, and on the other hand because of the interpretive practice of the Privy Council, which developed a unique constitutionalism on the basis of the text of the BNA Act. The prima facie advantage of a monarchy was that a royal family's interest was not generally identified with the interest of a particular national group. The Habsburgs, therefore, could transcend such differences, and belongingness to this or that social group was a matter of geography, rather than of race or ethnicity. In contrast, nationalities had overlapping claims on their territories, and they did not want to feel greater loyalty to this de-ethnicized royal family than to their own lands. The nationalist revolutions failed, but the ethnically and territorially based conceptions of

[23] The Austrian Constitution in 1920 introduced a congruent, symmetrical federation to a society on which federalism has never had any impact. This makes the Austrian federation extremely problematic: the "essence of federalism lies not in the constitutional or institutional structure but in the society itself"; cf. Watts, Ronald L.: *Comparing Federal Systems*. Montreal & Kingston, London, Ithaca, School of Policy Studies, Queen's University by McGill-Queen's University Press, 2nd ed. 1999, 15. But, as Claude-Sophie Douin puts it, Austrians were not in favour of an Austrian state either: "federalism was born in Austria in the complete absence of any enthusiasm for an Austrian state"; see Douin, Claude- Sophie: *Le fédéralisme autrichien*. 1977. 10.

[24] Gaudreault-Desbiens, Jean-François: Underlying Principles and the Migration of Reasoning Templates: a Trans-systemic Reading of the Quebec Secession Reference. In: *The Migration of Constitutional Ideas*. Ed.: Choudhry, Sujit. Cambridge, CUP, 2011. 178–208.

nationhood persisted; and in the case of the Hungarians, nationhood was justified by the constitutional myth of the Holy Crown, which represents as Hungarian the whole expanse of territory where the first Christian king, Saint Stephen, was ruler. As far as the Austrian part of the monarchy is concerned, the birth of Germany in the neighbourhood was philosophically justified by the cultural concept of nation; thus the German-speaking part of Austria could identify at least as much with the German population as with the Hungarian. This sentiment was obviously stronger than fidelity to the Hapsburgs.

Promoting de-territorialization

While the virtue of the BNA Act lay in the opportunity is presented for an ethno-cultural kaleidoscope, using clear territorial boundaries, Gellner's *Ruritania*[25], i.e. Eastern-Central European countries failed both to mitigate territorial-ethnic conflicts and to de-territorialize minority rights.

Interestingly enough, the debate is still open as to whether the drafts and plans for non-territorial cultural autonomy, as elaborated by Karl Renner and Otto Bauer in Austria, really count as paradigm shifts in the field of protecting national minorities vis-à-vis federalist theories on the one hand and liberal-individualistic theories on the other. Nevertheless, many contemporary political theorists – driven by a desire to promote stability and eternal peace in international relations – suggest that a *de-territorialized* theory based on cultural autonomy should be considered a panacea for the whole Eastern-Central European misère.

Renner's *State and Nation*[26] should be construed as a political pamphlet, rather than as an academic study. Despite its political character, it contains the intellectual and political seeds of a modern theory of state as cultivated in German and Austrian universities. This pamphlet-study is trying to cloak the ideological content in judicial phraseology. As for the community of persons to be protected, the national minority is defined in a legalistic way as a "factual personal association" which has its own "rights-holder legal personality".[27] With this, Renner, the legal scholar, elaborates a legal analogy to compare the declaration of membership of a national minority with the declaration of paternity. The second analogy that he uses is the organization of a Christian Church. If you take this doctrinal study really seriously, one can easily detect severe faults and methodological shortages of his *per analogiam* arguments. First of all, in most legal systems the declaration of paternity is only a subsidiary possibility in establishing the status of a child, since, if conception took place after marriage (or

[25] Gellner, Ernst: *Nations and Nationalism*. Ithaca, Cornell University Press, 1983. 58–62.

[26] Originally *Staat und Nation. Zur österreichischen Nationalitätenfrage*. Wien, 1899. The study was undersigned as Synopticus. Here I am using this English translation: Renner, Karl: State and Nation [1899]. In: *National Cultural Autonomy and its Contemporary Critics*. Ed.: Ephraim Nimni. London, Routledge 2005. 15–47.

[27] Renner: *State and Nation*. 1899. 27.

within a certain well-defined period of time prior to marriage), there is an assumption of fatherhood. The unilateral declaration of membership of a national minority group cannot be compared to an act of marriage, which presupposes two parties; indeed, neither the presumption of paternity nor the declaration works as an analogy in the field of determination of membership. The second objection is that it is rare for fatherhood to be declared without the consent of the mother, simply because the mother should be aware of someone declaring his paternity. Since the national community's consent cannot be required for a personal declaration of membership, this analogy does not work either. Furthermore, when crafting this legal analogy, we should bear in mind that a declaration of fatherhood is not always a voluntary act, in the sense that it is done on the father's initiative. In turn, a declaration on the membershio in a minority group is essentially a voluntary one. In many cases, the child's mother requests the father to declare his paternity, in order to enforce a set of obligations, for example child support. This set of obligations exists independently of the father's rights. Hence, for instance, a father cannot enforce his right of access to his child in return for the payment of support, while the mother is not allowed to refuse to allow her child to see the father if he has not paid the support and the arrears. In case of a national minority group, there is only a very weak (if any) obligation of simple loyalty to the group. If minority rights exist at all, their function is to protect the group externally from intervention by the majority, rather than to enforce specific rights inside the group.

As for the analogy between a national minority and a Church, that perhaps works but only if we agree with Renner that the origin of individual liberty is the Protestant vision of religious freedom and tolerance. Other churches are inappropriate to be compared with ethnic minority groups based on association. Unreformed Christian churches – for instance the Russian Orthodox Church or the Roman Catholic Church – do not require a personal declaration for the baptism of new-born children or infants who are unable to declare personally their adherence to the Church.

Compared to Renner, the more radically Austro-Marxist Otto Bauer, in his magnum opus, developes a political theory that gives priority to economic considerations over legal and constitutional aspects of the protection of national minorities.[28] Nevertheless, at an important point at the very beginning of his book, he almost immediately enters willy-nilly the field of legal scholarship. He analyses how Carl Friedrich von Savigny's *national spirit(ualism)*[29] refers to the *spirit of the people* as a driver of national action. Using Kant's transcendental philosophy, Bauer's rebuttal claims that this is a substantialist vision of the nation, which attempts to get us to believe that the nation really thinks and acts according to its *spirit*. Such a vision is contrary to materialistic-individualist premises. Savigny and his historical school promoted the organic development of

[28] Originally Bauer, Otto: *Die Nationalitätenfrage und die Sozialdemokratie*. Vienna, Verlag der Wiener Volksbuchhandlung Ignaz Brand, 1907. Here I am using this English translation cf. Bauer, Otto: *The Question of Nationalities and Social Democracy* [1907]. Ttransl.: Joseph O'Donnell, ed.: Ephraim J. Nimni. London, University of Minnesota Press 2000.

[29] Bauer: The Question of Nationalities. 1907. 23.

society and made efforts to immunize the political community against fighting and conflict. Attempting to bring German lawyers to his side effectively, he famously painted the romantic picture of socio-legal development as comparable to the silent evolution of language. In contrast to this romantic-conservative worldview, Bauer – in conjunction with Karl Marx and Rudolf von Jhering – conceptualized the problem of national sovereignty and minority issues in terms of fight and conflict. Bauer seems to feel frightened that "national self-determination on the basis of the territorial principle would simply provoke renewed struggles".[30] He defines the nation as "a relative community of character"; and being "relative", the way of organization of the peculiar unity should be variable. He acknowledges that a national minority should be organized as an association of persons,[31] and refutes that these groups are territorially organized corporations. The conflict situation between minority and majority is not uniquely German or Austro-Hungarian; hence, it can be generalized to all nations.[32]

As one might expect neither Renner nor Bauer was successful in healing the nationalist illnesses of the Austro-Hungarian Empire, and the Dual Monarchy disappeared from the political map. Despite this failure, their theories have had an impact on nation-building strategies in Central European countries. In addition, these theories have witnessed a renaissance in recent debates surrounding federalism, unionism, linguistic and other group rights, legal pluralism, secessionist movements and minority nationalism. The legislation of countries like Latvia, Hungary, Russia, Lebanon, Iraq and Israel has been biased more or less by the *territory-blind* theory of cultural autonomy. The different networks of the so-called cultural councils are probably the most palpable proof of their intellectual influence.

As a matter of fact, the Canadian scholar, Will Kymlicka disagrees with that. He argues that all new liberal democracies are *nation-building states*, and if they are multi-ethnic, then their nation-building component can promote more than one societal culture. This is the case, according to Kymlicka, in Canada, Switzerland, Belgium and Spain.[33] Within this framework, the question of doing justice can play a central role. In a well-established liberal and multi-ethnic democracy, the question is whether it is possible to avoid a situation whereby the majority's nation-building project harms vulnerable groups, which would constitute an obvious injustice (and if it is possible, how). The Eastern-Central European form of the same question is whether a widely recognized past injustice against a minority (or indeed a majority) can be rectified in this normative way, or whether only a sort of factual *Realpolitik* can guarantee national unity sustaining the current status quo in terms of the relationship between majority and minority. Kymlicka criticizes the radical contrast between the theory of justice and the effective ethnic risk management that has been undertaken by so many Western

[30] Bauer: The Question of Nationalities. 1907. 271.
[31] *Ibid.* 281.
[32] *Ibid.* 266.
[33] Kymlicka, Will: Politics in the Vernacular. Nationalism, Multiculturalism and Citizenship. Oxford, Oxford University Press, 2001, 26–27.

scholars. On the whole he thinks that such a strategy overemphasizes the question of security at the expense of justice. Vulnerable groups, including national minorities, have a right even in Central Europe, to a framework within which to practise their group-differentiated rights, other than non-territorial cultural autonomy.

What is more, he is critical of Renner's plan, which took it for granted that the Austro-Hungarian Empire would be divided between Magyars and Austrians; against this background, he advanced a plan for *non-territorial autonomy*: [T]he main point is that the model of the national-cultural autonomy presupposes that we have already determined the territorial units … The *personality principle* operates within the pre-existing territorial boundaries and administrative structures.[34] If the context is a multinational society, then, as part of the nation-building project, one of the conditions for a good moral or legal decision is a well-established spatial context and essentially uncontested borders. Indeed, if there is wider consensus on these spatial contexts, these judgements become more reflective and wiser at the individual level.

Deconstructing the distinction between civic and ethnic nationalism

Though currently sub-state groups, including the Aboriginal population and First Nations people, are entitled to this right today even if they do not live in a compact territory, in the classical sense only a territorially concentrated population can enjoy the collective right of self-determination. In Eastern-Central Europe, it has long been the norm to speak of collective rights and to refer to tracts of land as "our home-, mother- or fatherland", although it is fairly incompatible with Western liberalism and its essential political corollary of individual rights. Here only the most numerous nationalities were grouped in compact territories, and those groups were politically divided. The Hungarians made an agreement with the Austrians; subsequently the Croats did likewise with the Hungarians; while the Czechs favoured a further federalization of Austria-Hungary. In this context, it is the paradigmatic case that nationalism created the nation-state: when the Dual Monarchy disintegrated in 1918, a good number of these ethnic groups – approximately twenty, including Slovaks, Romanians, Croats, Bosnians, Turks and Slovenes – quickly took advantage of the Wilsonian notion of self-determination.

As newcomers to the country, Anglo-Canadians distinguished themselves by race, depending on whether they came from Scotland, England or Ireland. This racial distinction was a conventional one and it "coincides with the pinnacle of European colonialism and with slavery and displacement of indigenous peoples in the Americas."[35] French-Canadian linguistic rights outside Quebec have long been an

[34] Kymlicka, Will: Renner and the Accommodation of Sub-State Nationalisms. In: *National Cultural Autonomy and its Contemporary Critics*. 2005. 141–142.

[35] Heinze, Eric: The Construction and Contingency of the Minority Concept. In: *Minority and Group Rights in the New Millennium*. Eds.: Deirdre Fottrell – Bill Bowring. The Hague, etc: Martinus Nijhoff Publishers, 1999. 25–74, at 56.

unresolved issue, and the disintegration of Canada was a clear and present danger many years before the start of the twenty-first century. Lord Durham's remark from 1837 is often quoted: "I found two nations warring in the bosom of a single state. I found a struggle not of principles but of races."[36]

This all goes to show the fragility of the Canadian model. Curiously enough, Hungarian leaders who are regarded as ethnic nationalists referred to Hungarians as a political (i.e. civic) nation, and treated national minorities in the Hungarian part of the Dual Monarchy as "cultural" (i.e. ethnic) nations, meaning that in their eyes they were only premature societies unable to forge their own nation-states. Dominique Arel points out that in both Canada and Eastern-Central Europe in the nineteenth century, the intended goal was the same: to rationalize the state through the establishment of one central language; "yet the French/American model was called *civic* because the process proved non-conflictual in the end, and the Russian/Hungarian model was never called *civic* since it engendered conflicts".[37] This does not mean, however, that the French/American version of the civic state successfully separated politics from culture, as the idea of the civic state demands; but simply that it "succeeded because cultural minorities did not successfully challenge the culturally hegemonic French/Anglo-American project".[38]

The arguable civic/ethnic distinction was originally introduced to the scholarly discourse by Michael Ignatieff. He construes nationalism as a sort of belief that peoples in the world are divided into nations, along with the claim that each nation should have the right of self-determination. Whereas the basis for civic nationalism is patriotism (internalizing the common values of a political creed), the ethnic nationalist claim is that *belonging* to a nation is something inherited, and therefore the nation as a community cannot be based on a voluntary act of association. According to this distinction, while civic nationalists would argue that the English, Welsh, Scots and Irish nations emerged and united through common attachment to civic institutions (e.g. parliament), ethnic nationalists would appeal to their common roots rather than the legal system; inheritance rather than rational choice; fraternity rather than liberty. Ethnic nationalism is collectivist, claiming that it is the nation which creates individuals and not vice versa.[39]

Not surprisingly, the ethnic/civic distinction has given rise to profound disagreement. Among others, another Canadian political theorist, Will Kymlicka, disagrees: for him, it is probably closer to the truth to say that ethnic and civic elements coexist in both Western and Eastern nationalisms if ethnicity embraces not so much

[36] Quoted by William, Colin H.: A Requiem for Canada? In: *Federalism. The Multiethnic Challenge.* Ed.: Graham Smith. London – New York, Longman, 1995. 31–78. at 37.

[37] Arel, Dominique: Political Stability in Multinational Democracies. In: *Multinational Democracies.* 2001. 73.

[38] Ibid.

[39] Ignatieff, Michael: Blood & Belonging. Journeys Into the New Nationalism. Toronto, Viking 1993. 3–5.

biological similarities, but linguistic paternalism, cultural geography and the search for territorial autonomy delineated by historical borderlines. David Miller endorses this view. He describes the ethnic/civic distinction as a "spectrum", with *ethnic* and *civic* at its two ends, bringing out "qualitative differences between different kinds of nationalism".[40] Hence, he claims that if any civic nationalism exists at all in the world, it is exclusively in the United States – and even then ethnic and cultural elements can be detected. The distinctiveness of Lower Canada/Quebec is primarily linguistic, and for this reason cultural.

In this context, even Anderson's widely used definition of nation as *imagined community*[41] seems susceptible to criticism as an imperfect category, too. Not just Canada (as founded in 1867), but all its constituent nations – French and English-speaking Canadians, plus First Nations – are all "imagined communities", in the sense that these communities are at the same time societies (Quebec is a "distinct society") and their respective members no longer link to one another in face-to-face formed relations. In the absence of clear face-to-face relations, culture seems to replace (or even absorb) the community-constituting links. In that sense, Will Kymlicka uses "culture" as synonymous with a nation or a people. He defines its *societal* form as follows: "a culture which provides its members with meaningful ways of life across the full range of human activities … These cultures tend to be territorially concentrated and based on a shared language."[42] David Miller goes further on the basis of his refusal to connect ethnic identities with a territorial claim.[43] Rival national groups differ from *nested* nationals, in the sense that in the first case each ethnic group has an exclusive territorial justification for the same territory, while nested nationals, though organized territorially, "exist within the framework of a single nation, so that members of each community typically have a split identity".[44] This distinction may explain the success of Canada and the failure of Austria-Hungary. The former is a multinational state, integrating nested Anglo-Canadian and French-Canadian nationals; by the mere fact of reaching the Compromise, Austria-Hungary prevented its nationals from transforming themselves from rival into nested nationals, coexisting with one another. In Miller's argument, if an ethnic group qualifies as a nested nationality, then it has the right to (sub-state) self-determination. Thus, if Quebecers are nested nationals, they have this right; and probably both Austrians and Hungarians in the Dual Monarchy belonged to the same category. Yet, again, we may find that geography matters: what about those supposedly "nested" nation groups on the territory of the monarchy who declared themselves to be "nations", but were considered by Austrians and Hungarians to be (to use Miller's

[40] Miller, David: Nationality in Divided Societies. In: *Multinational Democracies*. 2001. 299–318. at 306.

[41] Anderson, Benedict: *Imagined Communities*. London, Verso, 1990.

[42] Kymlicka, Will: *Multicultural Citizenship. A Liberal Theory of Minority Rights*. Oxford, Oxford University Press, 1996. 18., 76. and 84.

[43] Miller: Nationality in Divided Societies. In: *Multinational Democracies*. 2001. 302.

[44] *Ibid.* 304.

terminology again) "rival nationalities" or "ethnic minorities"? And similarly, what about French-Canadians living outside Quebec? Or the Inuit, Métis or generally the First Nations in Canada? Again, in Austria-Hungary the main political question was essentially territorial. Whereas in Canada, Quebec City belongs indisputably to Quebec, and Toronto indisputably to Ontario, in Austria-Hungary it was always hazy whether Trieste was Slovene, Italian or Hungarian; whether Sibiu was German, Hungarian or Romanian; and whether Lvov was Polish, Ukrainian or home to the Jewish diaspora. Of course, the moral priority of the Canadian model is justified only if we consider that neither rival races (English, Scots, Irish, etc.) nor First Nations existed in Canada in 1867, and only if it is accepted that neither Austrians nor Hungarians were able to consider themselves political nations, but only ethnic-cultural. It appears nevertheless, that both usual presumptions were in fact false.

Conclusion

The Canadian political science has enabled Canada to be one of the core case studies in any discussion of the future of federalism in the post-conflict societies of Central-Eastern Europe and elsewhere in the world. Indeed, whereas the post-referendum (1995) Canadian model has been classified mainly as a *prêt-à-exporter* positive example,[45] the former Soviet Union, Yugoslavia and Czechoslovakia have been assessed as obvious negative examples by a great majority of scholars.[46]

Being the primordial vindication, the foundation of an independent nation-state is the heart of the inevitably conflicting Central-European nation-building strategies. This sort of conflict of territorial interest is not a characteristic in the case of the Canadian minorities, namely the First Nation people and Quebeckers. Through the lens of comparative constitutional law, the analysis of the relevant parts of the BNA Act may show that all-things considered, the Canadian solution was closer to the idea of a fully-fledged multinational constituent power implanting some seeds of the Canadian nationhood with a promise of a representative democracy. The Austro-Hungarian *Ausgleich* was unable to forge a multicultural national identity precisely because minority status here is tantamount with a recognition of a territorially established nation-state. Therefore, minority rights in this particular region of the world seems to resist to be *de*-territorialized, whereas the Canadian model leaves more flexibility to enhance rights of both territorially concentrated and dispersed socially vulnerable groups.

[45] Against this idea see Choudhry, Sujit: Does the World Need More Canada? The Politics of the Canadian Model in Constitutional Politics and Political Theory. In: *Constitutional Design for Divided Societies. Integration of Accommodation?* 2008. 141–172.; Williams, Colin H.: A Requiem for Canada? In *Federalism. The Multiethnic Challenge.* Ed.: Graham Smith. London – New York, Longman 1995. 51–72.

[46] See, for instance, the chapter entitled "Part II: The Break-Up of Socialist Federations", in *Federalism. The Multiethnic Challenge.* Ed.: Graham Smith. London – New York, Longman, 1995. 155–236 and "Part II: The New Europe – East and West" in *Nationalism, Racism and the Rule of Law.* Ed.: Peter Fitzpatrick. Aldershot, etc. Dartmouth, 1995. 75–148.

The Compromise represents one model of multinational cooperation, which succeeded in integrating various Eastern- and Central-European nations for only a couple of decades. Given that the Dual Monarchy collapsed after half a century, and given that the splintering was one of the direct and indirect causes of both the First and the Second World Wars, the Eastern-Central European way of dealing constitutionally with the multi-ethnic challenge is usually filed under "F" for *Fiasco*. By contrast, ever since the BNA Act came into force (leaving aside for a moment the devastating effects of colonization on the First Nations population), the Canadian model has been one of the most attractive examples of "how constitutional design can accommodate competing nation-building agendas within a single state".[47]

It would be wrong, however, to impute specific attachment to a territory to a particular mindset of the Eastern-Central European population. An American observer who pondered with President Roosevelt why the theorem of the melting pot is not a viable option in this part of the world explains that calling the patch of soil on which a national minority has lived its "home" or "its very own" is historically well founded, given that their forefathers lived there. Emigration is proof of the fact that this attachment does not constitute identity. He observed that once these people had migrated to the United States, they no longer considered that territory in the same way. The American land is already settled, and therefore it cannot be viewed as a wilderness, and new comers cannot be regarded as first settlers either.[48]

It is an undoubted fact that Compromise definitely not constitute a high point in either Austrian or Hungarian constitutional history. As a part of the Austro-Hungarian constitutionalism, its text remained a bulk of dead letters. In the meantime, in Canada and UK, the subsequent interpretations of the Judicial Committee of the Privy Council slowly but surely transformed the BNA Act – which was conceived in the *constitutional moment* – into an *organic instrument* that forms the basis for the contemporary Canadian federal system.[49] To achieve this degree of constitutionalism was difficult. The liberal interpretive practice of the Privy Council lead the lords to act in a "statesmanlike way", which was clearly not the intention of the founding fathers of the BNA and it was also running against interpretive rules of the Anglo-Saxon legal culture, too.[50]

Roughly 80 years after the BNA Act entered into force, the last judgment was rendered in 1954. Tellingly, that very same year Austria, under occupation by the Allied forces, was still struggling with its refugee crisis, sparked by the expulsion of ethnic German minorities from the Eastern-Central European countries. For Hungary, which was occupied by just Soviet troops, 1954 was marked by the emotional trauma of

[47] Choudhry, Sujit: Does the World Need More Canada? In: Constitutional Design for Divided Societies. Integration of Accommodation? 2008. 145.

[48] Schierbrand, Wolf von: *Austria-Hungary. Polyglot Empire*, New York, Frederick A. Stokes Company, 1917. 71-72.

[49] Varcoe, Frederick P.: *The Constitution of Canada.* Toronto, Carswell 1965. 4.

[50] Smiley, Donald V.: *The Canadian Political Nationality*. Toronto & London, Methuen, 1967. 20. and f.

watching the Golden Team (led by the most famous Hungarian of all time, Ferenc Puskás) lose its final match in the football World Cup in Bern, Switzerland. The grief almost drove the population to revolution (which finally happened two years later, in 1956). Nevertheless, astonishingly enough, some Canadian scholars prefer to identify 1982 – the "patriation" of Canada's constitution[51] – as the most profound constitutional moment in Canada instead of 1867 or 1954. However, in doing so, they implicitly recognize the importance of the BNA Act. The Compromise was unable to do what the BNA Act did, and thus it never became an organic part of the Austro-Hungarian constitutional tradition, shaping the identity of the subsequent constitutions.

It remains true that counter-arguments against nationalism should be expressed fairly and objectively, and overall, I find that the ethnic/civic distinction is unable to make evident the difference between the two countries in a comparative scrutiny. That is to say that, while Canada should have been struggling with a sort of peripheral or defensive nationalism, nationalist movements in the former Austria-Hungary were driven by a hegemonic nationalism demanding their own homelands on ruins of the Hapsburg Empire, where there is a strong impression (created by political scientists) that whereas the political failure – and by implication the misery – of Eastern-Central European "small states"[52] might be attributed to the dominant ethnic nationalism, the success of Western nationalism lies in its civic character. This distinction is dubious, and a comparison of the BNA Act and the Austro-Hungarian Compromise showcases a strange convergence: whereas the violent ethnicity of Eastern-Central Europe was not inevitable, Canada was not always exempt from primordialism or cultural-ethnic influences. Sober constitutionalists in Canada note, indeed, that "some lessons from what has occurred elsewhere" can be drawn – for instance, in order to manage "violent resistance of aboriginal peoples in northern Quebec to secession".[53]

Studying comparatively the genesis the nationalism in Eastern-Central Europe and Canada may lead us notwithstanding to see how to reconcile the idea of Rule of Law constitutionalism with different ethno-nationalist claims.

[51] See Peter H. Russell's seminal monograph: *Constitutional Odyssey. Can Canadians Be a Sovereign People?* Toronto, Toronto University Press, 1992.

[52] Istvan Bibó: *A Keleteurópai kisállamok nyomorúsága* [The Misery of Esatern European Small States], Budapest, Új Magyarország 1946.

[53] Choudhry, Sujit: Does the World Need More Canada? In: Constitutional Design for Divided Societies. Integration of Accommodation? 2008. 164.

CRITICAL JUNCTURES IN THE EVOLUTION OF BRITISH PARTY POLITICS

The 1997 General Election and its Impact on the Westminster Party System

Márton Kaszap*

Importance

The 1997 election was the last general election before devolution. The newly elected Labour Party soon started to deliver its political promise to devolve certain political powers to regional and local levels. This process culminated in the referenda and then the elections of the regional assemblies for Scotland, Wales, Northern Ireland and for London, too. So the 1997 election was the last general election without a multi-level political framework. After 1997, the UK general elections have been accompanied with other regional (Scottish, Welsh, Northern Irish and London) elections. Moreover, at EP elections since 1999, there has been PR electoral system instead of the previous majority system. So, in addition to the mixed regional electoral systems, the EP elections introduced a purely PR electoral system. Hence, the first-past-the-post general elections became only one type of election system beside many others in a multi-level polity.

The 1997 election was also a historic moment for Labour which gained a landslide victory. (Seyd, 1999; White & Chernatony, 2002) This result followed no less than 18 years of Conservative dominance. (Egedy, 1998) So, the pendulum swang from one extremity to the other. As later turned out to happen, Labour dominated the following decade until 2010. So the 1997 election was the starting point of a second predominant period like the 1979–97 Conservative period. This predominance was particularly shocking in 1997 when Labour received 63.43% of the total seats (almost two third majority – never seen before.)[1] This landslide victory also meant a record high electoral volatility: the 12.33% vote share change could have been compared only to the Feb 1974 election when it reached 14.43%. Just to make a reference, the mean electoral

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[1] All UK electoral data in this paper are from Commons Briefing Paper (2017) No. CBP-7529 *UK Election Statistics: 1918-2017* which has both .pdf and .xls versions. I used the .xls version for my own calculations. I calculated the later used indices (ENEP, ENPP, Pedersen index) from this dataset. All Figures and Tables in the text are also calculated from these data.

volatility between 1945 and 1992 was only 6.06%, and it was 6.26% between Oct 1974 and 1992, too. So the 1997 election was a clear end of class politics and voting by class affiliation. By contrast, this was a competition where two catch-all parties ran for the median voter and tried to reach as many electors as they could.

The third importance of the 1997 election was the beginning of the neo-liberal economic consensus on the one hand, and the liberal value consensus on the other hand. (Heffernan, 2000; Jessop, 2003; Powell, 2000) Hence, the previously polarised UK party competition became the rivalry of two almost identical catch-all parties. The Labour under New Labour and the Conservatives under Big Society were almost the same in economic and social policies. (Jessop, 2015) This convergence and similarity was a perfect example for the Downsian theory of median voter competition. (Downs, 1957) Nevertheless, this (neo)-liberal consensus 'left behind' major parts of the society. In 2010, I argue, these left behind people re-acted to this two-party convergence when a hung parliament was formed. Nevertheless, the neo-liberal legacy of the 1997 election has been still dominating British politics. So the 1997 election meant an end for the polarisation of British politics and introduced instead, a period of two-party convergence.

Data

The 1997 election was about two opposing trends. On the one hand, because of the landslide victory of Labour, it was a major swing from the Right to the Left. The previous 18 years of Conservative dominance finished and a new Labour dominance started instead. So it was an evidence and justification about the survival and vitality of two-party politics. Eventually, British politics were about either Labour or the Conservatives. On the other hand, however, this landslide victory wasn't similar to any previous Tory victories in the 1980s. The reason why lays in the emergence of third parties from the beginning of the 1990s. (Schedler, 1996) In fact, Labour truly achieved a landslide victory; nevertheless, the electorate was increasingly more willing to vote for other parties than Labour and the Conservatives, too. Therefore, the two-party vote share didn't stop declining (in 1997 it was only 73.9%). Whereas the 1980s and the Conservative predominance was accompanied with declining ENEP[2] and the polarisation of British politics, the Labour victory of 1997 happened in the context of increasing ENEP and centripetal manifesto competition. So, even though the 18 years of Conservative dominance and the 13 years of Labour hegemony are often treated as

[2] ENEP and ENPP are party system fragmentation indices. They refer to how fragmentized a party system is. ENEP is calculated by using electoral vote shares whilst ENPP is done so by parliamentary seat shares. For instance, if ENEP =3.5, it means that there are three and a half equal sized parties in a given party system. If it is 2.0, we are talking about a two-party system. For more information please visit: Prof Michael Gallagher's website at Trinity College Dublin. Available at https://www.tcd.ie/Political_Science/staff/michael_gallagher/ElSystems/Docts/effno.php Downloaded: 2/11/2017

the same, the rise of third party vote share and the increasing fragmentation of British politics make important differences.

	CON	LAB	LD	PC/ SNP	Other	Third parties	CON +LAB
1979	43.9%	36.9%	13.8%	2.0%	3.4%	19.3%	80.7%
1983	42.4%	27.6%	25.4%	1.5%	3.1%	30.0%	70.0%
1987	42.2%	30.8%	22.6%	1.7%	2.7%	26.9%	73.1%
1992	41.9%	34.4%	17.8%	2.3%	3.5%	23.7%	76.3%
1997	30.7%	43.2%	16.8%	2.5%	6.8%	26.1%	73.9%
2001	31.6%	40.7%	18.3%	1.8%	7.7%	27.7%	72.3%
2005	32.4%	35.2%	22.0%	2.2%	8.2%	32.5%	67.5%
2010	36.1%	29.0%	23.0%	2.2%	9.7%	35.0%	65.0%

Table 1 UK vote share (%) at general elections

As Table 2 shows, ENEP grew from 3.06 (1992) to 3.22 (1997) despite of the landslide Labour victory. In the following years, this trend continued under the 2nd and 3rd Blair governments (3.33 in 2001 and 3.59 in 2005.) This is in sharp contrast with Margaret Thatcher's and John Major's governments when ENEP gradually declined (3.46 in 1983, 3.33 in 1987 and 3.06 in 1992.)[3] At the same time with the growth of ENEP (party system from votes), the index of ENPP (party system from seats) was pretty much the same or it even declined. Following the 1992 Conservative victory and the ENPP of 2.27, the 1997 election provided a decline to 2.13 and the 2001 election with 2.17 didn't have significant change. ENPP started to increase slightly from the 2005 general election when it reached 2.46 and continued in 2010 (2.57) and levelled in 2015 (2.54). So what we can see is an increase in ENEP and a stagnation or decline in ENPP during the Blair governments. By consequence it suggests that the British party competition (ENEP) and the British party system (ENPP) began to separate after the 1997 election.[4] In other words, the landslide victory of the Blair governments became

[3] I don't consider the 1979 to 1983 ENEP jump as a trend rather as a one-off historical moment when the Social Democrats left Labour. So, although ENEP rose from 2.87 (1979) to 3.46 (1983), in sum, this was part of a larger declining period which was further confirmed by the following 2 general elections (1987, 1992.)

[4] I consider the UK *party system* as the party system inside Westminster and the House of Commons. However, when I talk about *party competition* it is a wider concept than Westminster politics and every contesting parties make part of it (not just those which manage to surpass the electoral threshold.) Therefore, I think ENPP and ENEP can measure both these two concepts. ENPP is calculated from parliamentary seats (so it can measure the party system) and ENEP is calculated from electoral votes (so it can measure party competition.) Due to the high electoral threshold in the House of Commons, ENEP should be always higher than

less and less responsive to general trends in the British electorate. The 1997-2010 period is therefore a time of gradual unresponsiveness between the British party system and the party competition.

	LSq	ENEP	ENPP
1979	11.58	2.87	2.15
1983	17.45	3.46	2.09
1987	14.95	3.33	2.17
1992	13.55	3.06	2.27
1997	16.51	3.22	2.13
2001	17.76	3.33	2.17
2005	16.73	3.59	2.46
2010	15.1	3.71	2.57

Table 2 ENEP/ENPP in the UK

Table 2 ENEP /ENPP in the UK demonstrates this separation. It is easy to recognise how ENEP declined until 1992 and then increased after 1997 until today. By contrast, ENPP has been pretty much the same (always under 2.6.) As a result, the difference between ENEP and ENPP has been growing since 1997.

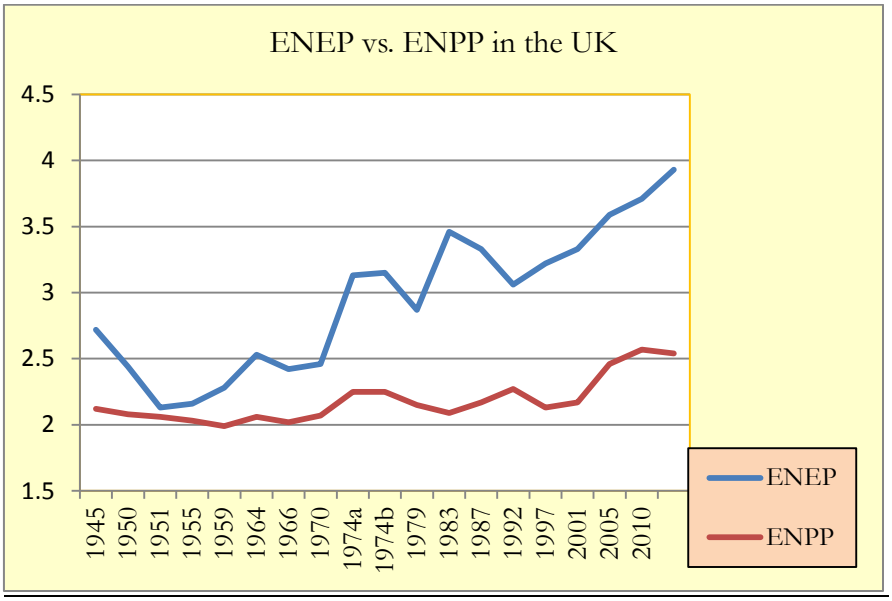

Figure 1 ENEP and ENPP in the UK (1945-2015)

ENPP.

Causes

Labour's landslide victory in 1997 was caused by a similar phenomenon like in 1945. In 1945 there was a negative Conservative Party which represented the past and a positive Labour Party which promised the future. This intensive antagonism caused a landslide victory for Labour both in 1945 and in 1997. However, the detailed causes behind the 1997 election somewhat differs from those in 1945. In the followings, I observe in two groups the causes; against the Conservatives, on one hand, and for Labour, on the other hand. I start with the Conservatives.

Negative Conservative Image

The negative image about the Conservatives was fostered by further two sub-causes: economic incompetence (valence politics) and internal party divisions. The *economic incompetence* was in sharp contrast with any previous Conservative records. The Tories under Margaret Thatcher gained much reputation for being the party of economic governance. They managed to restructure the UK economy, balance the books and produce an enduring economic growth. Nevertheless, this reputation gradually disappeared after 1992 and economic expertise became rather a weakness instead. The first economic shock which undermined the Conservatives' reputation occurred on 'Black Wednesday' (16th Sep 1992) when a coordinated speculation against the British pound dramatically devaluated the currency. The British pound's exchange rate for other European currencies declined so much that the British government had to withdraw the pound from the European Exchange Rate Mechanism (ERM). This was a monetary cooperation between the UK and the EU which had been passionately recommended by John Major as the Chancellor of the Exchequer in 1989. (Major, 2013) After Black Wednesday, however, it was the very same John Major who had to leave the ERM. In addition to this loss of prestige, the British government delivered some rather ineffective and very expensive measures to deal with the crisis. That's why the 1992 ERM crisis can't be compared to the 1973 oil crisis. In 1973, the oil crisis was an external shock which spilled over British domestic politics through high inflation, unemployment and trade union unrest. It was an external crisis which had wide scope of consequences and affected the whole world. Nevertheless, in 1992, the ERM crisis was both external and internal (because the shock came from outside but the wrong internal decisions were made inside), it had a limited scope of effect (only on the financial sector) and it affected only Britain. So theoretically the 1992 ERM crisis could have been much better treated than the 1973 oil crisis. This difference further underlines the economic incompetence of the John Major government.

Apart from Black Wednesday, the Conservative government delivered a couple of other wrong decisions which suggested incompetence. (I used Butler and Kavanagh (1997) for this paragraph.)

- They increased some taxes (eg. VAT) which they previously said not to do so during the 1992 election campaign.
- In 1996, the 'mad cow' disease erupted. Although it happened independently from the government (like the ERM crisis), John Major couldn't handle it effectively. The UK farmers suffered very much from banning them out of the EU market.
- The flagship of Conservative economic policy has also gone wrong. Privatisation seemed to lose control in various sectors (eg. British Rail, mining industry, water supply), nevertheless, the services often became worse than before under public companies. (Parker, 2009) The 'fat cat' CEOs of these privatised companies (who got extremely high salaries) and the 'revolving door' effect (when former politicians continued their career at the privatized companies) questioned the legitimacy and the efficiency of privatization.
- The Northern Irish sectarian conflict gained a new momentum under Major. The IRA carried out terrorist attacks in mainland England, too. On 9th Feb 1996, they exploded a bomb at Canary Wharf (London) and on 15th June 1996, there was another detonation in Manchester. Moreover, the collapse of the Soviet Union threatened to supply the political conflict with endless amount of new weapon. However, in the House of Commons, the Major government couldn't be totally impartial on the question because they needed the external support of the Ulster Unionist Party without whom the absolute majority would have been wrecked.

The second sub-cause beside the political incompetence was the *internal division* inside the Conservative Party. The campaign was already somewhat unimpressive. (Whiteley, 1997) In addition, further divisions were fuelled by personal scandals and political conflicts.

- The personal scandals seemed to overwhelm the Conservative Party. There were 9 ministers who had to resign for different scandals during this period. There were scandals for sexual misbehaviour and for corruption, as well. It was in sharp contrast with John Major's 'Back to Basics' program which suggested a return to moral politics in 1993. The 'sleaze' which surrounded the Conservative Party provoked much irritation inside the British society.
- The other reason for internal division came from Major's weak leading charisma and the ongoing EU negotiations in parallel. There were harsh debates and rebels because of the European issue inside the Conservative Party. Much of the frustration was caused by the Maastricht Treaty, the ban on British beef export (mad cow disease) and the ongoing negotiation about the single currency which wasn't explicitly rejected by Major. The European issue became so important that even a party was formed to hold a referendum about the UK's EU membership. James Goldsmith and his Referendum Party threatened to further divide conservative politicians and steal votes from the party during the next general election.

Positive Labour Image

At the same time, the Labour Party showed the opposite image, a very positive and competent party. (White & Chernatony, 2002) There are two sub-causes behind it which should be treated as one phenomenon: New Labour and Tony Blair. Although the Labour Party's reform had already begun in the 1980s, New Labour was eventually Tony Blair's idea. (Butler and Kavanagh, 1997: 64) Therefore, it is not possible to think of New Labour without Tony Blair and *vice versa*. The two sub-causes hence generate one single cause. In the followings, I briefly sum up what New Labour was about.

- From the mid-1980s, Neil Kinnock and John Smith started to reform the Labour Party and distance themselves from the left wing (Old Labour.) (Kinnock, 1994) It was enforced by contextual changes: (1) Thatcher's economic policies fundamentally transformed the British society from a social welfare state into an individualistic entrepreneurial society. Hence, the traditionally strong trade union movement lost ground and it endangered Labour's long-term performance. (2) The collapse of the Soviet Union ultimately brought a verdict over the capitalist-socialist debate; socialist economic policies lost ground. After 1990, there were very few people inside the Labour Party who still believed in the viability of the socialist economy.
- New Labour instead offered a completely new approach to economic policies. They kept much of Thatcher's economic policies (privatisation, fight against inflation, individual working rights instead of trade union rights, supporting free market and entrepreneurship, monetarism.) However, they also brought some new political issues from the left (like the NHS, education and environment.)
- At the same time, Tony Blair wanted to demonstrate that he indeed wanted to continue Thatcher's legacy. The symbol of this commitment was the abolishment of Clause IV in the Labour Party's constitution. (Wring, 1998) This prescribed nationalisation and public ownership. In 1995, Clause IV was cancelled and it marked a historical end of 80 year long party legacy (adopted in 1918.) (Riddell, 1997) This step, together with the monetarist shadow chancellor (Gordon Brown), showed that the Labour Party's old problem with 'tax and spend' policy was over. They offered instead economic responsibility and competence.
- Labour finally gave up its affiliation with the working class and became a 'party for all the people.' Previously Labour had been often considered as a *class based party* for their close relationship with the working class. New Labour became instead a catch-all party which wanted to get support based on political issues and not on class affiliation.
- Labour's party organisation was democratised. The trade unions lost their 'block votes' at the National Executive Conferences. Instead, the one member one vote procedure was accepted. This step further marginalised the trade union influence inside the Labour Party. Nevertheless, this democratisation process became

somewhat elitist because the party elite (the Parliamentary Labour Party) became the most important initiator inside the party. (M. Russell, 2005)

- New Labour and Tony Blair finished the debate over Europe inside the party, and they accepted a pro-European policy. (Daniels, 1998) So the new European cleavage was born between a Eurosceptic Right and a Pro-EU Left. Previously, the two parties stood on the opposite sides.
- Devolution and local governance became an important element of left politics. New Labour planned to give momentum for devolution. Although the 1970s had already showed certain attempts for devolution in Scotland and Wales, the Conservative years (1979-1997) marginalised devolution and favoured unitary state instead. The 1997 Labour victory hence brought back devolution on the political agenda.
- Strong party line: in parallel with Blair's attempts to marginalise the oligopoly of trade unions inside the Labour Party, the party has become very centralised. It meant that the main beneficiary of the trade union retreat has become the party leadership and not the party on the ground. This sort of centralisation was present at cabinet meetings as well. The ministers often got pre-decided policies by the party leadership. Hence, personal party member initiatives suffered to certain extent.
- New communication methods. White & Chernatony (2002) write that the party communication was centralised in the Milbank Tower (run by Peter Mandelson). The constituencies reacted to the Conservatives in accordance with the national party line. (The Excalibur software helped in it.) The tabloid newspapers turned friendly with Labour thanks to Alastair Campell's intermediation. The political communication was based on the latest techniques: focus groups, opinion polls, market research and commercial advertisement.
- New Labour couldn't have been trustworthily delivered with the old faces of the 1980s. Tony Blair's personality in this vein played an undoubtedly crucial role. He wasn't involved in the internal Labour fights of the 1970s and 80s. Moreover, he showed the sort of leadership and charisma which lacked from the Labour Party during the Thatcher years. Now, it seemed that Labour had a energetic leader whereas the Conservatives had a weak leader in John Major. In addition, Blair's fame was supported by other new young left politicians like Gordon Brown and Peter Mandelson. The 1997 victory was due to a perfect team-work rather than to Blair's lonely efforts.
- Andrew Hindmoor (2004) argues that New Labour meant a completely innovative approach to conventional British party competition. The bottom-line of his argument is the following; New Labour was a successful attempt for moving the Left to the political centre by building up a new *moderate* party image. Hence, Labour managed to introduce itself to the electorate as a centre party between the Conservative Party and the Old Labour. Hindmoor (2004) says that Down's theory about fixed voter preferences and infinite political space should

be questioned. New Labour didn't merely move to the centre (to the median voter's position) but also made the electorate believed that Labour had indeed the median-voter's position. Thus, New Labour managed to re-construct the political space and *'transport'* the median-voter to the Left. In other words, it wasn't Labour which changed its political position but it was the electorate which changed their preferences.

In sum New Labour was about economic policy, party organisational reform, new campaign techniques and Tony Blair's personal charisma. It successfully ended the Labour Party's heavy dependence on trade unions and the working class votes. However, the new catch-all party program left behind many Old Left supporters. In the short term, this policy generated a landslide victory, however, in the long term, I argue, it fostered anti-establishment sentiment on the left and inside the whole British society.

Aftermath

The 1997 general election had a controversial aftermath. On the one hand, it was a return to classic two-party politics with a Labour landslide. During the following general elections this perception was further confirmed because Labour won again in 2001 and in 2005, too. Some scholars even compared the 13 years of Labour dominance (from 1997 to 2010) to the 18 years long Conservative dominance (from 1979 to 1997). They argued that British politics was still two-party, however, it became more predominant. (Geddes & Tonge, 2002) Nevertheless, third parties were still considered irrelevant during this period. On the other hand, however, the pluralisation process which started in 1974 didn't stop. Although the UK party system in Westminster was dominated by two-party politics, there have been a growing number of new parties and contestants in the party competition. So there was a two-party system on the surface, however, the multi-party competition continued to be ever more fragmentised underneath. In the followings, I want to show both the signs of a two-party system and that of a multi-party competition.

Signs of a two-party system

ENPP decline

The signs of a return to two-party system could have been perceived at the House of Commons. The party system fragmentation index (ENPP) hit a very low level in 1997 (2.13) which could have been only compared to the post-war period (1945-74.) (See Table 3.) This index slightly started to rise to 2.17 in the 2001 general election. Nevertheless, this figure was still very low. This index could suggest that British party politics was indeed dominated by two big parties in the House of Commons. So British politics still remained about the Conservative-Labour dichotomy on the surface.

	LSq	ENEP	ENPP
1945	11.62	2.72	2.12
1950	6.91	2.44	2.08
1951	2.61	2.13	2.06
1955	4.13	2.16	2.03
1959	7.3	2.28	1.99
1964	8.88	2.53	2.06
1966	8.44	2.42	2.02
1970	6.59	2.46	2.07
1974a	15.47	3.13	2.25
1974b	14.96	3.15	2.25
1979	11.58	2.87	2.15
1983	17.45	3.46	2.09
1987	14.95	3.33	2.17
1992	13.55	3.06	2.27
1997	16.51	3.22	2.13
2001	17.76	3.33	2.17
2005	16.73	3.59	2.46
2010	15.1	3.71	2.57
*2015**		3.93	2.54

Table 3 ENEP, ENPP and LSq values in the UK (1945-2015)

Centripetal competition

The other reason why two-party politics seemed to continue was caused by the very same electoral dynamics in comparison with the post-war era. The two major parties continued a centripetal manifesto competition for the median voter. (See Figure 2)

It meant that both two parties wanted to achieve similar political goals. The only difference was the tool how they should be achieved. Between 1945 and 1974, this centripetal competition meant that the common political goal was making a welfare economic state. So there was a consensus about welfare economics. Later in 1997, however, the common political goal was about an absolutely different economic policy; it was about neoliberalism. Hence, the post-1997 two-party competition has similar centripetal dynamics like the post-1945 period. However, the nature of this centripetal competition was diametrically the opposite. Whereas the post 1945 consensus wanted more state intervention in the economy, the post 1997 wanted instead less regulations and more liberalism in the economy.

The ideological difference is only one characteristic which distinguish the post 1945 centripetal competition from the post 1997 one. The other difference comes from the changing society behind it. The 1945-74 period can be truly seen as a centripetal

competition about welfare economics. However, this period also coincided with a period of strong class affiliation. It means that voters often identified themselves primarily with their parties and their political preferences were just secondary. This strong party alignment gradually changed from the mid-1960s but it was very strong till then. From the 1980s, the previous mass parties were replaced by loose catch all parties. These parties didn't stick to one particular class in the society. They focused on issues instead which could cross-cut the different classes and appeal more votes than the previous mass parties. So the post 1997 period coincided with a very different sociological background than the post 1945 period. The post 1997 period was about a rivalry between two catch all parties but not about two mass parties. This difference is crucial because the centripetal competition in these two periods were different both in the ideological (previous paragraph) and sociological (this paragraph) context.

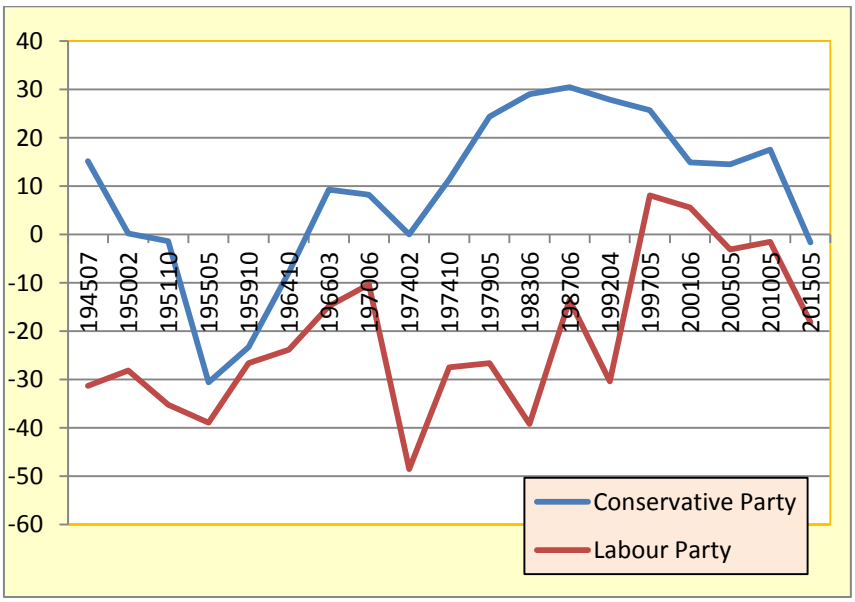

Figure 2 Left/Right manifesto positions in the UK at general elections (1945-2015)[5]

So the post 1997 centripetal competition was superficially similar to the post 1945 period. This might have made an illusion that two party politics returned. The 1997 Labour landslide victory could have been easily compared to the 1945 Labour landslide. However, as I mentioned before, the centripetal competition existed in very different contexts during the two different times. After 1945, the centripetal competition revolved around welfare economics between two mass parties. However, after 1997, the centripetal competition revolved around neoliberal economics between two catch

[5] Positive values stand for Right manifesto positions and negative values stand for Left manifesto positions. If the two curves diverge from each other, the manifestos become polarized. If the two curves converge, the manifestos become consensual. Data from Comparative Manifesto Project (2017, May 22). Retrieved from https://manifestoproject.wzb.eu/

all parties.

Signs of a multi-party competition

Disproportional general elections

The illusion that two-partyism still covers the UK party competition was largely due to the first-past-the-post electoral system. This electoral system was also in use during the 1945-74 period, however, at that time because of the strong alignment of the electorate with the two major parties didn't impose any democratic deficit or legitimacy concern. After 1974 and the gradual pluralisation of British politics, there have been increasing concerns with the fairness of the electoral system. The third parties suffered a lot from the majority electoral system and the entry barriers were extremely high for them. Then in 1997 when Labour got a landslide victory and a return to two-party politics was on the horizon in Westminster, the electoral system became extremely disproportional.

Table 3 in the LSq column it is obvious that the general elections after 1997 were accompanied with a record high electoral *disproportion*. The 16.51 value in 1997, the 17.76 value in 2001 and the 16.73 value in 2005 couldn't be compared to the 6.91 in 1950, the 7.3 in 1959 or the 8.44 in 1966. This meant that two-partyism which was suggested by the similar ENPP values and the centripetal competition wasn't as legitimate after 1997 as it was during 1945-74. The lack of two-party legitimacy is a major difference between the two times. In other words, the post-1997 two-partyism was only possible because the FPTP electoral system supported larger parties, otherwise, there wouldn't have been two-party dominance and Labour landslide.

Growing ENEP/ENPP difference at the national level

The growing multi-partyism behind the artificial two-partyism is justified by the continuously rising ENEP values despite of the ENPP decline after 1997. The 1997 Labour landslide victory couldn't stop the pluralisation trend in the party competition which started in 1974. (See Table 3) This logically means that if ENPP declines and at the same time the ENEP rises than the differences between them will increase. This was exactly true for 1997 and 2001 elections, however, in 2005 (due to the good performance of the Liberal Democrats) the ENPP kept pace with the ENEP rise. This doesn't mean, nevertheless, that the differences declined; they either grew or stagnated after 1997. So, the significant difference between the two-party system, on the one hand, and the multi-party competition, on the other hand, became obvious at the national level after 1997. This *incongruence* was further enhanced by the ongoing devolution process which created new multi-party competitions/party systems at the regional levels, too.

Multi-party politics at the regional level

The 1997 general election brought an additional incentive for multi-party competition. The newly formed *devolved assemblies* permitted to elect their members with mixed and more proportional electoral systems than FPTP. (R. Deacon, 2012) This multi-level polity immediately opened a way for regional multi-party politics.

Table 3 shows how much these devolved party systems differ from the Westminster party system. There have been 5 devolved elections since 1997 in Wales, Scotland, Northern Ireland and London. What we can see is that, in average, Wales has the lowest ENPP (3.07) and Northern Ireland has the highest (4.54.) However, the four devolved assemblies have together a 3.52 mean value which suggests that in each devolved party systems there are 3 and a half equally sized parties. Over time, the ENPP had a declining trend from 3.77 to 3.33. It means that after the formation of the new devolved assemblies, the party systems consolidated and converged to a lower number of parties. It is particularly true in Northern Ireland where the first election had a record high 5.37 ENPP figure and it declined to 4.32 in 2016. Other party systems in Wales and Scotland are much more stable in this vein. The bottom-line, however, is that devolved party systems provided significantly higher ENPP values than the party system in the House of Commons.

Table 4 ENPP in devolved assemblies demonstrates that the average ENPP value in Westminster (2.37) is much lower than the average devolved value (3.52) at the time. Whereas in Westminster there is still a two-and-a-half party system, in the devolved assemblies, there are different types of multi-party systems (usually three-and-a-half systems). It can be either moderate (like in Wales or London) or extreme (like in Northern Ireland.) Nevertheless, the incongruence between national and regional party systems is significant. Devolution hence further opened up the way for the pluralisation of British politics. First it started at the devolved level because the mixed electoral systems helped smaller regional parties to perform better. Second, this sort of pluralisation at the regional level spilled over to the national level, as well. The surprise victory of the SNP party in Scotland in 2015 had a major pluralising impact on the House of Commons itself. However, the SNP's way to Westminster can't be imagine without the consequent Scottish Parliament victories started in 2007. Similarly, the 2017 snap election resulted with a king maker position for the Democratic Unionist Party (DUP) from Northern Ireland. Although there is no formal coalition between the Conservatives and the DUP, their cooperation suggests that British politics is not about single majority governments like before. Third parties play an increasingly important role in this process. Recently, due to the collapse of the Liberal Democrats in 2015, these third parties are not national but rather devolved ones. The SNP's and DUP's success and the Lib Dem's failure show that the pluralisation process in the House of Commons is dominated by devolved parties (SNP, DUP) instead of national ones (UKIP, Greens, Lib Dems).

ENPP	1st election	2nd election	3rd election	4th election	5th election	Mean
Wales	3.03	3.00	3.33	2.90	3.11	3.07
Scotland	3.34	4.17	3.41	2.61	2.99	3.30
NI	5.37	4.54	4.30	4.16	4.32	4.54
London	3.34	3.83	3.14	2.68	2.88	3.18
Mean	3.77	3.89	3.55	3.09	3.33	3.52

Table 4 ENPP in devolved assemblies[6]

1997	2001	2005	2010	2015	Mean
2.13	2.17	2.46	2.57	2.54	**2.37**

Table 5 ENPP in Westminster

Multi-party politics at the European level

The third sign of the pluralisation process can be seen at the *European level*. Between 1979 and 1999, the UK elected their members of the European Parliament (MEPs) by using the first-past-the post (FPTP) electoral system. (Leonard & Mortimore, 2005) So it was the same kind of electoral system like at the general elections. Nevertheless, since the UK was the last EU member state with such majority electoral system, the EU obliged the UK to change this electoral system for a proportional (PR) one. In 1999, Tony Blair's government accepted to change to electoral system. The UK has been using hence a PR electoral system since then. Although this electoral system change wasn't the result of the 1997 Labour victory and it eventually should have happened under any future administrations, the new EP elections fit perfectly into the wider pluralisation process which has been going on since 1997.

It is very interesting because it shows how spectacularly both ENPP and ENEP separated from each other after the first PR elections were held at EP elections in 1999. The last FPTP election in 1994 produced 1.69 ENPP and 3.29 ENEP. However, the first PR election in 1999 produced 3.12 ENPP and 4.26 ENEP. This significant change brought an end to a long-term pattern of British EP elections. Previously between 1979 and 1994, ENPP had always been under 2.0 which meant that only two major parties controlled the EP from Britain. However, the 1999 EP election showed a sudden jump

[6] Table 4 only uses ENPP because ENEP can be difficulty calculated. Since there are usually two votes at every devolved election (one for a constituency and one for a party list) the fragmentation index derived from votes is more problematic because adding together all the votes would mean that one person votes twice. The ENPP, however, is the same for every devolved assembly because they are calculated from seat share not votes. Due to the mixed electoral systems in the devolved assemblies, the difference between ENEP and ENPP should be much lower than at the national level. Therefore, I argue, it is fair to use only the ENPP values at the devolved level.

to 3.12 (from 1.69) which was caused by the good performance of the third parties (Lib Dems, SNP, PC, Ukip and the Greens) due to the proportional electoral system. After 1999, this trend continued and went above 4.0 which means that 4 equally sized parties are present in the EP from Britain. Again, it was just two in 1994 and it became four after 1999. So there are two extra parties in the European Parliament from Britain due to the electoral system change.

	1979	1984	1989	1994	1999	2004	2009	2014
ENEP	2.61	2.96	3.25	3.29	4.26	5.52	5.99	4.74
ENPP	1.56	1.99	1.99	1.69	3.12	4.06	4.34	3.62

Table 6 ENEP and ENPP at EP elections in the UK

The new PR electoral system also answered a couple of questions. First, it confirmed by electoral data at the national level that UK politics have become multi-party over time. It is the only evidence for pluralisation at the same level (national UK level) and in the same question (EP elections.) All the other evidences for this electoral system change are either derived from other levels (devolution) or different questions (Welsh, Scottish, Northern Irish etc). The EP election is the only national election which can show what would happen for Britain if an electoral system change occurs in the UK. Second, it also proved that the FPTP electoral system suppresses the pluralisation process and creates instead an artificial two-party system. Third, the FPTP electoral system doesn't only artificially lower the ENPP (party system) but the ENEP (party competition), too. The ENEP which should be (more) independent from the electoral system grew together with the ENPP after 1999. It made explicit the already know psychological effect that majority electoral system biases the electorate's preferences and force them to abandon smaller parties in favour of bigger ones. Fourth, the EP elections together with the devolved elections proved that the introduction of a new mixed or PR electoral system produce a short term rapid rise in ENEP and ENPP which likely goes down after a couple of years. This implies that a stable majority electoral system is followed by a short period of contingency if the PR system is introduced. However, this contingent situation will likely temper down to a lower level after a couple of elections (which is still higher than the original level.) The New Zealand electoral system change in 1993 also supports this idea. There were a couple of electoral years after 1993 when ENEP was particularly high, however, later it moderated to a lower level and stabilised. (See Table *7*)

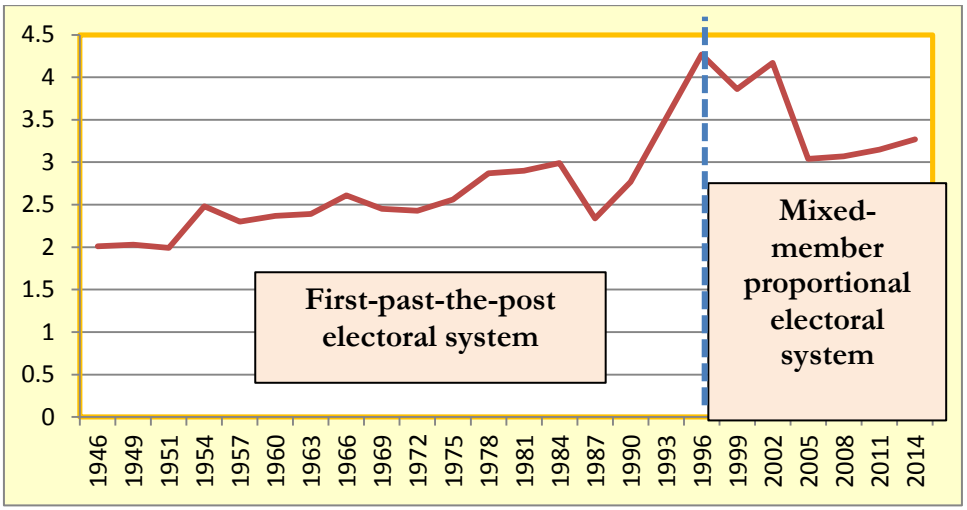

Table 7 ENEP in New Zealand between 1946-2014[7]

More referenda

Finally, after the 1997 general election, *referenda* became widely common in the UK. Previously there had been just 1 national referendum (EEC membership in 1975) and three regional referendums (Northern Irish sovereignty in 1973, Scottish and Welsh devolutions in 1979). After a period of relative silence about referendums during the 1979-97 Conservative governments, the Labour party re-introduced direct democracy in 1997. It doesn't mean that the previous governments didn't bring up referendum as a legitimate political tool (eg. John Major's pledge to hold a referendum) however, eventually it never materialised. Tony Blair's devolution policy however materialised referenda at the regional level. Therefore, between 1997 and 2010, there were 5 new regional[8] referenda about devolution. This was complemented by 39 local mayoral referendums which wanted to elect city mayors directly by the electorate and not indirectly by local councils. (More details: Commons Briefing papers SN05000, 2016)

The proliferation of referenda hence became a new pattern of British politics. The monopoly of parliamentary sovereignty was questioned by these referenda. It became a legitimate political tool in both two parties' repertoire (eg. Blair promised two referenda, one on the Euro and one on the European Constitutional Treaty, while Cameron pledged one on the Lisbon Treaty.) Whereas the devolved assemblies questioned the sovereignty of Westminster from 'below', the EP from 'above', the referenda did it from 'sideways'. Soon after 1997, the Westminster party system had to deal with pluralisation pressures from all around. The previously latent incongruence

[7] Data from Gallagher (2015)

[8] Greater London Authority referendum (1998), North East England devolution referendum (2004), Northern Ireland Belfast Agreement referendum (1998), Scottish devolution referendum (1997), Welsh devolution referendum (1997)

between the Westminster party system and the British party competition became explicit and widely recognizable hence.

Comparing 1997 with 1974

For the first blink, there is little common between the 1974 and 1997 elections. In 1974, there was a hung parliament and the pluralisation of UK politics began. Nevertheless, in 1997, there was an opposing trend: a landslide Labour victory happened and there was a return to two-partyism at least at the national level. The interesting thing is, however, that despite of the opposing phenomena, there is some similarity as well. If I consider the 1945, 1974, 1997 as 'critical junctures', I also assume that a path-dependency followed each one of them. Although the critical juncture means that the former path-dependency is altered, there still remains some relevance of every former path-dependency. This is the case with the 1997 election and the path dependencies before and after them.

On the one hand, the 1997 critical juncture imposed a wide range of change in the patterns of UK party politics (for instance, a landslide Labour victory instead of weak minority governments, economic prosperity instead of the 1973 oil crisis and the decline of ENPP instead of increase.) On the other hand, however, there is continuity in the pluralisation process particularly at the regional and European levels. After 1974 similarly to 1997, the question of devolution appeared on the political agenda. The nationalist parties (SNP, PC, DUP, UUP, SDLP, SF) also enjoyed growing popularity during these times. Both 1974 and 1997 were followed by major changes in the UK-EU relations: in 1973, the UK joined the European Economic Community whereas in 1993, they became part of the single market (Maastricht Treaty.) Later, the European integration penetrated into domestic politics in both 1979 and in 1999: in 1979, the UK first sent MEPs to the European Parliament which became the first regular alternative national arena beside Westminster, and in 1999, the EP elections became PR which stood in sharp contrast with the Westminster FPTP elections.

The 1997 period is, therefore both a rupture with the 1974 heritage and the continuation of it. This dual characteristic of the 1997 election makes substantive difference vis-á-vis the 1945 election. If the 1997 election had reproduced the 1945 patterns than the 1974 election would have been indeed a minor pluralist setback in British politics. Nevertheless, it wasn't the case and the path-dependency of 1974 has proved to be lasting. It demonstrates that the evolution of UK party competition has a long-term trend in pluralisation. The critical junctures of 1974 and 1997 had both additional roles in this process. In 1997, despite of the return to the 1945 results in certain way, the pluralisation process which started in 1974 continued.

	POST-1974	**POST-1997**
	Similarities	
Devolution referenda	1979 Scotland, Wales	Scotland, Wales, London, NI
EP elections	1979 FPTP introduction	1999 PR introduction
European relations	After joining the EEC (1973)	After Maastricht (1993)
	Differences	
	Labour minority in Feb 1974 and after 1976	Labour landslide
	1973 oil crisis and stagflation	Economic prosperity
	Pluralisation in party competition and in party system	Pluralisation of party competition and a return to two-partyism

Table 8 Comparing the post-1974 and the post-1997 periods

Conclusion

The 1997 general election meant both a return to the post-1945 period and a continuation of the post-1974 period. In this sense, it had a controversial impact on the evolution of UK party politics. On one hand, the two-party path dependency in Westminster was confirmed. This meant a superficial return to the post-1945 era. On the other hand, the multi-party path dependency at national, regional and European level was also confirmed. This meant the continuation of the 1974 pluralisation process. This *contradiction* is the most important impact that the post-1997 provided. The differences between the Westminster party system and the UK party competition hence started to increase.

This paper didn't want to involve current developments in British politics. However, one can see that after 2010, there is a rising popularity of anti-establishment sentiment in Britain. Although it is a worldwide phenomenon nowadays, Britain seems to be affected outstandingly. There are plenty of proofs for anti-elitist voting patterns; eg. the decreasing combined Labour-Conservative vote share, rising third party vote share, vote on the Scottish independence and vote on Brexit. I think that this anti-establishment sentiment can be understood if we take a look at the 1997 election. This election contributed to a contradiction between a superficial two party politics and a latent multi-party competition. This contradiction supports the idea of anti-establishment; the two parties can't represent electorate's multiparty preferences. Therefore, understanding the 1997 election result is crucial to understand current developments in British politics as well.

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PROTOCOL NO. 16 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

BEÁTA DEÁK*

Introduction

The European Court of Human Rights was created under the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms is a multilateral international agreement concluded under the aegis of the Council of Europe. The European Court of Human Rights is the oldest international court in the field of the protection of human rights. The Convention was opened for signature in Rome on 4 November 1950 and entered into force on 3 September 1953. The importance of the Convention lies not only in the scope of the fundamental rights it protects, but also in the protection mechanism established in Strasbourg to examine alleged violations and ensure compliance by the States with their undertakings under the Convention. Accordingly, in 1959, the European Court of Human Rights was set up.[1]

All the members of the Council of Europe are Contracting Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention gave effect to certain rights stated in the Universal Declaration of Human Rights and established an international judicial organ with jurisdiction to find against States that do not fulfil their undertakings.[2] At present, 47 European States are members of the Council of Europe, including the 28 Member States of the European Union. States that have ratified the Convention, have undertaken to secure and guarantee to everyone within their jurisdiction, not only their nationals, the fundamental civil and political rights defined in the Convention for the Protection of Human Rights and Fundamental Freedoms.

The European Convention for the Protection of Human Rights and Fundamental Freedoms is supplemented by a series of 14 protocols. Reforms of the European Convention on Human Rights and to the European Court of Human Rights are imprinted upon their respective histories. In recent years, the trend of steady, incremental reforms has given way to a near-constant cycle of reflections and reforms

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[1] http://www.echr.coe.int/pages/home.aspx?p=basictexts.

[2] http://echr.coe.int/Documents/50Questions_ENG.pdf.

initiatives, driven by the agendas of the High Level meetings at Interlaken (2010), Izmir (2011) and Brighton (2012).[3]

As a result of the job two additional protocols are open for signature and are not yet in force. These are Protocol No. 15[4] amending the Convention for the Protection of Human Rights and Fundamental Freedoms, which amends the European Convention on Human Rights in relatively minor respects, and Protocol No. 16, that contains a number of procedural amendments to further improve the efficacy of the procedure before the Court, as well as a codification of the margin of appreciation doctrine and the subsidiarity principle.[5]

Both protocols are part of the European Convention for the Protection of Human Rights system reform efforts, in view of realizing an effective implementation of the European Convention for the Protection of Human Rights and ensuring viability of the European Convention for the Protection of Human Rights mechanism. In this paper the author will present the 16th Additional Protocol[6] and the advisory procedure. The Additional Protocol will come into force on 1 August 2018, since 10 states have already ratified the Protocol so far.[7]

The New Protocol and the History

Several years ago, on 2 October 2013, the Committee of Ministers of the Council of Europe opened the Protocol No. 16 to the European Convention on Human Rights for signature. This new Protocol creates the possibility for supreme courts of the Contracting States to the Convention to request an advisory opinion from the European Convention of Human Rights on questions of principles relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.

20 Member States have already signed the new Protocol and 10 Member States have ratified it,[8] and will enter into force on 1 August 2018. The introduction of a new legal instrument is meant to strengthen implementation of the European Convention of Human Rights. The willingness of highest courts to exercise their right to request advisory opinions, and their choices of subject-matter, may offer genuine scope for the

[3] Noreen, O'Meara: Reforming the ECtHR: The Impacts of Protocols 15 and 16 to the ECHR, *iCourts Working Paper Series*, No. 31, 2015. 4.

[4] Hungary signed that in November 2015.

[5] Janneke, Gerards, Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights – A Comparative and Critical Appraisal. *Maastricht Journal of European and Comparative Law*, Vol. 21 (2014) Issue 4, 632.

[6] The Parliamentary Assembly, at the invitation of the Committee of Ministers, adopted Opinion No. 285 (2013) on the draft protocol on 28 June 2013. At their 1176th meeting, the Ministers' Deputies examined and decided to adopt the draft as Protocol No. 16 to the ECHR.

[7] https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures?p_auth=XHiY51TQ.

[8] Ibid. Hungary neither ratified, nor signed the Protocol so far (May 2018).

Convention for the Protection of Human Rights and Fundamental Freedoms to deliver substantively valuable advisory opinions and highlight perceived problems at national levels.[9]

Paragraph 1 of Article 1 sets out key parameters of the new procedure: first, by stating that relevant courts or tribunals "may" request that the Court give an advisory opinion, it makes clear that it is optional for them to do so and not in any way obligatory. In this connection, it should also be understood that the requesting court or tribunal may withdraw its request.[10]

The Advisory Opinions Procedure of Protocol No. 16.

The Protocol No. 16 has only 11 Articles. On the basis of the Protocol the highest national courts (and only the highest courts) may request the European Court of Human Rights to give advisory opinions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it.[11] The advisory opinions procedure entails that the competent national courts may present questions regarding the interpretation and application of the Convention for the Protection of Human Rights and Fundamental Freedoms. The advisory opinions procedure must relate to a concrete case presented to the national court. The national court must relate to a concrete case presented.

National courts must supply the European Court of Human Rights with information about the relevant legal and factual backgrounds of the case that has given rise to questions of interpretation of the Convention. The European Court of Human Rights is not obliged to accept a request for an advisory opinion. Paragraph 3 of Article 1 sets out certain procedural requirements that must be met by the requesting court or tribunal. They reflect the aim of the procedure, which is not to transfer the dispute to the Court, but rather to give the requesting court or tribunal guidance on Convention issues when determining the case before it. These requirements serve two purposes: i) *first*, they imply that the requesting court or tribunal must have reflected upon the necessity and utility of requesting an advisory opinion of the Court, so as to be able to explain its reasons for doing so; ii) *second*, they imply that the requesting court or tribunal is in a position to set out the relevant legal and factual background, thereby allowing the Court to focus on the question(s) of principle relating to the interpretation or application of the Convention or the Protocols thereto.[12]

[9] Noreen: *op. cit.* 25.
[10] See http://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf.
[11] Article 1 of the Protocol.
[12] Protocol No. 16, *Explanatory Report* (CETS No. 214), http://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf.

If the Court accepts a request, the Grand Chamber will deliver the advisory opinion. A panel of five judges of the Grand Chamber shall decide whether to accept the request for an advisory opinion, having regard to Article 1. The panel shall give reasons for any refusal to accept the request. If the panel accepts the request, the Grand Chamber shall deliver the advisory opinion.[13] The President of the European Court of Human Rights may invite other states or persons to submit written comments or take part in any hearing (Article 3).

If the advisory opinions to be delivered by the Court are reasoned in this case, then they will be published. Reasons shall be given for advisory opinions (Article 4). The judge can give separate opinion. Advisory opinions will not be binding for the requesting national court.[14] The non-binding character of advisory opinions is a more complex factor that carries both benefits and risks associated with the reinforcement of dialogue between national courts and tribunals and for the Convention for the Protection of Human Rights and Fundamental Freedoms.[15] According to the Article 6 acceptance of the No. 16 Protocol is optional for High Contracting Parties to the Convention.

The role of national courts is determining. The requesting national court is obliged to give information about the following questions during the advisory opinion procedure. It has to summarize the national procedure highlighting the subject of the domestic case and the conclusions concerning the facts (possibly comprehensive report), and has to review the relevant national laws. The national court has to refer to the provisions (rights and freedoms) of the European Convention of Human Rights that are requested to be interpreted. If necessary the member state court shall present the summary of the argumentation of the parties as well, moreover the requesting court can state its own opinion about the analysis of the question. The official language of the procedure of the European Convention of Human Rights is English or French, but by request domestic language is applicable.

The Court of Justice of the European Union and the Opinion

The fundamental rights form an integral part of the general principles of the European Union law. For that purpose, the Court of Justice of the EU draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The accession of the European Union to the European Convention of Human Rights and Fundamental Freedoms has been on the agenda of the European Union for long. After the European Union accession to the European Convention of Human Rights and Fundamental

[13] See Article 2.
[14] See Article 5.
[15] Noreen: *op. cit.* 27.

Freedoms will become part of European Union law. By an Opinion given in 1996,[16] the Court of Justice had than concluded that, as European Community law stood at the time, the European Community had no competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Four years later, the European Parliament, the Council of the European Union and the Commission have, in 2000, proclaimed the Charter of Fundamental Rights of the European Union, which has been given the same legal value as the Treaties by the Treaty of Lisbon, which entered into force on 1 December 2009. The European Union prepared one draft agreement because – in accordance with Treaty of Lisbon – the European Union must be connected the Convention for the Protection of Human Rights and Fundamental Freedoms.[17]

The draft agreement must be compatible with the Treaties. In 2013 the European Commission submitted a request pursuant to Article 218 (11) of the Treaty on the Functioning of the European Union for an Opinion of the Court of Justice on whether the draft Accession Agreement is compatible with the EU Treaties. The Court of Justice of the European Union examined this question and one year ago, on the 18 December 2014, the European Court gave an opinion (hereinafter: Opinion).[18] The Court of Justice took an extremely protective approach in Opinion 2/13 while interpreting the role of the preliminary rulings procedure in the light of Protocol No. 16 of the European Convention of Human Rights. Evidently, the Court of Justice connected the possible effects of Protocol No. 16 with two fundamental theoretical issues: i) the importance of the preliminary reference procedure as an integral part of the EU judicial system and ii) its role in the protection of the primacy of EU law within the EU legal order.[19] This opinion scrutinizes the draft document concerning accession. The Opinion of the Court of Justice of the European Union investigated several questions, e.g. the compatibility of the agreement with EU primary law, the specific

[16] Opinion 2/94 of the Court of Justice (ECR 1996 I-01759). http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130d5b2518e8e56c641df87ecd2d91d5e75a3.e34KaxiLc3eQc40LaxqMbN4Oa3eSe0?text=&docid=99493&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=86692.

[17] Treaty of Lisbon, Article 6 „2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

[18] Opinion 2/13. (full court). http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=572096. See also, Mohay, Ágoston: Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR – Case note, *Pécs Journal of International and European Law*, 2015/1. 28-36.

[19] Daminova, Nasiya: Protocol No. 16 of the ECHR in CJEU Opinion 2/13: Analysis and perspectives, https://blogs.uta.fi/ecthrworkshop/2016/02/29/daminova/.

characteristics and autonomy of European law and Protocol No. 16. The Court of Justice of the European Union concludes that the draft agreement on the accession of the European Union to the European Convention on Human Rights is not compatible with European Union law.

The material scope of Protocol No. 16 is clearly confined to the Convention and its protocols, but some concerns have been expressed in the recent past, e.g. the Protocol No. 16 would not threaten the autonomy of European Union law and the monopoly of the Court of Justice of the European Union on the interpretation of European Union law, by allowing supreme courts of the Member States to engage in a kind of "forum shopping" between the Court of Justice of the European Union and The European Court of Human Rights.

First of all, it should be noted that the scope of Protocol No. 16 is not limited to the European Union and its Member States but rather covers all Contracting States to the European Convention on Human Rights, of which the European Union Member States form only a part.

Summary and Concluding Remarks

The Lisbon Treaty introduced some major changes to the nature of fundamental rights protection in the European Union, which affect the nature of its relationship with the European Convention on Human Rights. Article 6 of the Treaty on European Union, as amended, ensures the binding, primary law status of the Charter of Fundamental Rights, as well as creating a new legal basis for the European Union to accede to the European Court of Human Rights.[20]

The request for an advisory opinion can be presented to the European Convention for the Protection of Human Rights exclusively by the highest court of the member state, in Hungary only by the Kúria. The dispute has to be judged by the highest court of the member state so the case supposed to be in stage of legal remedy. Protocol No. 16 constitutes a valuable starting point for a better understanding of human rights. Hungary has not signed the additional protocol, however, the new procedure - ensuring the protection of the fundamental rights - could be important and useful for the law enforcement bodies as well. This new procedure provides further possibility for national courts to get support in interpreting fundamental rights and freedoms; therefore this paper takes a stand with the ratification of the Protocol.

As long as Hungary ratifies the Protocol the author would recommend the creation of a working group of judges at the Supreme Court, namely at the Kúria to examine the advisory opinion procedure.

[20] Sionaidh, Douglas-Scott: The Court of Justice of the European Union and the European Court of Human Rights after Lisbon. In: de Vries, Sybe – Bernitz, Ulf – Weatherill, Stephen (eds.): *The Protection of Fundamental Rights in the EU After Lisbon*. Oxford and Portland, Oregon, 2013. 153.

Propositions to the Content of the Additional Protocol

In the scientific literature and with regard to the opinion stated by the Court of Justice in December 2013, it is a common point of view that the relation between advisory opinion and preliminary ruling is yet unclear. Nor the draft agreement examined by the Court of Justice dealt with their relation. This was because at the time the draft agreement got presented the additional protocol was still under reconciliation. A basic difference compared to the preliminary ruling is that in this case the legal dispute should be judged by the highest level court, since only that court is authorized to submit a petition for an advisory opinion. By stating that relevant courts or tribunals "may" request that the Court give an advisory opinion, it makes clear that it is optional for them to do so and not in any way obligatory. In this connection, it should also be understood that the requesting court or tribunal might pull back its request.[21]

In the preliminary ruling procedure judges pass a resolution by simple majority. The ruling does not show the name of judges who voted against it or who had given separate opinion, on the order hand in the advisory opinion procedure the judge with a different opinion can give a separate opinion to the resolution. It is also necessary to be examined that the petition for advisory opinion was submitted by an EU member state, and which judiciary level did the request come from. According to these restrictions the apprehension from the EU is not by all means so significant that the advisory opinion procedure would limit or substitute the preliminary ruling procedure. In the course of the review of the draft agreement it is necessary to ensure the autonomy of the preliminary ruling and the European Union legislation.

The European Court of Human Rights shall decide about the request in a reasonable time because the new procedure extends the duration of the basic case. Due to this it is very important for the national tribunal to submit a proper and complete petition. So that to avoid breaching the right for fair trial the European Convention for the Protection of Human Rights itself has to give the advisory opinion within a reasonable time. The author believes as the additional protocol getting into force the European Convention for the Protection of Human Rights will aim to lead a fair trial and deciding about the petitions within a reasonable time is an important element of this.

In the interest of the member states it is a guarantee rule to have the national judge of the requesting country in the panel of judges. The member state national judge has a more comprehensive knowledge about the given national law so this way the decision shall be more complex contributing to a proper advisory opinion considering the interpretation of fundamental rights and freedoms.

[21] Beqiraj (Mihani), Pranverav – Çani (Methasani), Eralda: The Reform of the European Court of Human Rights – The Ongoing Process. *European Academic Research*, Vol. III (2015) Issue 4, 4650.

The optional character of Protocol No. 16 strengthens national authority by member states are not obliged to join it. The request for advisory opinion proceeding is optional in the respect that the national tribunal can withdraw its petition nor the content of the advisory opinion bound the requesting court so it is not obliged to include it into its own decision. The advisory opinion is not-binding for the national court; necessarily the national court is authorized to decide the action.

Technical Propositions to the Additional Protocol

It is necessary to assess the increase of the number of cases and the workload and in compliance with that the amendment of the procedural rules is necessary as well. It is the obligation and the responsibility of the national court to submit an appropriate and accurate request.

A detail concerning the procedure for advisory opinion has to be worked out for the procedural regulation. At the same time the workload of the Court of Justice has to be under examination whether the application for advisory opinion increases the caseload of the court and if this requires staff increase that may cause extra cost within the budget of the organization. The Court of Justice publishes every year a report describing its last year activity. Referring to the 2014 report the number of requests for preliminary ruling procedure was 428 and in averages a case last for about 15 months. This can give the European Convention for the Protection of Human Rights a starting point to estimate the caseload deriving from the establishment of the advisory opinion procedure. This of course depends on how many member states ratify the supplementary protocol. The number of applications for preliminary ruling procedures before the Court of Justice increased with a third since 2010.

The main topic of this kind of requests received in 2014 was the interpretation of legal matters concerning the territory of freedom, safety and enforcement of law. The estimation of the possible number of requests for advisory opinion procedure need to be made depending on the condition that the highest courts of the contracting states are exclusively entitled to apply for an advisory opinion. This measure has to be taken before establishing the new procedure to prepare the technical conditions for the European Convention for the Protection of Human Rights.

According to *Noreen O'Meara*, the future impact of Protocol No. 16, the objectives of the Protocol No. 16. are laudable, namely aiming to ultimately reduce the Court's incoming caseload, to offer a platform for reinforcing dialogue with national courts and to further embed the Convention through influencing the adjudication of contentious cases in European Court of Human Rights and at national level. This partnership and the concomitant dialogue between courts is thought to contribute to the improvement

of practicable fundamental rights standards and, thereby, to the effectiveness of fundamental rights protection on the national level.[22]

The final goal of Protocol No. 16, as a continuation of previous reforms, is the reduction of the Court's excessive caseload. Advisory Opinions of the Court regarding the interpretation and application of the Convention will help to explain the provisions of the Convention and the case law of the Court, by giving further instructions to help States Parties to avoid violations in the future. In this respect, the reform of Protocol No.16 through the enhancement of the dialogue between The Court and the highest national courts or tribunals aims a better application of the Conventions at the domestic level. This is seen as an opportunity to reduce the workload of the Court.[23]

According to *Ada Paprocka* and *Michał Ziółkowski*, the advisory opinions may become a useful instrument of dialogue between the Court and national authorities that would enhance the Convention's impact on national legal systems. They may also help to clarify the Strasbourg jurisprudence in certain areas or even to develop the case-law. Full assessment of their relevance and importance in the European Convention for the Protection of Human Rights and Fundamental Freedoms system will depend on the national courts' activity and the Strasbourg Court's goodwill in a multilevel human rights dialogue.[24] The questions mentioned above shall be cleared after 1 August 2018, when the Additional Protocol will enter into force.

[22] Janneke: *op. cit.* 638.

[23] Beqiraj-Çani: *op. cit.* 4652.

[24] Paprocka, Ada – Ziółkowski, Michal: Advisory Opinions under Protocol No. 16 to the European Convention on Human Rights. *European Constitutional Law Review*, Volume 11 (2015) Issue 2, 292.

DOES THE LABOR LAW REGULATION MAKE YOU HAPPY? LEGAL AND SOCIAL SITUATION OF MALE EMPLOYEES AFTER STARTING A FAMILY

JÁCINT FERENCZ*

Research results of other fields of science gain more and more importance in the modern theories of labor law, just like legal science, modern psychology, sociology and economics also analyze the labor environment and relations from their own perspective. Current study was inspired by a study published in the 2017 June/July issue of the periodical called Economist 1843. Emily Bobrow, the author of the article discusses the situation of family men in the changing word of labor law.1 She analyzes it in details that while in the case of women falling out of work when starting a family, as well as consequences originating from this (holiday, parental leave, looking after the child) are socially accepted, even more, result in an acknowledged status, the same event in the case of men though results in a higher salary, it is also accompanied with an increased level of stress. Referring to several American researches she expresses that male employees get into a so called "trap"; though the birth of their child is undoubtedly a happy event, it apparently means a disadvantage at their workplace if they go on a holiday because of this or simply spend more time with their family. In the study the author deals with this slightly researched area in details: can we talk about a so-called negative discrimination in the case of male employees with small children? If yes, can it be remedied with legal tools?

Equal Treatment in the World of Employment

Social Impacts of Equal and Fair Treatment

In the last decades a wide range of legal literature has been dealing with the topic of equal opportunities and equal treatment at workplaces, primarily with regards to vulnerable employees. Therefore, we can find a great deal of literature if we would like to get more information on these groups' rights and their emergence, as well as on the equality of women,[2] minorities and underprivileged people. More and more studies

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[1] Bobrow, Emily: The Man Trap. *Economist 1843*, 2017/June-July, 90-95.

[2] The topic of female rights has been dealt with by the main periodicals, such as the Australian Feminist Law Journal or Feminist Legal Studies.

have emerged dealing with how the effects of equality and connected employee preconceptions affect work ethic and the quality and efficiency of the work performed. It has been demonstrated that if employees find their salary fair, they are willing to put more effort into their job.[3] In connection with the relationship of fair wage conditions and health, a 2016 German study presented that there is a connection between fair wage conditions, fair understood from the point of view of employees and the frequency of cardiovascular diseases.[4] *Coltrane* and the co-authors published quite interesting research results concerning male employees: they established that after starting a family, male employees spend more time at their workplace as before, however, if they resort to paid time off work or holiday, a so-called „*flexibility stigma*" sticks to them, which results in a significantly lower salary and less chance to be promoted in the long run.[5]

Further researching "flexibility stigma", *Cech* and *Blair-Loy*, members of the expressly highest ranked American university sphere established that stigmatized employees are less persistent, the balance between their job and private life is worse, they are less satisfied with their job as well, moreover, these negative circumstances undoubtedly derive from the gender and the parental status.[6] As the result of empirical studies, *Thébaud* and *Pedulla* revealed an interesting connection regarding the topic of the balance of work and private life. It seems to be a generally accepted fact that female employees leave their well-paid jobs themselves in order to have part-time jobs or to be housewives, that is, they are the ones who choose the predominance of private life; while on the other hand, research data do not support this perception, it is rather the work environment and the constraint that form the bases of their decision. Researches among young employees before starting a family have revealed that the initial preference for both genders is the equal family status: that is, men and women plan to participate in the family life as wage earners and do the housekeeping equally. However, as work environment, legislature and company policy forces them to choose, plan 'B' in most cases is that men spend more time at their workplace as this is what results in higher salary and promotion in most companies.[7] This fact has been confirmed by more studies, too. In spite of that the difference between the salary of male and female

[3] Such as: Fehr, Ernst – Kirchsteiger, Georg – Riedl, Arno: Does Fairness Prevent Market Clearing? An Experimental Investigation. *The Quarterly Journal of Economics*, 1993. No. 2,437-459.

[4] Falk, Armin – Kosse, Fabian – Menrath, Ingo – Verde, Pablo – Siegrist, Johannes: Unfair Pay and Health. SOEP – The German Socio-Economic Panel, *SOEP papers on Multidisciplinary Panel Data Research at DIW Berlin*, 870/2016. 3.

[5] Coltrane, Scott – Miller, Elizabeth C. – DeHaan, Tracy – Steward, Lauren: Fathers and the Flexibility Stigma. *Journal of Social Issues*, 2013. No. 2, 279-302.

[6] Cech, Erin A. – Blair-Lay, Mary: Consequences of Flexibility Stigma Among Academic Scientists and Engineers. *Work and Occupations*, 2014. No. 1, 86-110.

[7] Pedulla, David S. – Thébaud, Sarah: *Can We Finish the Revolution? Gender, Work-Family Ideals, and Institutional Constraint*. Paper submission for Population Association of America 2014 Annual Meeting. http://paa2014.princeton.edu/papers/140240.

employees gradually tends to decrease, overtime and connected company policy results in the increase of the difference again. While in the 1980s less than 9% of employees (13% in the case of male and 3% in the case of female) worked more than 50 hours per week in the USA, by the millennium this ratio was already 14% (19% male and 7% female).[8] Research results of the American Gallup from 2014 show that 58% of grown-ups in the USA worked more than 40 hours per week, while 39% more than 50 hours per week.[9] Based on empirical studies, *Cha* and *Weeden* established that company culture and inner rules are highly responsible for this over-time ratio: the ideal (male) employee is fully committed to his employer and is basically available 7/24, which availability is highly supported by today's technology. At the same time, this commitment and constant availability are the bases of promotion.[10]

A wide scale research has been conducted in Germany with family men employees; the results highly resemble the ones in the USA. Based on the result of the representative research published in November 2016, more than half of the German family men wish to spend less time at work; this ratio is 69% among young men aged 18-25. However, men participating in the research generally found German workplaces father-friendly (*väterfreundlich)*: on a scale of 1-4 they ranked them as 3.15. As for the future, the most interesting part of the study is that the participating family men listed some factors that make a workplace father-friendly. The most important factor is the way of company communication, as the article in Economist also expressed. Moreover, flexible working hours, motivating promotion system and predictable payment are also significant factors that make a workplace father friendly according to German fathers.[11] In parallel with this, another German study also found similar results: primarily flexible working hours, exchange facility between full- and part-time jobs and better adaptation to family needs (such as the planning of holidays) were the main factors.[12]

With regards to our topic, a relevant question is that among the above mentioned factors which can be supported by legislature. In the opinion of the author, the answer lies in non-standard employment together with some parts of social and support policy.

[8] Cha, Youngjoo – Weeden, Kim A: Overwork and the Slow Convergence in the Gender Gap in Wages. *American Sociological Review*. 2014. No. 3, 457-484. Electronic copy available at: http://mypage.iu.edu/~cha5/Youngjoo_Cha_files/Cha_weeden.pdf.

[9] Saad, Lydia: The "40-Hour" Workweek Is Actually Longer – by Seven Hours. Gallup, 29 August 2014. http://www.gallup.com/poll/175286/hour-workweek-actually-longer-seven-hours.aspx.

[10] Cha-Weeden: *op. cit.* 5.

[11] https://www.erfolgsfaktor-familie.de/fileadmin/ef/Wissenplattformfuer_die_Praxis/Ergebnisse_Vaeter-Barometer_2016.pdf.

[12] https://www.bmfsfj.de/blob/75876/427470763d967566b32624f0597bebfb/memorandum-neue-vereinbarkeit-allensbach-charts-data.pdf.

Regulation of Working Hours and Gender Differences

Compared to the abovementioned thoughts, in the countries of the European Union statistical data projects a much more promising picture. According to the statement of the Hungarian Central Statistical Office issued in 2014, female employees working full time generally worked 40.2 hours per week in 2013, while men worked 41.1 hours. In the 28 EU member states the standard deviation is quite small: the differences mainly depend on the ratio of self-employed people: where their ratio is high (such as in Greece), the weekly working hours exceed the EU standard. The usual weekly working hour in the case of men is 6.1 (Danish men worked for the shortest period for 39.5 hours in 2013, Greek men worked the most, 45.6 hours), as for women, the number is 4.3 hours (41,8 hours in Austria and Greece and 37.5 hours in Ireland).[13] However, if we analyze the question more closely and the data of the questionnaire and not the officially reported one, the results are not as good as it was indicated in the statistics in themselves. Even in the case of Germany family men with small children are said to have worked higher hours than what was reported in the statistical data. According to the 2015 data, 34% of German family men with small children said to have worked for more than 50 hours per week.[14]

However, overtime work has numerous health risks. An American study cited by many, demonstrated that longer working hours or overtime highly increases the risk of accidents or diseases suffered in connection with work.[15] A Canadian study from 2000 established that old, young, male and female employees listed the exact same stress factors at workplaces: exaggerated expectations and overtime.[16] Compensating the above mentioned, with regards to European Union member states, *Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time* established the minimal safety and health requirements connected to the organization of working time with regards to the aspects of daily rest period, breaks, weekly rest period, maximum weekly hours, number of annual holidays, night shift, shift work and work schedule. According to the directive, general working hours, including overtime must not exceed 48 hours in seven-day periods.[17]

[13] Hungarian Central Statistical Office: Munkaidő, munkaidő-kiesés, műszakrend. [Working Hours, Time Loss, Work Schedule]. *Statisztikai Tükör*, 2014/69. 1.

[14] https://www.bmfsfj.de/blob/112720/2d7af062c2bc70c8166f5bca1b2a331e/vaeterreport-2016-data.pdf.

[15] Dembe, Alex – Erickson, Bianca – Delbos, Rachel – Banks, Steven: The Impact of Overtime and Long Work Hours on Occupational Injuries and Illnesses: New Evidence from the United States. *Occupational and Environmental Medicine*. 2005/9, 588–597.

[16] Williams, Cara: Sources of Workplace Stress. *Perspectives on Labour and Income*, 2003/6. http://www.statcan.gc.ca/pub/75-001-x/00603/6533-eng.html.

[17] Article 6 of Directive 2003/88/EC of the European Parliament and of the Council of 4th November 2003 concerning certain aspects of the organization of working time, which modified the directive of 1993, contains the same regulation.

According to the previously cited report of the Hungarian Central Statistical Office, the two main reasons of losing a whole week of working time is holiday and illness; these two were the reasons of absence in 84.8% in the case of women and 82.7% in the case of men. According to statistical data, almost exclusively women resort to holiday in order to take care of their sick child. 4.8% of their total absence can be led back to the reasons of maternity leave and taking care of sick children.

Labor Law Regulation and Family Men with Small Children in Hungary

In 2003, just before joining the European Union, among the Visegrad countries Hungary, Poland and the Czech Republic conducted wide-scale researches on social gender reforms. The research results showed that social inequality cannot necessarily be eliminated by social reforms, however, labor law regulation, the formation of values and the proportional distribution of allowances can jointly have actual positive effects.[18] Researches connected to well-being at work highlight that workers enjoying subjective well-being mean a committed group of workers for employers in the long run that is, the well-being of workers is simultaneously the interest of employers.[19]

International Labour Organization (ILO) accepted its Convention No. 156 concerning *Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* on 23rd June 1981. Under the term family responsibilities, the convention not only forms recommendations in connection with dependent children but also concerning other family members and employees who are especially in need of support and care. According to the convention, when planning for the whole community, with special regards to community services, participating states have to do everything in order to take into consideration the need of workers with families (Article 5.) The text of the convention specifically highlights the equality of opportunity and treatment for female and male employees (Article 6.), at the same time, the preamble suggests that the convention was primarily accepted with the aim of decreasing the disadvantageous discrimination of female employees.

The Hungarian *Act on Family allowances* specifies among the basic principles that "one of the most important tasks of the state is to assist families", and the Act specifically aims at assisting families' financial safety [Act LXXXIV of 1998 on Family Support, Paragraphs 1 and 3]. Hungarian statistical data show that the income of families with children is significantly lower (even together with family allowances) than the income of families with no children. Based on the calculations of *Szilvia Závecz*, in 2010, families

[18] Fultz, Elaine – Ruck, Marcus – Steinhilber, Silke (ed.): The Gender Dimensions of Social Security Reform in Central and Eastern Europe: Case Studies of the Czech Republic, Hungary and Poland. Foreword. ILO, 2003. 9.

[19] Kun, Ágota: Munkahelyi jóllét és elköteleződés [Well-being and Commitment at Workplaces]. *Munkaügyi Szemle*, 2010. No. 2, 35-41.

with children generally earned 36% less in Hungary than families without children.[20] In spite of that in the Hungarian family allowance system financial supports are in majority, moreover, they especially show an increasing trend. Financial allowances that can be resorted to by fathers as well are the following: *family allowance* and *child raising allowances*. According to main rule, maternity allowance can implicitly be resorted to by mothers but if the mother entitled to maternity allowance dies before granting the allowance, then the maternity allowance has to be paid for the father living in the same household as the mother.

A non-financial form of family allowance is the labor law regulation connected to children. The Hungarian Act 1 of 2012 on Labor Code provides extra vacation time for employees as follows: i) two working days for one child; ii) four working days for two children; iii) a total of seven working days for more than two children under sixteen years of age. [Labor Code, paragraph 118 (1)]. The significance of this regulation is that it not only refers to parents with small children as it is provided until the child reaches the age of sixteen. A regulation especially referring to fathers is that upon the birth of their children, they are provided 5, in the case of twins 7 working days up until the end of the second month from the date of birth, which shall be allocated on the days requested by the father. The leave shall be provided also if the child is stillborn or dies [Labor Code paragraph 118 (4)].

The Hungarian government supports the formation of family friendly workplaces through the Ministry of Human Capacities. An annual tender possibility is the program entitled "*Assisting the formation and the development of family friendly workplaces*". It aims at supporting those practices and policies which contribute to the effective realization of this objective. Winners of the tender become entitled to use the title "Family friendly workplace". However, we must note that the total budget for the funding period of 1st June 2017-31st June 2018 (sic!) is 60 million Hungarian forints (~ 190 000 EUR) nationwide, which makes us question the idea's seriousness, moreover, candidates have to pay a 5 000 Hungarian forint (~ 16 EUR) tender fee.[21]

Summary and Thoughts on Solutions

Modern labor law cannot ignore the fact that if the aim is quality employment, then employers have to ensure workers that their workplace is not a stress factor but a potential area of self-realization, at least with regards to the majority of labor relations. Having regard to that half of the employees are men and the majority of them is family

[20] Závecz, Szilvia: A népességfogyástól a gyermekszegénységig: A hazai családtámogatási rendszer dilemmái. [From the Decrease of Population to Child Poverty: Dilemmas of the Domestic System of Family Support]. *E-CONOM*, 2012. No. 1, 104-116. http://epa.oszk.hu/02300/02301/00001/pdf/EPA-02301-10_ZaveczSz_e-conom_2012_1.pdf.

[21] See (in Hungarian) http://www.emet.gov.hu//_userfiles/felhivasok/csbm/csp_csbm_17_palyazati_felhivas.pdf.

men with children, their potential expectations and needs have to be taken into consideration in order to employ satisfied, committed employees. The unique situation of employees with family responsibilities is investigated by several studies, however, for a long time family relations have been mainly researched from the point of view of women. At the same time, the situation of family men as the only wage-earners in families often has an increased effect on the family as a whole itself as families' existential security depends on the profit-making circumstance of the father.

As for the formation of family-friendly workplaces in Germany, the Federal Ministry for Family Affairs has issued special support programs starting from 2006. The aim of the programs entitled 'Family Success factor' (*Erfolgsfaktor Familie*) and 'Company Childcare' (*Betriebliche Kinderbetrenung*) is especially to incent the formation of family-friendly workplaces. In Germany, the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth comprehensively examines the situation of family men in the society. They have discovered that 57% of German fathers (62% of mothers) feel the pressure of time; furthermore, it is also interesting that they published such statistical data that confirm the previous statements in connection with the acceptance of part-time jobs and paid time off work after giving birth, or rather with their unacceptance with regards to men.[22] As for supporting the formation of family-friendly workplaces, more activities have been urged by the German government: besides flexible working hours and part-time jobs the formation of childcare places is supported (besides also providing 400 EUR maternity support per month). If we strictly investigate the efficiency of the latter one with regards to men, then another German study has revealed that this type of childcare support mainly increases the satisfaction of women, while its effect on men's well-being is marginal.[23]

To sum it up, the flexibility of working hours and the frames of employment are obvious worker needs based on the research results mentioned above. One group that can benefit from the spread of non-standard forms of employment can be the fathers themselves, who would like to spend more time with their family. Upon what was mentioned before, the number of such employees is very high. An American research has revealed that flexible working hours as a motivational factor has overtaken higher salary, option for shares or training opportunities when talking about employee loyalty.[24] Therefore, this solution can simultaneously serve the interest of employers and employees – and together with it, the increase of society's well-being.

[22] https://www.bmfsfj.de/blob/112720/2d7af062c2bc70c8166f5bca1b2a331e/vaeterreport-2016-data.pdf.

[23] Lauber, Verena – Storck, Johanna: Helping with the Kids? How Family-Friendly Workplaces Affect Parental Well-Being and Behaviour. SOEP – The German Socio-Economic Panel study at DIW Berlin. *SOEP papers on Multidisciplinary Panel Data Research*, No. 883/2016. 17.

[24] Bureau of Business & Economic Research, University of New Mexico: Social Outcomes of Family Friendly Policies and Practices in the Workplace.
http://bber.unm.edu/media/presentations/Social_Outcomes_Matrix_9.28.11.pdf

INTRODUCTION TO THE SCIENCE OF MEDICAL RIGHTS AND ETHICS – THE MOST RELEVANT INSTRUMENTS

SZILVIA KELLNER*

Medical research is vital to the interests of people, nations and the prosperity and well being of society.[1] Thanks to medical research, many previously incurable diseases can now be completely treated or at least have their ill effects strongly reduced. It is necessary to pay particular attention to this area, as history is rife with cases where doctors abused sick people or performed experiments without a patient's consent. The activity and brutality of Nazi-era doctors is well-known, examining the effects on humans of drowning, cooling and changes in air pressure. Another example is doctors in the USA having observed patients with syphilis that was left untreated. The abhorrent cases mentioned above called attention to the need for the introduction of international regulation of this area, to be strictly interpreted and applied.

The first convention to which this study refers is the Convention on Human Rights and Biomedicine ("Biomedicine Convention").

Relevant Legal Instruments

The Council of Europe (CoE) enacted this agreement in Oviedo on 4 April 1997. The purpose of the convention[2] is to protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine.

The preamble lists other conventions that were taken into consideration when formulating the Biomedicine Convention:

i) The Convention for the Protection of Human Rights and Fundamental Freedoms adopted in Rome on 4 November 1950;

ii) The European Social Charter signed by Council of Europe members in Turin on 18 October 1961;

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[1] From the Hungarian legal literature, see Dósa, Ágnes: Emberen végzett orvostudományi kutatások [Medical Research on Humans]. *Lege Artis Medicinae*, Vol. 12 (2002) No. 6-7, 434., Kovács, Gábor: *Bioetika és büntetőjogi kodifikáció* [Bioethics and the Codification of the Criminal Aspects]. Széchenyi István Egyetem, Győr, 2008.

[2] This convention was implemented into Hungarian law as Act VI of 2002.

iii) Two covenants adopted on 16 December 1966 under the aegis of the UN: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights;

iv) The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, signed by the Council of Europe' member states in Strasbourg on 28 January 1981;

v) The Convention on the Rights of the Child, adopted by the UN in New York on 20 November 1989.

Relationship to Other Conventions

The European Convention on Human Rights (hereinafter "ECHR") is referenced in two articles[3] that lay down the foundations for the prohibition of injustice and abuse in the medical profession. Their inclusion was motivated by the appalling history of inhuman treatments in Nazi Germany as well a certain controversial experiments in the USA and the fear that these could be repeated. "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally …"[4]

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[5] All these clauses were violated by the above-mentioned human experiments. Respect for a patient's life, human dignity, integrity and protection of self-determination provide the basis for these rights. No infringement is possible if the patient has given his/her voluntary and informed consent to some kind of intervention. However, during dark days of history, people were indeed treated as mere objects. This situation was considered untenable and the international conventions protecting the human life and health were created as a result.

Both the Article 11 of the European Social Charter (hereinafter "ESC") and Article 3 of the Biomedicine convention imply the right to receive medical care, but while the ESC focuses on prevention, the Biomedicine Convention emphasizes treatment. The International Covenant on Economic, Social and Cultural Rights (hereainafter: "ESCR") and the International Covenant on Civil and Political Rights (hereinafter: "CPR") are similarly closely related to the convention. ESCR Article 12 plays a similar role to the ESC section mentioned above. The right to health appears here as a fundamental human right, being supplemented by a list of detailed, enumerated examples of what signatory states must provide.[6] The CPR states that everybody has

[3] Articles 2 and 3.

[4] Article 2, paragraph 1.

[5] Article 3.

[6] ESCR Article 12 Section 2: „the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; the improvement of all aspects of environmental and industrial hygiene; the prevention, treatment and control of epidemic, endemic, occupational and other diseases; the creation of conditions which would assure to all medical service and medical attention in the event of sickness."

the inherent right to life, that all people are equal before the law and have a right to non-interference with their privacy.[7] Clearly, anybody subjected to any aspect of medical research must be able to provide or deny consent, a decision that must be respected in all circumstances. This means that "consent must be revocable anytime, without justification and harmful consequences". Article 10 of the Biomedicine Convention actually specializes CPR Article 17, with the latter enshrining the right to privacy in general, and the former specifying protection in connection with health related data. In Strasbourg on 28 January 1981, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data was signed, with the purpose to secure for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him ("data protection").[8]

It is necessary to note very briefly some thoughts about the processing of medical data. Data relating to physical and psychological health may only be handled when the patient gives their consent in writing or when specifically allowed by law. Crucially, a separate area of law deals with the informational self-determination right and the freedom of information for data collection as part of scientific research and treatment. In practice, there is often no time to obtain written consent, since medical treatment and lifesaving procedures need to be performed quickly.[9] What, then, is essential to know about the management and use of sensitive data? In medical research, the use of such data is regulated by two, independent requirement systems. One is the system of measures for the protection of personal data; the other consists of ethical rules for medical research. They are not necessarily consistent.

According to Article 24 of the Convention on the Rights of the Child, a child is entitled to the possible best health care, and medical assistance when necessary for a healthy upbringing. This approach deals with the notions already mentioned above, but there's more: research carried out on children is especially unethical, because it is the child's legal guardian who consents rather than the subject acting independently, despite the child assuming the greater risk. In medical circles it is accepted that children are not simply scaled down adults, but rather have differing physiological functions that influence the absorption rates of medicines and their effects, for example, risking greater damage to health in some cases.

Content and Interpretation of the Convention on Human Rights and Biomedicine

The convention consists of fourteen chapters.

[7] Articles 6, 16, and 17.

[8] Article 1.

[9] Páva, Hanna: *Az egészségügyi adatok védelméről általában* [On the Protection of Medical Data in General] http://www.szoszolo.hu/06tanulmanyaink/230611pava.htm (Szószóló, Alapítvány a Betegek Jogaiért).

The interests and welfare of the human being shall prevail over the sole interest of society or science.[10] This means that medical research must only be carried out on humans if national legislation has adequate regulation in place.

Hungary's law CLIV of 1997 entails regulation of public health. Paragraph 159 (1) implies the following lines and thoughts.

Research on adults with capacity to act can only be conducted if they comply with this law.

In Hungary, that means the purpose of the research must be one of the development of new or improved procedures, better understanding of diceases and pathogens or the gathering of clinical data on the effectiveness and efficiency of medical instruments, at a health facility with infrastructure appropriate for the type of research and its risks. In addition, all of the following conditions must be met:

a) The research plan has been authorized,

b) Preliminary studies have proven the effectiveness and safety of the factors being applied,

c) There are no alternative procedures with effectiveness comparable to human research,

d) The risks to the person in the course of the research are proportional to the expected benefits of the research and the significance of its aims;

e) The subject of the research has consented in writing to the research. If this is impossible due to illiteracy or disability, then oral consent is required before two witnesses with no interest in the research. The declaration of oral consent must be put into writing and signed by both witnesses. In case of an oral consenter regaining their ability to write, written confirmation of consent is required before research is allowed to continue. In absence of this, research on that person must stop.

(2) Research exposing the subject's life and physical on psychological health to disproportionate risk must not be conducted.

This relates to Article 27 of the Biomedicine Convention, which states that the treaty lays down minimal expectations, and does not exclude stricter regulation on a national level, which may include vocational provisions.

Data about the subject is a key element of medical research and its use is subject to informed consent. Council Directive 2001/20/EC defines informed consent in a similar way: a decision, which must be written, dated and signed, to take part in a clinical trial, taken freely after being duly informed of its nature, significance, implications and risks and appropriately documented, by any person capable of giving consent or, where the person is not capable of giving consent, by his or her legal representative; if the person concerned is unable to write, oral consent in the presence of at least one witness may be given in exceptional cases, as provided for in national legislation.

[10] Article 2.

All of Chapter IV of the Biomedicine Convention deals with human genetics, with one particular provision on the prohibition of selection of a child's gender: procedures capable of being used to select the offspring's gender before birth must only be performed for the detection and prevention of serious hereditary diseases. An ethical problem arises here according to *Ágnes Dósa*, in what diseases are to be considered serious enough to justify selecting a particular gender. Selecting a child's gender is dangerous from a demographic point of view,[11] since the deliberate intervention upsets the ratio of males and females born. *"*… Selective abortion has become so widespread, for example in certain countries of Southeast Asia that up to 80 million women are now "missing" from that region according to research estimates. Due to Chinese birth control politics and to customary views favouring men, China has 112 male children for every 100 females, but even India, Malaysia and Singapore far exceed the healthy ratio of 106 to 100."[12] Indeed, in India's economically more developed regions and China's Hubei province it is not unusual for 120 to 130 boys to be born per 100 girls. More recently, the problem of gender selection for economic interest has arisen. It is a statistical fact that men earn more than women in equivalent jobs. Even though unacceptable, economic considerations provide parents incentives for selecting their child's gender. When a male child reaches adult age, chances are that he will be able to take better care of his parents because of his higher earnings than a female child could. As a result, the risk of population gender ratios being upset is real.

"More male children are born in the world than females (107 boy births for every 100 girl births); this shows clearly in the gender ratio for the 0-14 year age group, with only 936 girls per 1000 boys. For those aged 15 to 64, the ratio evens out somewhat (979 women for 1000 men), due to higher mortality of middle-aged men (40-60) – a general trend in developed countries. Combined with the effect of higher life expectancy at birth for women, the ratio inverts for the over-65s, with 1273 women per 1000 men in this age group."[13]

In order to eliminate financial compensation for organ donations, Article 21 was created, prohibiting financial gain for body parts. This is entirely sound. The number of kidnappings would grow by leaps and bounds if profitmaking were permissible – the organ trade would ramp up and stopping it would be near impossible.

The Bioethics Convention is a binding international contract, and the chapter detailing the consequences violating it reflects this. The signatory states' judiciary must sanction violations of the agreement. The European Court of Human Rights may give,

[11] And nowadays, it is crime under the Hungarian Act C of 2012 on the Criminal Code. Section 170 (Altering the Gender of an Unborn Child), which reads as follows: „Any person who performs a procedure for the purpose of altering the gender of an unborn child is guilty of a felony punishable by imprisonment between one to five years."

[12] http://www.ng.hu/Civilizacio/2010/08/Felborul_a_nemek_aranya_a_vilagban.

[13] http://tamop412a.ttk.pte.hu/files/foldrajz2/ch02s02.html.

without direct reference to any specific proceedings pending in a court, advisory opinions on legal questions concerning the interpretation of the Convention.[14]

Committee on Bioethics (DH-BIO)

Set up under the direct authority of the Committee of Ministers, the Ad hoc Committee of Experts on Bioethics (CAHBI), which in 1992 became the Steering Committee on Bioethics (CDBI) has, since 1985, been responsible for the intergovernmental activities of the Council of Europe in the field of bioethics.[15] On 1 January 2012, following the reorganisation of intergovernmental bodies at the Council of Europe, the Committee on Bioethics (DH-BIO) has taken over the responsibilities of the Steering Committee on Bioethics (CDBI) for the tasks assigned by the Convention on Human Rights and Biomedicine as well as for the intergovernmental work on the protection of human rights in the field of biomedicine.[16]

All member states of the Council of Europe, and furthermore, all parties to the Biomedicine Convention outside the Council of Europe, may be represented in the commission and a vote is at their disposal.

The World Medical Association's Declaration of Helsinki and Geneva

Helsinki Declaration

The World Medical Association (WMA) adopted the Declaration in June 1964 in Helsinki. It provides basic ethical principles and directives for doctors and scientists who implement medical research carried out on humans.[17] "Although the Declaration is addressed primarily to physicians, the WMA encourages other participants in medical research involving human subjects to adopt these principles."[18] The foundation of both declarations (Helsinki and Geneva) is the individual's freedom and well-being and the weighing of risks versus benefits.

The Declaration of Helsinki adds the principle of research value and the significance of technical and scientific development. The Declaration formulates an important basic principle in connection with placebo-controlled experiments: such experiments may be ethically acceptable even given the existence of proven therapeutic techniques, when due to where absolutely necessary and scientifically sound methodological reasons it is

[14] Article 29.

[15] http://www.coe.int/t/dg3/healthbioethic/cdbi/INF_2012_4%20E%20info%20doc%20dhbio.pdf.

[16] http://www.coe.int/t/dg3/healthbioethic/cdbi/default_en.asp.

[17] http://egk.tatk.elte.hu/index.php?option=com_docman&task=doc.

[18] http://www.wma.net/en/30publications/10policies/b3/.

necessary to determine the effectiveness or safety of a prophylactic, diagnostic or therapeutic procedure; also, where a less significant aspect of a prophylactic, diagnostic or therapeutic procedure is being studied and the placebo recipient subjects are not exposed to a risk of serious or irreversible harm.19 The declaration has been amended repeatedly. The declaration positively formulates the ethical principles of medical research. It firmly states that the patient's health must be paramount for doctors and that the health of the individual should be put before the interests of science, but it also records that research is necessary for furthering science. In all research protocols it should be declared that research is carried out in accordance with the basic principles of the Declaration.[20]

Geneva Declaration

WMA's second general meeting adopted this in Geneva in 1948. "This declaration (…) is essentially a medical oath summarizing general ethical maxims. One of its points specifically refers to the sins of medicine in Nazi Germany: "I will maintain the utmost respect for human life from the time of its conception; even under threat, I will not use my medical knowledge contrary to the laws of humanity."[21]

Good Clinical Practice (GCP)

The International Conference on Harmonisation ("ICH") Steering Committee, which was created by its Expert working group, adopted GCP governing principles in May 1996. Good (Correct) Clinical Practice is the international ethical and scientific qualitative requirement system for the planning of, documentation for and reporting on clinical trials conducted on humans. These requirements ensure that the rights, safety and wellbeing of persons involved in clinical trials are safeguarded – according to the principles of the Declaration of Helsinki – and that trials supply reliable data. The aim of these governing principles by the ICH is to create a common requirement system in the European Union, Japan and the United States for facilitating the mutual acceptance of clinical data.

GCP based on the Declaration of Helsinki clears up essential concepts in the first chapter, lays down basic principles that must be taken into consideration during clinical

[19] http://www.magyosz.org/dokumentumok/Osszefoglaloesz_.pdf.

[20] Kaló, Zoltán – Nagyjánosi, László – Kovács, Gábor – Nagyistók, Szilvia: A klinikai vizsgálatok gazdasági hatásának átfogó elemzése és a hazai versenyképességének javítása [Analysis of the Economic Effects of Clinical Trials and Improving their Domestic Competitiveness]. Syreon Research Institute, 2010. 25 www.syreon.eu/FileContent?id=24.

[21] Kerpel-Fronius, Sándor: *A nürnbergi orvosper ma is élő tanulságai* [Lessons of the Nuremberg Doctors' Trial Still Valid Today]. Szent István Tudományos Akadémia Székfoglaló előadásai, Szent István Társulat, 2007. http://szit.katolikus.hu/feltoltes/Kerpel-Fronius%20Sandor.pdf.

trials. The interests of the patient are highlighted and stand above all else. It also states that any doctor conducting a trial should have expert knowledge and certification.

Institution Supervisory Body/ Independent Ethics Committee

The governing principle prescribes that a body such as these, consisting of a reasonable number of members, must validate research. A minimum requirement formulated is that there be at least five members with at least one of them having a field of interest that is primarily not scientific; moreover, there is need for a member who is independent of the institution where the trial is conducted. They may request, beyond the information granted, that further information be given such data could significantly contribute to the protection of the rights, safety and wellbeing of trial's subjects. The governing principle declares members' rights, their obligations and details the commission's procedures. It is important to write briefly about the declaration found in European Union Directive 2001/20/EC on bioethics.

Directive 2001/20/EC of the European Parliament and of the Council

The Directive on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use was passed on 4 April 2001. The governing principles are also guides for member states to follow, who had implement the Directive into national legislation by 1 May 2004.[22]

The aim of the Directive is to harmonize national regulatory frameworks for clinical trials, which is a considerable task since trials are generally not conducted in one location but in multiple member states. The governing principle coming into force had a positive effect on the safety of clinical trials performed in the EU, on ethical standards and benefited the accuracy and reliability of data, and also had a positive effect on cooperation between national authorities. The Directive refers to the Declaration of Helsinki in its basic ethical principles for research carried out on human subjects.

Conclusion

Among others, the author has dealt with the Convention on Human Rights and Biomedicine, the Geneva Declaration, the Declaration of Helsinki, Good Clinical Practice and Directive 2001/20/EC. These international documents all protect human rights. For national legal systems, the task is for detailed laws to be drawn up that must be equivalent to the international legislation and agreements.

[22] Kovács, József: *Bioetikai kérdések a pszichiátriában és a pszichoterápiában* [Bioethics in Psychiatry and Psychotherapy]. Budapest, 2006. 411. http://real-d.mtak.hu/347/1/Kovacs_Jozsef.pdf.

As we have seen, events throughout history (such as abuses) have motivated the creation of these conventions as a response. Ever evolving situations, creating opportunity for abuses will always surface with the development of medical science. An example is cloning, which is relatively new and has brought up many ethical questions.

SOME THOUGHTS ON THE POSTMODERN VIRTUALITY OF LAW

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Law is a complicated phenomenon of a human life. It is not always an obvious fact what place is dedicated for law in our history, culture and social life. We may say that the law is an inherent and non-removable element of society and state. The author really doubts that somebody would not agree with such statement. However, what can we say about it today? In the 21st century, there are a lot of newly arisen processes and phenomena, which are typical for the modern era of globalization and postmodern reconsideration of those basics, on which worldwide-civilized humanity has been relied for centuries.

This can mean that we are witnesses of a crucial moment in all humankind existence. We learned to create virtual reality, where almost anyone can realize his\her desires, ideas, goals and sometimes his\her entire life. We are not talking about a virtual reality like Internet or something related to IT technologies. We learned to live according to legal, social, cultural and business norms and regulations that are also some kind of a virtual reality, because we cannot state that such definitions as law, hope, love, rule, honour have their material presence (appearance) in some things. A law cannot be equal to a text of some legal act.[1]

Now, we can say that it is important to return to the origins. There are a lot of definitions of law. Some of them are very conservative and traditional, others are flexible and disputable. The author does not want to bring just a new empty speculation regarding the matter, but rather to clarify the situation that is currently dominant in legal theory of Euro-Atlantic civilization. Nevertheless, the globalization process, which connects all civilizations together, will spread ideas and thoughts from one society to another, so no modern state will be able to avoid an influence of mainstream legal theories and thoughts.

The material world is overlapped by ideal (virtual) world and humanity has no means to limit information spreading absolutely and stop some kind of undesirable ideology formation, if society is tended to absorb such ideas.

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[1] Even each particular legal act is not equal to its paper expression, because it is usually consisted of norms and rules, which are not material entities.

Welcome to the 21st Century

Virtue and Virtuality

As Anna Mancini states: "the traditional legal world is focused on material wealth, while in cyberspace wealth comes from human beings and not from matter."[2] It is difficult not to agree with such idea, but there are some lawyers denying that fact. Still, this is not a subject of the paper. What we should notice is that human being has several levels of existence: the physical one, psychical, social, spiritual etc. The more complicated this level is, the more virtual it is. By using the word "virtual" the author does not want to say that something becomes less real, but rather more important and fragile, so it needs more care and protection. At the same time, increasing numbers of people are using the new information technologies to participate in virtual communities or to challenge traditional notions of self and identity.

The IT technologies are just tools for human essence revealing. A human is a criterion for everything. The whole Law worldwide is just a fiction, which can be violated and its rules and norms can be changes or broken. It is just like an "*I-love-you-but-you-love-somebody-else*" type of relationship between a couple. The essence of law is that everybody will consider it proper and right, so each one will follow the rulings of law, which is partially based on moral, religious and other values. What will happen to law if each person will decide to live outside law and its regulatory functions will be no longer applicable to this person? Law will obviously die. No wonder that the word "*virtue*" and the word "*virtual*" or "*virtuality*" both have the similar origin.[3] Law should be worth to follow in order to preserve its real virtue or it shall become just a virtual fiction.

The author does not want to be criticized for not proving his statements, so historical facts shall follow next. Unfortunately, the author must bring political element to the essay and its arguments. Law and politics are tightly bound, so this should not be a problem.

The Specific Issues of International Law

Let us analyse the events, which has been taking place for several years in Eastern Ukraine. The Ukrainian-Russian conflict around the Crimea and territories of Eastern Ukraine has forced the parties that take part in it to exchange quotes or rules from international law norms, though in a question of accessory of disputed territories crucial importance is never played by legal formulas. Guns remain final instance always.

[2] Mancini, Anna: Internet Justice, Philosophy of Law for the Virtual World. Buenos Books America LLC., 2005. 41.

[3] See www.dictionary.com/browse/virtual.

This conflict cannot be solved on the basis of international law not only because the stronger side, which is Russia, can force weakness to concede disputed territories without thinking about regulations. The international law is not (or questionably) capable to decide the similar conflicts also for the reason that it is not some code with reference to the paragraphs of legal principles, and it is quite a free collection of the various and mutually contradicting to each other acts, customs and norms.

Ukraine and its supporters constantly refer to the principle of "inviolability of borders" and prove that the Crimea is Ukrainian because it currently belongs to this state, and this is the main justification of its accessory. Russians categorically send to other formula of international law, namely to "the right of the people to self-determination", answering to the American critics with a reference to a scandalous incident of the Serbian Kosovo, which has been torn off from Serbia (and, even without a referendum on this subject). From the point of view of international law, which does not represent harmonious system both the first, and the second argument, are equally well-founded. Each party appeals to the most suitable principle.

Interesting Coincidence

Usually, we are tended to think and say that law is a fairly correct reflection of moral principles in a society. Well, what would we say, if we find some suspicious facts that non-directly state and support another point of view? Let us estimate some regulations from the Penal Codes of several countries:

- Article 115. Murder: "that is wilful and unlawful causing death of another person – shall be punishable by imprisonment for a term of seven to fifteen years."[4]
- § 2332. Homicide: "Whoever kills a national of the United States, while such national is outside the United States, shall..."[5]
- Section 160. Homicide: "Any person who kills another human being is guilty of a felony punishable by imprisonment between five to fifteen years."[6]

What can we see? The vast majority of regulations and norm in penal (criminal) codes of different countries do not define a crime (in this case – a crime of intentional killing of a person) as a prohibited or unlawful act. More than that, there are no references to some moral principles, social values etc. There are only a hypothesis, disposition and sanction – the standard elements of a legal norm. No more. How can we evaluate such lacks and gaps in law? It can be understood that law is only a receptacle for values, which particular society wants and can to contribute into its laws.

[4] Criminal Code of Ukraine entered into force on 1 September 2001.
[5] Title 18 of The Code of Laws of the United States of America.
[6] Act C of 2012 on the Hungarian Criminal Code.

Universalization of Law and Cultural Relativism

Is it possible to create a globally effective and positively evolving legal system at all? Can humanity come to some worldwide substantial law, which is established on fundamental rights that are acceptable for each party on equal terms?

In order to be precise and as objective and possible, we have to agree that it is impossible to deal and successfully solve the problem of "*universalism – regionalism*" relations during globalization process of law. Unfortunately, many of modern universal rights and standards are born in Euro-Atlantic civilization and are not so pleasant for some societies. Therefore, there is a need in not only global and universal legal principles and fundamental rights, but also in specific and individual law regulations on the regional and national levels.[7] That is why modern landmarks specify only minimal requirements for national legislations, where the ones become fundamental principles rather than precise and consolidate legal norms.[8]

Nowadays, some legal, social and cultural scientists support such phenomena as "*cultural relativism"*. This system of criteria denies universal values and principles because of the obvious distinctions that are inherent in separate national, regional or local cultures. In the context of interpretation of fundamental and global human rights, the cultural relativism is shown in the statement that they are a product of the Western culture and therefore cannot be considered as universal. Within the current understanding of human rights, there are jurists and politicians (among other supporters of the cultural relativism movement) from the countries of Asia prevail (in particular, China and Iran); as a rule, this system is used by them as a counter-argument on criticism from the international organizations for an occasion of human rights violation in their countries. Most definitely, this idea has been stated by the delegation of China at the World Conference on Human Rights in Vienna, 1993: "*the countries which are at different stages of development or with different historical traditions have also various understanding and realization of Human Rights. Thus, you shouldn't believe that standards and models of Human Rights in some countries are the only one for exclusive acceptance and grant the right to demand from other countries to live according to them*."[9] As it was noted by critics of universality of human rights, hungry people without roof over the head would not think of the political rights.

Sure, but can we state that hunger person has no political rights even if s/he does not acknowledge such rights on daily basis? This is an open question and it should be deeper revealed in separate paper.

[7] Марченко М. Н [Marchenko M. N.]: *Тенденции развития права в современном мире* [The Tendencies of Law Development in Modern World], 2015. 323.

[8] Ibid.

[9] Symonides, Janusz: New Human Rights Dimensions, Obstacles and Challenges: Introductory Remarks. In: Symonides, Janusz (ed.): *Human Rights: New Dimensions and Challenges.* UNESCO, 1998. 26.

World Challenges for Law – Different Aspects

Definitely, we live in quickly and radically changing world. You can go asleep in one country and get up tomorrow in completely another country due to constitutional *coup d'etat*. Migration crisis is spread around Europe and the Member-States from the Middle East. Transnational global businesses lobby their interests and spread influence around the globe. Healthcare and education issues overflow modern developed countries, while somewhere the risks of starvation exist.

Where are we all going, you may ask? It is important to understand that the answer on this question is going to be found. The only one way to successfully deal with all problems is to adapt and be both flexible and worth in every complex situation. Modern world is changing, so should do states and its legal systems. Modern law should become postmodern, but only humanity can do it, not law itself.

The main difference between modern and postmodern states is, probably, expressed in the way of social existence on the highest level (education, healthcare, social care etc.). Thus, we consider that a modern state offer access to a good level of education and to information that is reasonably necessary for such social existence. Again, we can talk about information as a virtual entity, which exists only in human consciousness and depends on the spectator rather than on some impersonal object.

Perhaps, the postmodern law should be something like a *New Edge movement*, which eclectically absorbs everything and turns it on its own elements, but the author think that such way of law evolution will lead to a crisis of emptiness, which is actual in the sphere of cultural, moral and philosophical (ideological) values nowadays. Therefore, the postmodern law include some added value, something crucially unique, which will make it relevant for centuries.

Legal measurement of the globalized world induces reconsideration and revision of whole system of legal regulation of the international relations in various spheres. It is caused by emergence of the latest subjects of world economic communication both on national, and on supranational levels. In the conditions of globalization there is a new phase of corporate construction, search of modern forms and methods of legal regulation within a new world order, and first of all – geo-economic one. It is about a new class of the contracts, conventions, frame "laws doctrines", etc. defining new approach to taking into account interests of all participants of a world reproduction cycle, and their responsibility in the conditions of global transformation of the world. *Professor Kochetov* allocates several aspects of legal measurement of the modern world.[10]

Firstly, the law and order in modern conditions cannot be reduced unambiguously only to the international legal relations as zones of its application were considerably narrowed. The state that generates the law including international one, actually

[10] Кочетов Э.Г [Kochetov, Ernest]. *Основные характеристики глобализационного процесса и правовое измерение мира* [The Main Characteristics of the Globalization Process and Legal Changing of the World], 92-95.

delegates law-making functions to numerous economic entities. As a result, the newest model of world legal system is formed.

Secondly, a justification of the traditional legal models which have grown from outdated geopolitical understanding of a world order, and often self-elimination of lawyers from understanding of new world realities become dangerous and can slow down inclusion of any state as equal one to others in the world globalized system. For the last decades, there was a situation in which lawyers saw threat to the traditionally developed legal sciences because of pressure from economy and finance. There is a rough ripening of the new processes: formation of huge network reproduction systems, development of "*new economy*" on the basis of high information technologies (Internet economy), etc. However, legal ensuring of these processes as well as the formation of models of their legal regulation significantly lags behind.

Thirdly, globalization and as her central reflection the geo-economy and geo-finance have generated a number of the most interesting and actual problems, which solution waits for its researchers. First of all, it is about geo-economic crimes, the newest phenomenon on a boundary of the 20th and the 21st centuries. Using high geo-financial and geo-economic technologies, businessmen of global level including the states acting as ones are capable to devastate literally any national economy, dooming to deep deformation her economic and financial infrastructures. Recent financial crisis has visually confirmed such opportunity. The enterprise instincts, which have escaped to the global sphere, are restrained by nothing. It is possible to select, say, without use of weapons, practically all national income and force to the knees any national system, without being afraid of responsibility for it, though in the political sphere the world community has fulfilled system of punishment for crimes against humanity for a long time. So where to look for protection against geo-economic crimes? The legal system has practically lost track of this problem.[11]

Fourthly, in the conditions of globalization, the legal norm (or its absence) as the scientist believes, has turned into the powerful offensive weapon reflecting protection of interests of one country, group, corporation to the detriment of another. Moreover, all fight for introduction of norms, their mitigation or toughening is a reflection of political struggle for long-term domination in this or that sphere (finance, economy, industry, social, military etc.). Whether harmonization of a legal framework in the conditions of the acute fight of interests in political, military-political, financial, industrial and other spheres is possible? The answer should be looked for in the general global and constitutional doctrines, which not studied enough.

The *fifth aspect* of legal measurement of the globalized world that is considered by the scientist is the fact that geo-economic approach dictates adoption of the unified code of a world geo-economic order, and this task can be successfully solved on the

[11] Kochetov: *op. cit.*

international basis within the cooperation of theorists, methodologists, economists, lawyers, sociologists, political scientists and other experts of allied industries.

Based on the abovementioned paradigms of global measurement Kochetov allocates three tiers of system of the right and legal regulation: the national law, international law and the globalized, geo-economic law with special nature of interaction between them.[12] From the point of view of the scientist, the geo-economy (economic measurement of the global world) has acted as a new paradigm of a world order, as the brightest reflection of process of globalization.[13] Proceeding from this concept, he believes that the globalized geo-economic law, which has succeeded, the international economic law is urged to regulate geo-economic activity. The globalized geo-economic law, as well as national and international law, is a component of the world globalized legal system. Globalization of world economy creates prerequisites for formation of the political and legal superstructure that corresponding to a common economic space.

We assume that a state's laws apply only within its borders – and that, similarly, no other state's laws apply here. This is unproblematic as long as domestic transactions are at stake. However, it has even been true, by and large, for questions of public and private international law. In public international law, the idea of territorial integrity and exclusive jurisdiction remains strong – even though it allows for exceptions, and even though the idea of territoriality has been enhanced to include so-called intra-territorial effects of conduct that took place elsewhere. For example, it is now almost universally accepted that a state has jurisdiction over antitrust violations that have an effect on the state's markets, even if the conduct leading to the violation took place elsewhere. Enforcement actions by the state are, traditionally confined by a state's borders. Similarly, territoriality has traditionally played a great role for private international law (or conflict of laws), even though it does not govern absolutely. Thus, the jurisdiction of courts is mostly based on territorial connections like the defendant's domicile, or the place of a tort, etc. Territoriality also governs questions of applicable law: the law applicable to a tort, for example, has traditionally been the place where the tort occurred. Such territoriality has never been exclusive, however. Not infrequently, the applicable law is determined on the basis of non-territorial connecting factors like the parties' nationality.

This great importance of territoriality for the law is not a coincidence. Rather, it reflects the great importance that territoriality has, traditionally, had for sovereignty. Territorial integrity and sovereignty are perhaps the most important characteristics of a state. Now, globalization challenges this importance of territoriality in a number of ways. First, globalization often makes geographical distances less relevant. Not only has travel become much easier, and accessible to large numbers of people. More importantly, improved means of communication (most importantly the internet) have

[12] Ibid.
[13] Ibid.

made such travel far less necessary in many cases. The same document can now be edited at various places at the same time. Global production chains are made possible. And social interaction has undergone a qualitative change. Second, for the same reason, state borders have become less important – and less effective. Previously, it may have been possible to keep unwanted information out by simply closing borders and censoring the press. Today, given the global character of the internet, and the omnipresence of blogs and twitters, this has become much harder.

In legal scientific literature, it was truly noted that "globalization has significant effect on transformation, changes and modernization of state and legal institutes, norms and the relations at the world, macroregional and interstate levels, stimulates, accelerates and updates processes of a universalization in the field of the right."[14]

At the same time, a process of globalization impact on the rights in general, in theoretical and methodical plan differs in such features and lines as:

a) versatility of his influence on the right and its systematics based on the influences caused by the nature of globalization "*as a system integration of ideas, principles, communications and the relations*";[15]

b) fundamental and, at the same time (in the potential plan), very radical nature of influence of globalization on the law and on development of its theory. In this regard, it is far not incidental that Western researchers of this matter pay attention to a potential opportunity, and even inevitability of "*fundamental changes*" in the law, and "*in its modern theory*" indicating applications of "*pluralistic approach*" to the knowledge process of the modern law and development of its theory as the important necessity.[16]

c) big variety of ways and forms of impact of globalization on the law and its theory, of which the internationalization of the law concludes in the form of its reception, harmonization and better efficiency.[17]

d) direct and indirect (generally saying via economy and policy) impact of globalization process not only on national (interstate), but also on international law – on its character, sources, contents, "*the action mechanism*".[18]

[14] Нерсесянц В. С. [Nersesiants, V. S.] *Процессы универсализации права и государства в глобализирующемся мире. Государство и право.* [The Processes of Universalization of Law and State in Globalizing World]. *State and Law*, 2005. No. 5, 38.

[15] Куров С. В. [Kurov S. B.] *Глобализация и образование – правовой аспект. Глобализационные процессы в сфере права: проблемы правового развития в России и СНГ.* [Globalization and Education – Legal Aspect. Globalizing Processes in the Sphere of Law: Problems of Legal Development of Russian and CIS]. Материалы научно-практической конференции], 2001. 29.

[16] Twining, William: *Globalisation and Legal Theory*. Cambridge University Press, Cambridge, 2000. 13.

[17] *Правовая система России в условиях глобализации и региональной интеграции: теория и практика.* [Legal system of Russian in Globalization Conditions and Regional Integration: Theory and Practice.] In redaction of Поленина С.В. [Polenina, S. V.], 2006. 20

[18] Лукашук И. И. [Lukashuk, I. I.] *Глобализация, государство, право. XXI век.* [Globalization, State, Law. XXIth century], 2000. 173.

Globalization of Law

Globalization has some impact not only on the nature of the rights, but also on its content, institutional and functional role, as well as it aims the challenges and objectives. Of course, law, no matter how it is understood and perceived in a given society, it always remains the law. It always contains a generally binding rules of conduct, no matter where they came from and whoever they happen to be secured. It has always acted as a regulator of social relations, and has many other features.

However, as we know, the right has never remained the same at a particular stage of development of society and the state features, and with constantly changing and evolving social relations. This applies to every entity, as well as all other aspects of the legal matter, including its formal-legal, political, ideological, information and other aspect.

On the hypothetical question of what changes in the content of the law as far as exposure to globalization processes, it is possible to give a brief answer. It consists in the fact that the national component in domestic law is constantly supplanted by the global component and, accordingly, the domestic legal standards, filling a formal-legal and other content of the national law with the development of integration processes are consistently superseded by supranational, global standards.

The technical and legal terms, this is done in two ways – namely, by direct transfer of the existing legal standards with a global or regional level, as is the case, for example, in the European Union, at national level, or by activating the existing national legal standards with supranational standards. It should be noted that standardization as a phenomenon in one way or another is not limited to legal, but also many other areas of society such as environmental, social, political, spiritual, etc.[19]

However, the law is the most vivid manifestation. Its concrete expression of the legal standardization, as correctly notices in the scientific literature, is the first and the foremost thing to establish in the framework of international organizations' common minimum standards and requirements for the legal regulation of certain public relations; to establish uniform requirements, relating to the rights and freedoms of man and citizen; in the definition and establishment of "legal standards in the field of justice functioning in entrepreneurial activity in the financial sector, etc."[20]

Naturally, along with the change of formal legal ("standardized") aspect of the content of the rights, to some extent, changes and other aspects, as well as subjected to the well-known "adjusting" the goals, objectives and the very purpose of law. As in nature, the content of the rights as far as the development of the globalization process comes, thus, logically, more space will occupy at national, domestic, and supranational beginning. The globalization process has a definite influence not only on the nature, content and purpose of the rights, but also on its sources or forms of law. This impact

[19] Toffler, Alvin: *Third Wave*. 2002. 89-103.
[20] Marchenko: *op. cit.* 9-10.

affects all levels of the existence of a legal matter – namely, at the global, regional and domestic (national). The sources of law are directly linked mainly to the law-making activities of supranational and international institutions, and at the national level – as before – mainly from the law-making activity of the state. At the present time, as evidenced by social practice, the strongest and most significant impact from globalization have undergone regional and national sources of law.

A good example of the impact of globalization on regional sources of law can serve a process of formation and development in the post-war period, various sources of European Union law – such as the founding treaties; treaties amendments and additions to the constituent documents; the accession treaties of the new states to the European Union; precedents created by the European Court of Justice; and other acts.

Conclusion

The process of postmodern world creation does not seem to be easy, thought we can do our best in order to be well prepared to all possible challenges. As lawyers, we should draw our attention mostly to the problems of postmodern state and law. Law becomes more interactive, it speared deeper into our lives and this give us opportunity to form a better virtual law, which should not be associated with cyberspace only, but rather with all aspects of humankind existence.

The postmodern law will be fair and worth only, if it is based on human being rather than on materialistic entities or relations. There is no need or reason to be desperate that law is just a fiction and has no real force to maintain state functioning and protect private personal life, because in the postmodern world each one could be a creator of his\her law, which has metaphysical essence in particular person, who is a subject of rights and freedoms.

Globalization process should be met with careful but optimistic intentions. There is no need to afraid some intolerance or rights violation by representatives of other cultures that are naturally overlapped in the postmodern world. We can say that there is no law, where is love, because these two things exclude each other, but, unfortunately, humanity has not learned to live under the rules of eternal love (which is obviously a dream that could not be realised), so we need to improve and properly direct the evolution of modern law and state theory in order to guarantee the better life for our ancestors in the inevitable postmodern future.

NATIONALE EINHEIT ODER ETHNISCHE VIELFALT?

Die poliethnischen Politiken und Homogenisierungspolitiken sowie deren Folgen

Éva Gulyás*

Sowohl im Diskurs der Politikwissenschaft als auch in dem des öffentlichen Lebens bzw. der Politik mögen sich viele extrem über die Gegenwart und Zukunft des Nationalstaates äußern. „Der Nationalstaat ist vorbei" – sagt die eine Seite, und erhält die folgende Reaktion von der anderen: „im Gegenteil, er erlebt sogar seine Renassaince". Die Debatte dauert nunmehr seit drei Jahrzehnten an.[1] Um in der Debatte Stellung zu nehmen, muss man jedoch – meiner Meinung nach – nicht drei Jahrzehnte, sondern drei-vier Jahrhunderte prüfen und die derzeitigen Krisenphänomene unter Berücksichtigung der historischen Tendenzen beurteilen.

Die Beurteilung des historischen lokalen Wert des Nationalstaates hängt natürlich auch auf diese Art und Weise davon ab, welche Stellung man in einigen wichtigen Fragen der Staatstheorie nimmt: Zum Beispiel davon, was wir über Globalisation, Souveränität und sogar über den modernen Staat selbst denken. Hier können diese aber offensichtlich nur indirekt betroffen werden. In dieser Studie versuche ich, die zweifellos vorhandenen Krisenzeichen des Nationalstaates um drei – meiner Meinung nach akut zu betrachtende – Probleme herum zu konzentrieren und in Bezug auf diese die Situation am Anfang des 21. Jahrhunderts zu beurteilen.

Der eine Problemenkreis betrifft, ob der poliethnische Nationalstaat – sogar der in einigen Ländern teils davon ausgewachsene multikulturelle Nationalstaat – Homogenität von einem gewissen Grad erschaffen kann, der zum einheitlichen Handeln eines Volkes genügend ist. Dafür muss vor allem der Homogenisierung

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[1] Nur als Beispiel verweise ich auf zwei charakteristische Standpünkte. In Bezug auf das Konzept „das Ende des Nationalstaates" siehe Ohmae, Kenichi: *The End of the Nation State. The Rise of Regional Economies*. New York, Free Press, 1995. Zu dem Standpunkt der anderen Seite siehe Hirst, Paul – Thompson, Grahame – Bromley, Simon: *Globalization in Question. The International Economy and the Possibilities of Governance*. Polity Press, 1996, 3. überarb. Aufl. 2009. Das *Ende des Nationalstaates* – das ebenso naiv klingt wie Fukuyamas übereilte, dann schnell zurückgenommene bekannte These über das *Ende der Geschichte* – kann offensichtlich im Kontext der Globalisierung sowie im Zusammenhang mit Souveränität widerlegt werden.

erstrebene Nationalstaat in Kontrast zu dem polietnischen Nationalstaat gestellt werden. Der andere Problemenkreis betrifft, mit was für einem Nationsbegriff der Staat verbunden werden soll, und ob die heutigen Staaten auf institutioneller Ebene den ethnisch bzw. kulturell erweiterten Nationsbegriff erfassen sowie handeln können. Und schließlich der dritte Problemkreis ist wie folgt: kann der zu Multikulturalismus tendierende poliethnische Staat als Nationalstaat betrachtet werden? Bei der Analyse dieser Fragen ist man Teilnehmer in den verschiedenen sprachlichen Diskursen, in denen die Bedeutungen der einzelnen Begriffen miteinander nicht unbedingt kompatibel sind, deswegen weise ich als Ergänzung auf die einzelnen semantischen Elemente des in der Studie benutzten Begriffssystems hin.

Der Unterschied zwischen dem homogenisierenden und dem poliethnischen Nationalstaat

Der konventionelle Begriff des Nationalstaates impliziert, dass die Verbindung zwischen dem Staat als Institution und der Nation als historische, kulturelle bzw. soziale Einheit auch in dem Sinn notwendig ist, dass die Verbindung von mindestens einem Kriterium einer Art „Nation" und einer Art „Staat" jeden Nationalstaat charakterisiert. Letzlich und in einer verschärften Art und Weise würde das bedeuten, dass *eine Nation einen Staat* bildet, und umgekehrt, dass *ein bestimmer Staat der Staat einer einzigen Nation* ist. Dagegen steht es fest, dass nur ungefähr 5-7% – anderen Schätzungen zufolge zirka 10% – der 195 tatsächlich existierenden Staaten diese Möglichkeit erfüllt. Diese sind die sog. homogenischen Nationalstaaten.

Die Untersuchung der Homogenitätsproblem ist in der Staatswissenschaft nicht eine ungewöhnliche Frage. Erstmal wurde es von Hermann Heller in der Zeit der Weimarer Republik aufgeworfen, als er behauptete, dass die Möglichkeit zur *politischen Einheitsbildung* von der *sozialen Homogenität* abhängt. Damit vermutete er auch, dass soziale Homogenität einen gewissen Grad hat, „unter" dessen demokratische politische Einheitsbildung überhaupt nicht möglich ist. Es ist zwar wahr, dass Heller dieses Problem in Bezug auf die „soziale" Homogenität untersuchte und auf die politische Einheit schaffenden demokratischen Institutionen konzentrierte, aber seine Auffassung kann – meiner Meinung nach – auch in Bezug auf die nationale Homogentiät anregend sein. Es lohnt sich, seine Argumentation im Zusammenhang mit dem „System der Willensvereinigung" gründlicher zu betrachten.

„Das Volk als Vielheit soll sich selbst bewust zum Volk als Einheit bilden. Ein bestimmtes Maß sozialer Himigenität muß gegeben sein, damit politische Einheitsbildung überhaupt möglich sein soll. Solange an die Existenz solcher Homogenität geglaubt und angenomment wird, es gäbe eine Möglichkeit, durch Diskussion mit dem Gegner zur politischen Einigung zu gelangen, solange kann auf die Unterdrückung durch physische Gewalt verzichtet, solange kann mit dem Gegner

parliert werden. Carl Schmitt ist deshalb weit davon entfernt, das „geistige Zentrum" des Parlamentarismus dadurch zu treffen, daß er, gefangen von den irrationalen Reizen des Gewaltmythos, als die ratio des Parlaments den Glauben an die Öffentlichkeit der Diskussion und den Glauben an Wahrheitsfindung durch freie Meinungskonkurrenz bezeichnet. Solche begründung mag ehemals einigen rationalistischen Apologeten und noch mehr den heutugen Gegnern des Parlamentarismus willkommen gewesen sein. Tatsächlich ist die geistesgeschichtliche Basis der Parlamentarismus nicht der Glaube an die öffentliche Diskussion als solche, sondern der Glaube an die Existenz einer gemeinsamen Diskussionsgrundlage und damit die Möglichkeit eines fair play für den innerpolitischen Gegner, mit dem man sich unter Ausschaltung der nackten Gewalt einigen zu können meint. Erst dort, wo dieses Homogenitätsbewußtsein verschwindet, wird die bis dahin parlierende zur diktierenden Partei. Von einer größeren oder geringeren sozialen Homogenität ist also die größere oder geringere Möglichkeit einer politischen Einheitsbildung, die Möglichkeit einer Repräsentationsbestellung und die größere oder geringere Festigkeit der Stellung der Repräsentanten abhängig. Es gibt einen gewissen Grad von sozialer Homogenität, ohne welchen eine demokratische Einheitsbildung überhaupt nicht mehr möglich ist. Eine solche hört dort auf, wi sich alle politisch relevanten Volksteile in der politischen Einheit in keiner Weise meh wiedererkenen, wo sie sich mit den staatlichen Symbolen und Repräsentanten in keiner Weise mehr zu indentifizieren vermögen. In diesem Augenblick ist die Einheit gespalten, sind Bürgerkrieg, Diktatur, Geburt der kontinentalen Koalitionsregierungen, ihre kurze Dauer, sowie ihr Mangel an durchgreifender Wirkung sind die handgreiflichsten Symptome einer unzulänlichen sozialen Homogenität und damit höchst bedenkliche Krisenzeichen für unsere Demokratien."[2]

Diesen Gedankenweg folgend sagt man folgendes: zur Entstehung der politischen Einheit des Nationalstaates muss es nationale Homogenität von einem gewissen Grad sein, der das Minimum von „Wir"-Bewusstsein und den aktualisierenden Gemeinschaftswille erschafft. Möchtet man es aber nicht aus der psychologischen Perspektive betrachten, dann die Frage ist, wann eine staatsbildende Gesellschaft als national homogen interpretiert werden kann.

In dieser Frage kann man zwei Methoden anwenden: Während der Analysen versucht man, die Grenzen, wo die Verbindung von mehreren Staaten die nationalstaatlichen Natur des Staates noch nicht ausschließt, entweder eine Art *quantitatives* Prinzip folgend zu bestimmen, oder sucht man nach einem *qualitativen* Kriterium.

Die „quantitative" Betrachtungsweise ist allgemeiner. Ihre Notwendigkeit formulierte Ignác Romsics wie folgt: Laut einem „weit verbreiteten Sprachverbrauch" stellt „der Nationalstaat Staate dar, deren Bevölkerung national (ethnisch-sprachlich) mehr

[2] Hermann Heller: Politische Demokratie und solziale Homogeniät. in: *Probleme der Demokratie.* Politische Wissenschaft. Schriftenreihe der Deutschen Hochschule für Politik in Berlin und des Instituts für Auswärtige Politik in Hamburg. Heft 5., Berlin-Grunewald, Dr. Walther Rotschild, 1928. S. 39-41.

oder wenig homogen ist. So ein Staat existiert aber nicht und gab es auch nie in der modernen Geschichte – formulierte der mitteleuropäische, ost- und südosteuropäische Beziehungen forschende Historiker –, in dem überhaupt keine nationalen Minderheiten leben. Die Bestimmung des Homogenitätsgrades ist also fundamental."[3] Die Frage dieses Grades analysierte Romsics mit Hinweis auf das Werk von Georg Brunner wie folgt:

Georg Brunner „hat vor kurzem vorgeschlagt, nur die Staten als Nationalstaat zu bezeichnen, in denen der Anteil der Minderheiten 10 Prozent nicht übersteigt, und im Fall der Minderheit(en) über 10 Prozent die Bezeichnung Nationalitätenstaat zu benutzen. Akzeptiert man diese Grenze, können nicht nur die Staaten in Ostmitteleuropa bzw. Südosteuropa sondern auch die überwältigende Mehrheit der Staaten in der Welt als Nationalstaat bezeichnet werden, obwohl eine 65-70-prozentige staatsbildende Mehrheit in den seltesten Fällen sich so berücksichtigt, dass die von ihr erschafften rechtlichen-politischen Rahmen keine nationale Charakter haben. Akzeptiert man also, dass der Begriff Nationalstaat sich nicht nur auf die objektive statistische Lage sondern auch auf die politische Einstellung der nationbildenden dominanten Mehrheit bezieht, muss die statistische Schwelle vermindert werden. In Kenntnis sowohl der objektiven als auch der subjektiven Faktoren [...] wird deswegen jeder Staat als Nationalstaat betrachtet, in dem der Anteil der staatsbildenden dominanten Mehrheit mindestens zwei Drittel der Gesamtbevölkerung erreicht und das andere Drittel in Minderheits- und nicht in nationaler Gemeinschaftsposition ist. Die von Brunner vorgeschlagte 10-prozentige Grenze wird folgendermaßen akzeptiert: falls man im Rahmen des Begriffes Nationalstaat differenzieren möchte, bezeichnet man die Staaten mit 90-prozentiger oder mehr Homogenität als homogenischer Nationalstaat und die mit einem Minderheitenanteil von zwischen 37 und 10% einfach als Nationalstaat bzw. nationaler Staat."[4]

Das scheint zweiffellos wie eine Art „Zahlenspiel"[5]. Portugal bleibt somit als homogener Nationalstaat betrachtet, denn es wird 99% von Portugiesen beherbergt.

[3] Ignác Romsics: Nemzet, nemzetiség és állam Kelet-Közép- és Délkelet-Európában a 19. és 20. században [Nation, Nationalität und Staat in Ostmittel- und Südosteuropa im 19. und 20. Jahrhundert]. Budapest, Napvilág Kiadó, 1998. S. 15.

[4] *Ebenda*, S. 15.

[5] Der Ausdruck weist darauf hin, dass auf quantitativer Grundlage, aus Zahlen ausgehend die Fragen der Nationalstaat nicht gelöst werden können. (Für den Ausdruck „Zahlenspiel" [„számháború"] siehe Péter Takács: A nacionalizmus és a nemzetállam eszméje [Der Nationalismus und die Idee des Nationalstaates]. In: *Államelmélet I.* [*Staatslehre I.*] Hg.: Péter Takács. Szent István Társulat, Budapest, 2008. S. 338.) Eine weitere Angabe zur Frage der Zahlen : „Eine 1971 durchgeführte Umfrage, in der 132 Staaten geprüft wurden, hat folgendes ergeben:

1.) Nur 12 Staaten (9,1%) können nachweislich als [homogener] Nationalstaat betrachtet werden.

2.) Im Fall von 25 Staaten (18,9%) gehört mehr als 90 Prozent der gesamten Bevölkerung des Staates zur Nation oder zur potentiellen Nation; gleichzeitig lebt auch eine beträchtliche

Belgium ist aber als „nationaler Staat" betrachtet, weil 45-50% der Bevölkerung in flämischsprachigen, 45-49% in belgisch-französischsprachigen und 1% in deutschsprachigen Gemeinschaften lebt. Wie soll aber der *Plurinationaler Staat Bolivien* (*Estado Plurinacional de Bolivia*) behandelt werden, wo etwa 55% der Bevölkerung Indianer, 30% Mestize und 15% Kreole bzw. (laut lokaler Definition) „Weiß" ist? Man muss nicht so fern gehen: Wie soll das Vereinigte Königreich behandelt werden, wo 87% der die Bevölkerung ausmachenden Weißhäutigeren sich teils als Brite (einschließlich Schotte oder Waliser), teils als Ire betrachtet, aber niemand kann beantworten,[6] ob der „englischer Staat" Nationalstaat ist, und wenn ja, wessen Staat es it, wenn nicht, dann warum nicht?

Aus der Perspektive des nationalen politischen Denkens ist Großbritannien ein sensibles Beispiel, denn es ist Beweis dafür, dass die verschiedenen Spaltungen (mit dem englischen Ausdruck: *cleavage*) in den westlichen Gesellschaften sich auf Tausende Weise überlappen. Neben der oben mit Hellers Theorie gezeigten „*sozialen Spaltung*" und der in dem Nationsbegriff immer latent vorhandenen „*ethnischen Verteilung*" (siehe die Unterscheidung zwischen Indianern, Mestizen und Weißen in dem vorherigen Beispiel) kann es auch eine „Spaltung nach nationalen Kulturen" geben, in der es nur Spuren von Verschiedenheiten gibt, denn eine der dominanten Gemeinschaften die als „peripher" betrachteten Gemeinschaften akkommodiert hat. Ungefähr sowas ist übrigens beispielsweise in Frankreich geschehen, und ist in den letzten neunzig Jahren in Rumänien auch zu beobachten. In Bezug auf Spaltungen möchte ich auch darauf hinweisen, dass in Hinsicht auf den Multikulturalismus am Ende des 20. Jahrhunderts kann auch eine vierte, nämlich *religiöse Spaltung* eine Rolle spielen. Obwohl die europäische Staatsentwicklung ein jahrhundertenlanger Säkularisierungsprozess ist und hat dieses Problem durch die Normalisierung der Beziehung zwischen Staat und Kirche pazifiziert, wurde sie durch der Erscheinung von Islam in den europäischen Großstätten in der muslimischen-christlichen Dimension in den Mittelpunkt gestellt.

Jedenfalls war Homogenisierung eine der in ihrer frühen Phase allgemein zu betrachtenen Grundtendenzen des Nationalstaates: das Erschaffen von einsprachlicher Bevölkerung mit denselben nationalen Gefühlen und derselben Kultur der national verschiedenen Bevölkerung. Allerdings ist es unbestritten, dass diese Homogenisierung – nach einer gewissen Zeit – dem Untergang geweiht wurde und zu Katastrophen

Zahl von Minderheiten innerhalb der Staatsgrenzen.

3.) In weiteren 25 Staaten (18,9%) gehört 75-89 Prozent der Bevölkerung zur Nation oder zur potentiellen Nation.

4.) In 31 Staaten (23,5%) gehört 50-75 Prozent der Bevölkerung zur größten ethnischen Gruppe.

5.) In 39 Staaten (29,5%) gehört weniger als die Hälfte der Bevölkerung zur größten ethnischen Gruppe."Connor, Walker: Nemzet, állam, nemzetállam [Nation, Staat, Nationalstaat]. In: *Világosság*. 1998. 8–9. S. 646.

[6] Es ist natürlich übertrieben; siehe z. B. Parekh, Bhikhu: The Future of Multi-Ethnic Britain. Report of the Commission on the Future of Multi-Ethnic Britain. Profile Books, 2000.

geführt hat. In dieser Hinsicht kann wieder auf das Werk von Ignác Romsics verweist werden.[7] Natürlich ist es nicht zu behaupten, dass jede homogenisierende Tendenz zu extremen Ergebnissen führt, aber es lässt sich auch nicht leugnen, dass die Grundrichtung der Homogenisierung das in dominante Position Bringen eines Volkes oder einer Nation in einem gewissen politschen System ist. Dessen extremste Variante ist die Theorie über die Herrschaft einer Rasse, jedoch lässt es sich nicht zu behaupten, oder ist eine übertriebene und verdächtige Behauptung, dass Rassismus notwendigerweise die extreme Variante des Nationalismus (statt Chauvinismus) ist.

Die Mittel der Gewährleistung der nationalen Homogenität sind wohl bekannt. Sowas war zum Beispiel die mehr oder wenig friedliche oder mehr oder wenig gewaltsame Assimilation, die Vertreibung, Einbürgerung und Neuansiedlung von Völkern (mit einem etwas euphemistischen Ausdruck: die sog. Bevölkerungsbewegung). Am Ende des 19. Jahrhunderts und in der ersten Hälfte des 20. Jahrhunderts wurde diese Politik – auf ethnischer Ebene – besonders gewaltsam: die autoritären und totalitären Staaten haben nicht einfach Völker deportiert, eingebürgert und neuangesiedelt, sondern haben den territorialen und zahlenmäßigen Anteil von Volksgruppen beschränkt (*ethnische Säuberung*), wollten und haben sie verschwinden lassen (*Völkermord*) oder ihre Kultur eliminieren (*Ethnozid*), um die Veränderung des Staatsgebietes bzw. Grenzen sowie die Einheit schaffenden Sprachgesetze nicht zu erwähnen.

Die homogenisierende Politik hat aber in Westeuropa nach dem Zweiten Weltkrieg im Prinzip eine Niederlage erlitten, und – im Gegensatz zu Mittelost- und Südosteuropa – das nationale politische Denken hat angefangen, die minimale Einheit *durch Institutionen* zu erschaffen. Solche sind zum Beispiel die Vetorechte auf nationalen

[7] „Staatliche Homogenisierung vor der Geburt der modernen Massengesellschaften – beispielsweise in Frankreich, wo schon 1539 königliche Verordnung die Verwendung von nicht-französischen Sprachen sowie von Dialekten außer dem standardisierten Französischen auf allen Ebenen der Verwaltung verbot – war im Allgemeinen erfolgreich. Die Versuche im 19-20. Jahrhundert – zum Beispiel das Erzwingen des Deutschen in der Habsburgermonarchie, des Ungarischen in Ungarn oder des Russischen bzw. Preußischen in den polnischen Gebieten sowie die besonders verspäteten Versuchen in den neuen Nationalstaaten zwischen und nach den Weltkriegen – waren jedoch ausnahmslos fehl am Platz. Nach den Scheitern von fast zwei Jahrhunderten kann es als Regel festgestellt werden, dass die Politik der gewaltsamen Assimilation für die Änderung der Identität von kulturell integrierten, national bewussten und politisch mobilisierten bzw. zu mobilisierenden Minderheiten – z. B. die meisten heutigen Nationalitäten in Ostmittel- bzw. Südosteuropa – nicht geeignet ist." Ignác Romsics: *Nemzet, állam, régió* [*Nation, Staat, Region*]. *Tanulmányok Erdélyről és Kárpát-medence interetnikus kapcsolatairól a 19-20. században* [*Studien über Siebenbürgen und die interethnische Beziehungen des Karpatenbeckens im 19-20. Jahrhundert*]. Klausenburg, Komp-Press Kiadó-Korunk, 2013. S. 235. Ich möchte bemerken, dass ich nicht alle der Aussagen von Romsics teile. Die Fortsetzung des obigen Zitates – „Wenn und wo die führende Elite zum Mittel der gewaltsamen Assimilation greift, macht es nicht aus der Überzeugung, dass dadurch die sprachliche-kulturelle Homogenität ihres Landes möglich ist, sondern aus dem Grund, denn er kann mit dieser Politik die Aufmerksamkeit von anderen Problemen ablenken, und damit hofft sie auf die Verstärkung bzw. Ersetzung ihrer instabilen oder nicht vorhandenen Legitimität" *(ebenda)* – ist beispielsweise nicht unbedigt überzeugend.

und ethnischen Grundlagen, die parlamentarische Vertretung von nationalen Minderheiten sowie im Allgemeinen die verfassungsmäßigen Institutionen des Minderheitenschutzes, die Minderheitenrechte, der Föderalismus, dann der Regionalismus usw. Es wurde also als denkbar betrachtet, dass der „nationale" Wille eines zum Staat gewordenen Volkes nicht durch die Homogenität der Quelle des Willens, sondern durch das effektive Funktionieren der politischen Repräsentation entsteht. Und dieses System hat funktioniert: Seit 1945 gibt es im Prinzip Frieden in Westeuropa, und zwar nationale Konflikte bzw. Spannungen (z. B. im Baskenland, Nordirland oder Belgien) noch existieren, führen zu keinen inneren oder internationalen Konflikten; sie sind also vernachlässigbar. In der Ära nach dem Zweiten Weltkrieg bzw. dem Kalten Krieg war Mittel- und Osteuropa (das ehemalige Jugoslawien, Moldau, die Ukraine, die Halbinsel Krim) der Schauplatz der lokalen Kriege, der Unsicherheiten sowie der von der staatlichen Autorität aufzuhaltenden ethnischen Konflikte, d. h. die Region, die immer noch auf dem Weg der Homogenisierung des Nationalstaates war.

Für den westlichen Erfolg – unter anderem – war es erforderlich, das genealogisch-ethnishe Element aus dem Nationsbegriff zu entfernen, d. h. die alten Formen des nationalen Denkens an diesem Punkt zu neutralisieren. Das kann mit folgendem Beispiel veranschaulicht werden: im traditionellen Nationalismus ist eine polnisch-litauische Union oder die Österreichisch-Ungarische Monarchie ohne Schwierigkeit denkbar, aber eine muslimisch-wikingere Föderation oder eine friesische-hinduistische Personalunion kaum. Den mentalen Schwung dieser scherzhaften (oder so gedachten) und ein bisschen schwerfälligen Beispiele wird natürlich plötzlich verhindert, wenn man bedenkt, wie effektiv die skandinavischen Gemeinschaften – beispielsweise – Äthiopier und aus anderen Ländern Subsahara-Afrikas flüchtende Ethnien integrieren können bzw. könnten, und dass – lange davor – Österreich-Ungarn das galizische Judentum relativ erfolgreich assimiliert hatte. Außerdem soll man auch nicht vergessen, wie gut die englische Gesellschaft mit der friedlichen hinduistischen Bevölkerung in einzelnen Bezirken Londons zusammenlebt. Diese Beispiele sollen die wahre Möglichkeit erläutern, dass im Fall von bestimmten Bedingungen auch aus einer ethnisch heterogenen Bevölkerung politische Einheit gebildet werden kann. Für die politische Einheitsbildung – falls bestimmte institutionelle Bedingungen gegeben sind und andere Umstände deren Chance nicht verschlechtern – ist homogenisierende Nationalitätenpolitik nicht notwendig.

Meine erste Behauptung ist also, dass poliethnische Nationalstaaten, die sich um nationale Homogenisierung nicht bemühen aber das Entstehen von kulturellen Dominanzen bzw. Peripherien nicht verhindern, die Voraussetzungen der staatlichen Einheit bis zum Erscheinen[8] des Multikulturalismus – durch die Mittel

[8] Über Multikulturalismus im Allgemeinen siehe Margit Feischmidt (Hg.): *Multikulturalizmus* [*Multikulturalismus*]. Osiris Kiadó-Láthatatlan Kollégium, Budapest, 1997.; als knappe Zusammenfassung siehe Offermanns, Mike: *Zwischen Nationalität und Multikulturalität*. GRIN Verlag, München, 2002.; im Zusammenhang mit der Einwanderung siehe Ariëns, Elke –

der Repräsentation und des Rechtsschutzes – erfolgreich geschafft haben. Multikulturalismus hat aber die kulturelle, politische und sogar rechtliche Autonomie – einschließlich sogar die „Einschlüssen" (z. B. die Durchsetzung von muslimischem Recht von *Scharia*-Gerichten in den Vororten von Brüssel und London) – der Teil der westlichen Gesellschaften gewordenen, auf ethnischen Grundlagen bestehenden ethnische Gruppen „östlicher" Herkunft ermöglicht, damit angefangen, den Nationalstaat im poliethnischen Sinn zu verändern, was zur Entstehung zahlreicher akuter Probleme geführt hat.

Zusammenfassend kann festgestellt werden, dass in Bezug auf ihre Leitlinien Nationalstaaten zwei große Ären hatten. Seit den 1990er Jahren fängte eine dritte Ära an, die zweite zu ersetzen; die wird hier in Ermangelung eines Besseren als multikulturelle Politik verfolgender Nationalstaat bezeichnet. Diese hat Probleme aufgeworfen, die auch von dem institutionellen System der zweiten Ära nicht gelöst werden konnten.

Fraglich ist aber, ob Multikulturalismus eine Ära des Nationalstaates oder Anfang des neuen Stadiums der Staatsentwicklung ist, dessen Schicksal – Erfolg oder Untergang – noch Zukunftsmusik ist. Die Frage betrifft hier (noch) nicht die Zukunft des Multikulturalismus, sondern was für ein Nationalstaat der multikulturelle Politik verfolgende Nationalstaat ist. Man kann „multiethnisch" sagen. Es wirft aber eine Reihe von neuen Fragen auf.

Nationalstaaten im Kontext der Ethnien

Wenn Nationalstaaten von „Nationen" gebildet werden, was wird von „Ethnien" gebildet? Ethniestaaten vielleicht? Da sowas gibt es nicht, die Frage muss wie folgt beantwortet werden: auch Ethnien bilden Nationalstaaten, und zwar ethnische Nationalstaaten. Wer aber den Begriff „ethnische Nationalstaaten" benutzt, denkt in der Regel an die mehrere Nationen umfassenden Nationalstaaten, die eventuell multiethnische Politik verfolgen.[9] Nun, im Fall von solchen Behauptungen müssen vor

Richter, Emanuel – Sicking, Manfred (Hgg.): *Multikulturalität in Europa: Teilhabe in der Einwanderungsgesellschaft*. Bielefeld, Transcript Verlag, 2013. Zum Begriff siehe Neubert, Stefan – Roth, Hans-Joachim – Yildiz, Erol (Hgg.): *Multikulturalität in der Diskussion. Neuere Beiträge zu einem umstrittenen Konzept*. Wiesbaden, VS Verlag für Sozialwissenschaften; Auflage, 2008. Zur ungarischen Fachliteratur siehe Gergely Egedy: (Multi)-kultúra – konzervatív olvasatban [(Multi)-kultur – in konservativer Lesung]. In: *Konzervativizmus az ezredfordulón* [*Konservativismus an der Jahrtausendenwende*]. Magyar Szemle Könyvek, Budapest, 2001. S. 222-240 und A multikulturalizmus kihívása: értjük-e Európát? [Die Herausforderung des Multikulturalismus: Verstehen wir Europa?] In: *Kommentár*. Nummer 2/2016, S. 73-86.

[9] Aufgrund der ethnischen Erneuerung der Nationen (siehe unten) wurde das Wort *Ethnie* so weit verbreitet, dass in vielen Analysen schon statt *Nation* verwendet wird. Siehe zum Beispiel das Werk von László Szarka, in welchem der Autor eigentlich an die Nationalitätenpolitik der von mehreren Nationen gebildeten Staaten, d. h. Nationalstaaten denkt, während über die aus mehreren „Ethnien" entstehenden Nationalstaaten spricht; vgl. László Szarka: *A multietnikus*

allem die Begriffe – mindestens ungefähr – geklärt werden. In diesem Bereich ist die Definierung und präzise Formulierung des Problems schon dann ein Fortschritt, wenn endgültige Antworte für die gestellten Fragen eventuell nicht zu finden sind.

Das Problem steht nicht darin, ob der Begriff Ethnie festgelegt werden kann,[10] sondern wie der Ethnienbegriff mit dem Begriff des Nationalstaats verbunden ist. Dieses Problem stellt sich auch in dem traditionellen nationalen politischen Denken, aber gewinnt an wahre Wichtigkeit in dem dritten Stadium des Nationalstaates laut der oben genannten Staffelung. Für Klärung muss man natürlich hier auch auf mehrere Jahrzehnte zurückblicken.

So sehr der moderne Nationsbegriff vielfältig ist – zum Beispiel: Portugiese ist, wessen Vorfahren Portugiesen sind, wessen Gefühle portugiesisch sind, wer Portugiesisch spricht, wessen Interessen der portugiesische Staat anzeigt, wen die Geschichte in die portugiesische Einheit zusammenschmiedete usw. –, soviel kann trotz der Vielfalt behauptet werden, dass die Verbindung[11] der „Nation" zu dem Staat verschieder Art ist, als die Verbindung einer „Ethnie" (im traditionellen Sinne) zu dem Staat. Es zeigt sich auch darin, dass Ethnien – im Vergleich zu der den Nationalstaat bildenden Nation bzw. Nationen – manchmal mit „Minderheiten" bezeichnet werden. Es wird gelegentlich aufgeworfen, ob Ethnien fähig sind, selbtständig Nationen zu bilden. Zum Beispiel am Anfang der modernen Staatswissenschaftsliteratur, d. h. zu Beginn des 20. Jahrhunderts, wurde von Zeit zu Zeit aufgeworfen, dass es Nationen gibt (früher wurden sie im Ungarischen manchmal als „Nationalitäten" [nemzetiségek] bezeichnet), die *unfähig sind, Staaten zu bilden.*[12] Es zeigt wohl den Radikalismus dieser

nemzetállam 1918-1992 [*Der multiethnische Nationalstaat 1918-1992*]. *Kísérletek, kudarcok és kompromisszumok Csehszlovákia nemzetiségi politikájában* [*Versuche, Niederlagen und Kompromisse in der Nationalitätenpolitik von Tschechoslowakei*]. Bratislava, Kalligram, 2016.

[10] *Ethnie* ist – mindestens mit relativer Pünktlichkeit – auch nicht dann unmöglich zu bestimmen, wenn man weiß, dass es – wie bei dem *Nations*begriff – keinen *Ethnien*begriff gibt, der jede Kritik erträgt. Zum Beispiel die als die Nation verschlossenere, auf kleinerem Gebiet lebende, durch das genealogische Zusammengehörigkeits-Bewusstsein fester zusammengehaltene, aber weniger bewusste, durch Sprache bzw. Lebensweise vereinigte Volksgruppe, die in Minderheit oft als „Nationalität" bezeichnet wird.

[11] Als kurze Zusammenfassung der Fachliteratur über die Verbindung von „Nation" und „Staat" siehe: Lajos Arday: Nép, nemzet, állam, nemzetállam, nacionalizmus [Volk, Nation, Staat, Nationalstaat, Nationalismus]. *Nemzetállamok és kisebbségek* [*Nationalstaaten und Minderheiten*]. *Történelem és identitás Közép-Európában* [*Geschichte und Identität in Mitteleuropa*]. Budapest, L'Harmattan Kiadó, 2016. S. 241-246.

[12] Als Beispiel dafür siehe Georg Jellinek: Allgemeine Staatslehre. Berlin, Verlag von O. Häring. 1914. In ungarischer Übersetzung: Általános államtan. (Übers. Péter Szilágyi). Budapest, ELTE ÁJK Tempus, 1994. S. 65-66.: „Es gibt Stämme – schrieb er –, die nur zum Erschaffen von rudimentärer Staatsbildung fähig sind, und können kein entwickeltes Staatsleben permanent aufrechterhalten [...] Die Neigung zum Staat – wenn auch nicht in der Form irgendeines mysteriösen Staatsinstinkts – gehört zum natürlichen Wille eines Volkes", und „die Unterschiede von menschlichen Rassen und Stammen manifestieren sich auch in den Unterschieden der geistigen und moralischen Neigungen". Dazu, warum die Staatswissenschaft im 20. Jahrhundert diese Untersuchungslinie nicht gefolgt hat, siehe Péter

Behauptung, wenn man es mit einigen Beispielen aus dem Begriffssystem der alten deutschen Staatswissenschaft illustrieren möchte: Es wird beispielsweise aufgeworfen, warum es keinen zigeunerischen Staat gibt, oder ob es sowas geben sollte; und warum das Judentum erst seit der zweiten Hälfte des 20. Jahrhunderts einen modernen Staat bildet usw. Obwohl diese Fragen erstaunlich scheinen können, zeigt ihr natürliches Entstehen wohl, dass sie in dem traditionellen Begriffssystem der europäischen Geschichte auch vervielfacht werden können; man kann nach dem Grund für den Mangel des bunjewatzischen Staates fragen; warum die Gascogner kein *Parlament* gegründet haben; oder warum die rätoromanische Tradition nur sprachlich gewahrt wurde.

Diese Bedeutung von Ethnie war mit dem Begriff der Nation verbunden. Die Ethnien selbst sind in der Ära der Nationalstaaten andere Wege gegangen: Entweder sind sie im Laufe der Geschichte Nationen geworden (die sog. „tótok“[13] sind z. B. Slowaken geworden), haben sich in einer Nation aufgelöst (wie die Jazygen in der ungarischen Nation) oder sind verschwunden. Bevor es stattfinden konnte, war auch in vielen Fällen vorgekommen, dass – wegen der Stärke der ethnokulturellen Muster – sie selbstständig jahrhundertelang unter der Rinde der modernen Staaten überleben hatten, wie zum Beispiel die Tschetschenen oder Basken, und hatten auf das Erwerben politischer Existenz, d. h. auf die Staatsbildung gewarten. Die Nationalismustheorien haben sie in der letztgenannten Rolle bemerkt und ihre Signifikanz vor einigen Jahrzehnten erkannt. Solche Erkenntnisse kann man auch in den Werken von Benedict Anderson finden.[14] Die Theorie von Anthony D. Smith – trotz ihrer diversifizierten Natur – hat aber im Prinzip die „ethnische Wiedergeburt” in den Mittelpunkt der Aufmerksamkeit gestellt.[15]

Die von ihm erwähnten Ethnien können in zwei Hauptgruppen eingeteilt werden, zu denen seit der Erscheinung seinem Werk eine dritte auch dazukommt.

Takács: *Államtan* [*Staatslehre*]. 2. Budapest, Nemzeti Közszolgálati Egyetem. 2013. S. 112.

[13] „Tót” ist die ein wenig pejorative ungarische Bezeichnung für eine kleine, im Vergleich zu den ungarischen als sekundär behandelte Ethnie, wie auch im heutigen Slowakischen „magyar” [Ungar] laut einem gewissen Wörterbuch ungeschickt, albern bzw. dumm bedeutet.

[14] Benedict Anderson**:** Képzelt közösségek [Vorgestellte Gemeinschaften] (ursprünglich: London, Verso, 1983), Auszug. In: *N*acionalizmuselméletek [Nationalismustheorien]. Szöveggyűjtemény [Textsammlung]. Hg.: Zoltán Kántor. Rejtjel Kiadó, Budapest, 2004. S. 79-108.

[15] Anthony D. Smith: A nemzetek eredete [Die ethnische Herkunft der Nationen]. In: Zoltán Kántor (Hg.): *Nacionalizmuselméletek* [*Nationalismustheorien*]. *Szöveggyűjtemény* [*Textsammlung*]. Budapest, Rejtjel, 2004. S. 204–229. Allgemein siehe Smith, Anthony D.: *The Ethnic Origins of Nations*. Wiley-Blackwell, Oxford, 1986. und Smith, Anthony D.: *The Ethnic Revival.* Cambridge, Cambridge University Press, 1981. Die Geburt des sog. Ethno-nationalismus wurde eigentlich von jedem Analysten bekannt gemacht. Hobsbawm hat zum Beispiel verschiedene *Ziele* dem „Denken in Nationen” bzw. dem „Denken in Ethnien” zugeschrieben; vgl. Hobsbawm, Eric J.: Etnikai identitás és nacionalizmus [Ethnische Identität und Nationalismus]. In: *Világosság*. Nummer 4/1993, S. 20.

Die eine bilden die in der europäischen Gesellschaftsentwicklung nicht Nationen gewordenen Gruppen – Waliser, Bretonen, Schotten, Basken, Katalonien, Quebecer, Korsen –, die auf die Möglichkeit der selbstständigen politischen Existenz warten oder für das reine Überleben kämpfen. Zu der anderen Gruppe gehören die Ethnien, die in den *an die Formen der Nationsentwicklung nicht gelangenen*, sog. *östlichen* Gesellschaften für die Anerkennung ihres Gemeinschaftsleben oder für ihr reines Überleben kämpfen – beispielsweise die Tamilen, Sikhs usw. –, deren Kampf in einer globalisierten Weltordnung immer sichtbar ist, obwohl früher vor europäischen Augen versteckt war. Schließlich seit dem Werk von Anthony D. Smith sind die in die Gesellschaften der westlichen Großstädten *eingewanderten* – eingeladenen und da gebliebenen, nicht eingeladenen, aber dahin gegingenen, geflüchteten, migrierten –, *ihre Identität bewahrenden*, durch *ihre Religion* (und damit durch ihre Kultur) zusammengehaltenen Gemeinschaften – beispielsweise die Kurden, Eritreer, Araber und Türken – erschienen. Wenn heutzutage von „Ethnien" gesprochen wird, wird oft an sie gedacht.

Die nach Westen migrierten Ethnien als Gemeinschaften werden nicht durch die Faktoren zusammengehalten, daran sich Europäer als „Westlicher" während der Nationalisierung gewöhnt haben (gemeinsame Geschichte, gemeinsame Sprache usw.), sondern vor allem durch Religion. Die meisten sind Gläubigen des Islams, der sich in ihrer Region vor ihrer Auswanderung aus der Heimat wie „ein heißes Messer durch Butter" verbreitete. Einen Großteil dieser Gruppen – teils wegen des Zustandes ihrer Religion vor Säkularisation, teils in Ermangelung von Institutionen dafür – konnten nicht integriert werden; damit muss hinzugefügt werden, dass sie es auch nicht wollten. Diese ethnischen Gemeinschaften existieren deshalb als Elemente einer multikulturellen Ordnung, und üben die Rechte (Gleichheit, Religionsfreiheit) aus, die vom Westen für andere Arten von Ethnien entwickelt wurden.

Zusammenfassend muss festgestellt werden, dass man auch an diesem Punkt an die folgende Auffassung kommt: in der Entwicklung des Nationalstaates stellt nicht nur die mit ihm im Gegensatz stehende und ihn abzubauen versuchende internationale *Integration*spolitik – in anderem Kontext: die *Globalisierung* – die größte Herausforderung dar, sondern die Ausübung des – mit der Globalisierung im Zusammenhang stehenden – *Multikulturalismus*.

Das „Multiethnische" und das „Multikulturelle"

Meine dritte Frage ist, ob die oben dargelegten – und in beider Hinsicht zu dem Multikulturalismus führenden – Tendenzen den Nationalstaat verändern. Anders formuliert: Ist der multiethnische multikulturelle Staat ein Nationalstaat? Um es zu beurteilen, muss man wieder die Haupttendenzen von Jahrhunderten prüfen.

„Nationalstaat" steht traditionell für mehrere Sachen, was von verschiedenen Aspekten analysiert werden kann. Oben – auf die wichtigsten politischen Leitlinien konzentrierend – habe ich gezeigt, dass falls der Nationalstaat Homogenisierungspolitik

verfolgt, verweist seine Bedeutung im Prinzip auf politische Maßnahmen (Entscheidungsserien) mit bestimmtem Inhalt, wozu jeder Staat fähig ist, selbst wenn totalitäre Staaten in diesem Bereich „am effizientesten" sind. Wenn es aber um poliethnische Politik geht: sie wird von westlichen konstitutionellen Demokratien „durchgeführt". Ich habe bemerkt, dass der aus der zweiten Ära gewachsene und multikulturelle Politik verfolgende Nationalstaat kein neues institutionelles System entwickelt hat, was damit verbunden ist, dass Multikulturalismus vor allem als eine allgemeine politische Leitlinie zu betrachten ist.

In der Staatslehre von Péter Takács werden die verschiedenen Bedeutungen des *Nationalstaat*es auch aufgrund *der wichtigsten Schwerpunkte der Staatstätigkeit* unterschieden, obwohl da verschiedene Aspekte hervorgehoben werden. In seiner Meinung nach können Nationalstaaten homogenische Nationalstaaten (oben habe ich diese Frage analysiert), von dem Netzwerk der mittelalterlichen Personenabhängigkeiten unterschiedene Regionalstaaten, wirtschafliche Interesse begünstigende moderne zivile Staaten, für Legitimisierungsmechanismen bzw. für das Demos und Ethnos[16] den Rahmen bildende politische Nationalstaaten sein. Diese Auffassungen zeigen in zwei Hauptrichtungen, die einen – kein Wunder – an die zwei Hauptrichtungen der Nationsauffassungen erinnern. Wie man im Rahmen des Letzten zwischen *objektiven* und *subjektiven* Auffassungen unterscheidet (z. B. Portugiese ist, wer durch der Geschichte und Interessen Portugals zu der Gemeinschaft von Portugiesen zugeordnet wird bzw. Portugiese ist, wer portugiesische Nationalgefühle hat), so können auch diese Nationalstaatskonzepte in zwei Hauptgruppen zugeordnet werden, obwohl es zwischen denen Übergänge geben kann, die sogar von unsicherer Art werden können.

Der die Interessen der Wirtschaft in Anspruch nehmende Staat als Nationalstaat (z. B. die Ansicht von Oszkár Jászi[17] und Max Weber) beruht jedenfalls auf eine objektiv gemeinte Nationsauffassung. Max Weber hat es zum Beispiel in diesem Zusammenhang wie folgt formuliert:

„Und der Nationalstaat ist uns nicht ein unbestimmtes Etwas, welches man um so höher zu stellen glaubt, je mehr man sein Wesen in mystisches Dunkel hüllt, sondern die weltliche Machtorganisation der Nation, und in diesem Nationalstaat ist für uns der letzte Wertmaßstab auch der volkswirtschaftlichen Betrachtung die »Staatsraison«. Sie bedeutet uns nicht, wie ein seltsames Mißverständnis glaubt: »Staatshilfe« statt der »Selbsthilfe«, staatliche Reglementierung des Wirtschaftslebens statt des freien Spiels der wirtschaftlichen Kräfte, sondern wir wollen mit diesem Schlagwort die Forderung erheben, daß für die Fragen der deutschen Volkswirtschaftspolitik, – auch für die Frage unter anderen, ob und inwieweit der Staat in das Wirtschaftsleben eingreifen oder ob

[16] Als gründliche philosophische Analyse der Beziehung von Demos und Ethnos siehe Attila Demeter: Demeter M., Attila: Ethnosz és Démosz [Ethnos und Demos]. Egyetemi Műhely Kiadó, Klausenburg, 2013.

[17] Oszkár Jászi: A nemzeti államok kialakulása és a nemzetiségi kérdés [Die Entstehung von nationalen Staaten und die Nationalitätsfrage]. Budapest, Gril, 1912.

und wann er vielmehr die ökonomischen Kräfte der Nation zu eigener freier Entfaltung losbinden und ihre Schranken niederreißen solle, – im einzelnen Falle das letzte und entscheidende Votum den ökonomischen und politischen Machtinteressen unserer Nation und ihres Trägers, des deutschen Nationalstaates, zustehen soll."[18]

Den antagonistischen Gegensatz dieser These hat Ernest Renan formuliert, wessen Theorie die Grundlage des Nationalstaates im Sinne der Legitimierung[19] ist:

„Les intérêts, cependant, suffisent-ils à faire une nation? Je ne le crois pas. La communiauté des intérêts fait les traites de commerece. Il í a dans la nationalité un côté de sentiment; elle est âme et corps à la fois; un Zollverein n'est pas une patrie."[20]

Die enge Verbindung zwischen dem Legitimierungsprinzip und dem Nationalstaat bedeutet, dass der Staat seinen BürgerInnen auch für Identifikationsrahmen steht. Homogene Nationalstaaten können für ein Volk, poliethnische Nationalstaaten (Belgien, die Schweiz, Spanien oder das Vereinigte Königreich) für mehrere Völker Identifikationsrahmen bedeuten. An diesem Punkt wurde der politethnische Nationstaat von der Erscheinung und Betontheit des Multikulturalismus – wie Metall von Säure – geätzt. Zum Beispiel in europäischer Hinsicht ist das Hauptproblem nicht (nur), dass es keine bestimmte europäische Identität gibt,[21] sondern dass die während der europäischen historischen Entwicklung entfaltende *nationale* Identität und die während der mit der Globalisierung im Zusammenhang stehenden Bevölkerungsbewegung Fuß fassende *ethnische* Identität zwei verschiedene Sachen sind. Obwohl der in Paris lebende muslimische Kurde oder der sich in Hamburg niedergelassene Syrer die Französische Republik bzw. die Bundesrepublik Deutschland als sein eigener Staat betrachtet, ist seine „wahre Heimat" die *Umma*, d. h. die Gemeinschaft aller Mulime, der keine Grenzen hat. Die in die gemeinsame Vergangenheit oder in die (angebliche) gemeinsame Herkunft zeigende Richtung der „politischen Nationalstaatsauffassung" funktioniert in diesem Zusammenhang nicht: Wie im Fall eines in Paris lebenden Kurden die Idee der „gemeinsamen Herkunft" mit einem Franzosen ausgeschlossen ist, betrachten die in Hamburg wohnenden Syrer die Teutonen als gemeinsame Vorfahren mit den Deutschen keineswegs. Die andere (sog. französiche) Version der „politischen Nationalstaatsauffassung", d. h. die auf Rechten beruhende Konstruktion könnte im

[18] Max Weber: Der Nationalstaat und die Volkswirtschaftspolitik. Akademische Antrittsrede. Freiburg (Breisgau) – Leipzig, J. C. B. Mohr, 1895. 19-20. Weber, Max**:** A "nemzet". in: *Gazdaság és Társadalom: a megértő szociológia alapvonalai. 2/3*. Budapest, Közgazdasági és Jogi Kiadó, 1996. S. 27–31.

[19] Über die Legitimierungsfragen des Nationalstaates siehe Walker Connor: Nacionalizmus és politikai illegitimitás [Nationalismus und politische Legitimität]. In: *Magyar Kisebbség*. Nummer 1–2/2005. S. 232–263.

[20] Renan, Ernest: *Qu'est-ce qu'une nation?* [Vorlesung an der Universität Sorbonne, 1882]. Toronto, Ont., Tapir Press, 1996. S. 42.

[21] Vgl. Gergely Egedy: A multikulturalizmus kihívása: értjük-e Európát? [Die Herausforderung des Multikulturalismus: Verstehen wir Europa?] In: *Kommentár*. Nummer 2/2016, S. 86.

Prinzip für die Migranten eine Identifikationsgrundlage erschaffen; ihre religiöse Werte sind aber in der Praxis stärker.

Insgesamt ist festzustellen, dass während der „Nationalstaat" für Legitimierungsverfahren und – in diesem Zusammenhang – Muster der Zugehörigkeit zu einem Gemeinschaft steht, wurden bisher in der europäischen Staatsentwicklung keine einheitlichen Lösungen gefunden, die die institutionelle Kraft des poliethnischen Nationalstaats – auch in Bezug auf die Ethnien – zu Legitimitätskraft umformen könnten. Dies ist das dritte akute Problem der modernen europäischen Staatsentwicklung.

Dieses Problem wurde von Samuel P. Huntington in seinem Klassiker gewordenen Werk im Zusammenhang mit „dem moralischen Niedergang, kulturellen Selbstmord und politischen Spaltung des Westens" vorhergesagt.[22]

Laut Huntington steckt sich hinter der von der Integration nicht gefolgten Einwanderung die Struktur des Multikulturalismus, die um die Vielfalt zu fördern und das Überleben der ethnischen Verschiedenheiten zu erleichtern, die in der europäischen bzw. euro-atlantischen Entwicklung entstandenen politischen Lösungen verwendet – obwohl zum Bewahren einer anderen Kultur. [23]

Der homogene Nationalstaat wurde also historisch nicht zu einem multinationalen Nationalstaat, sondern wird oder kann sich zu einem multiethnischen Staat, zu dem Staat der Zusammenlebenden Ethnien entwickeln. Es ist auch fähig, den auf den traditionellen Nation bildenden kulturellen Zusammenhalt – durch den Multikulturalismus – zu beseitigen. Es muss auf dieser Grundlage festgestellt werden, dass der multikulturelle Politik verfolgende multiethnische Staat kein Nationalstaat ist. Wer sein Kommen nicht wünscht, muss die Geschichte anhalten.

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[22] Samuel P. Huntington: A civilizációk összecsapása és a világrend átalakítása [Kampf der Kulturen: Die Neugestaltung der Weltpolitik im 21 Jahrhundert]. Európa Könyvkiadó, Budapest, 2015. S. 524-529.

[23] Samuel P. Huntington: zitiertes Werk, *ebenda.*

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